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**TRANSPARENCY & ACCESS TO INFORMATION**

**IN SOUTH AFRICA**

**An Evaluation of the Promotion of Access to Information Act 2 of 2000**

by

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I hereby declare that I have read and understood the regulations governing the submission of LL.M. dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Cape Town, \_\_\_\_\_ 2007

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*'A little sunlight is the best disinfectant.'*

- U. S. Supreme Court Justice Louis Brandeis  
*'Other People's Money, and How the Bankers Use It' at 92.*

## Table of Content

A.	Introduction.....	1
B.	The Constitutional Framework of Transparency.....	3
I.	The Interim Constitution.....	3
II.	The Final Constitution.....	5
C.	The Promotion of Access to Information Act No. 2 of 2000.....	10
I.	Scope.....	13
II.	Procedure.....	14
1.	Records held by Public Bodies.....	14
a)	General Procedure.....	14
b)	Remedies against Non-disclosure.....	16
aa)	Internal Appeal.....	16
bb)	Applications to Court.....	16
2.	Records held by private Bodies.....	17
a)	General Procedure.....	18
b)	Qualification.....	18
III.	Grounds for Refusal.....	20
IV.	Enforcement.....	23
V.	Evaluating PAIA.....	25
1.	Scope of the Constitutional Test.....	25
a)	Section 32 (2) of the Constitution.....	25
b)	Section 36 of the Constitution.....	26
2.	Constitutionality.....	27
a)	Criticising PAIA's Scope and Grounds of Refusal.....	27
aa)	No Access to 'Any Information'.....	28
bb)	Institutional Exceptions.....	29
(1)	Problem.....	29
(2)	Justification.....	30
cc)	Protection of International Relationships.....	33
dd)	Integrated 'Necessity of Harm'-Clauses.....	34
ee)	Public Interest Override.....	35
b)	Criticising PAIA's Procedure.....	35
aa)	Interpretation.....	35
bb)	Deemed Refusal.....	36

cc)	Fees .....	36
dd)	Access in the Context of Litigation.....	38
(1)	Aligning PAIA with Rule 35 of the High Court.....	39
(2)	Response Times and Matters of Urgency.....	46
(aa)	PAIA’s Time Frame.....	47
(bb)	The Importance of Time .....	48
(cc)	Ways to shorten Response Periods .....	50
(b)	No Access via Urgent Proceedings.....	52
(aa)	Reconciling PAIA with Urgent Matters via Interpretation? .....	53
(bb)	Justification - Balancing Requesters’ Rights .....	55
ee)	Appeal Process .....	58
3.	Implications of PAIA’s Unconstitutionality.....	59
D.	Conclusions.....	61
I.	Interpreting PAIA in Consistency with the Constitution.....	61
II.	Unconstitutional Provisions of PAIA.....	62
E.	Tables of Cases.....	64
I.	South African Case Law.....	64
II.	United States Case Law.....	65
III.	Canadian Case Law .....	66
F.	Sources.....	67

## A. Introduction

This thesis focuses on the grant and promotion of transparency within the South African legal system and the constitutionality of the Access to Information Act 2 of 2000 ('PAIA'). It draws upon the constitutional background regarding the constitutions of 1993 and 1996 and examines the PAIA against it.

To be able to access information is crucial in many ways. It is a prerequisite to gain knowledge which can be defined as a systematically organized amount of information. Information extends the choices of action; furthermore, it constitutes an important factor in an economy. Within our globalised and IT-interlinked world information is as important as time or money. Nowadays, no one can afford to make uninformed choices in our often so called 'information society'.<sup>1</sup> The authority to distribute information forms a considerable factor of economic power. Whoever shares information also shares power. The possible area of conflicts is huge: Due to modern technology, information can be replicated without high costs and without loss of quality. It can be easily transmitted over vast distances within seconds via fax and email and also be made available to an unlimited number of people via websites. The share of information generally is irrevocable – once proliferated, information is hard to control. Furthermore, to acquire proper information necessarily precedes any legal action.

Within a democracy, the state gathers and stores information on behalf of its citizenry. Still there is considerable resistance by public bodies to granting wide access to held information. The perception is, that information access requirements are a drag to 'core' agency functions, that an agency might be embarrassed, that disclosure might jeopardise agency enforcement functions or constitute an unwanted intrusion into private interests or just the sense that the devoted effort merely serves individual curiosity or commercial interests.<sup>2</sup> For this and other reasons it often seems to be common sense to keep as much information confidential as possible - contradictory to the constitutional goal of a transparent society.

The main concern of this thesis is that information is very time-sensitive. The principal argument is that late access to information often proves worthless. This makes the

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<sup>1</sup> See Bovens, Mark 'Information Rights: Citizenship in the Information Society' (2002) 10 *Journal of Political Philosophy* 317 at 327.

<sup>2</sup> Grunewald, Mark H 'E-FOIA and the "Mother of all Complaints:" Information Delivery and Delay Reduction' (1998) 50 *Administrative Law Review* 345 at 367; Sinrod, Eric J 'Freedom of Information Act Response Deadlines: Bridging the Gap between Legislative Intent and Economic Reality' (1993-1994) 43 *American University Law Review* 325 at 342.

right of access to information very vulnerable to procedural issues. The thesis will examine the procedural flaws that lead to the unconstitutionality of PAIA and which have to be resolved for the sake of an effective and efficient implementation of access to information as stipulated by the constitution.

To define ‘transparency’ is difficult. One reason is that the term is used in almost every context these days.<sup>3</sup> For instance, it is easier to describe the contrary of ‘transparency’, by using terms like ‘opacity’, ‘ambiguity’, ‘uncertainty’ or ‘vagueness’, just to name some besides the negation ‘intransparency’. In the legal and political context underlying this paper, transparency is best characterised as a general issue of *‘public hygiene’*.<sup>4</sup> ‘Access to information’ as a subset of the general term ‘transparency’ is more concrete. While ‘transparency’ appears to constitute an ‘overall value’, access to information is an individual right, regarded as part of the *‘fourth wave of citizens’ rights’*.<sup>5</sup>

Other important terms include ‘privacy’ and ‘secrecy’ as they are often used to justify the limitations of the right of access to information. While privacy and secrecy can be defined as ‘control over one’s [...] information’,<sup>6</sup> ‘transparency’ and ‘access to information’ are about control over information other people hold.

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<sup>3</sup> The search for ‘transparency’ via Google results in not less than 40.7 billion web hits, the search for ‘access to information’ still in 1.1 billion web hits.

<sup>4</sup> See eg Bovens (note 1) at 317 ff.

<sup>5</sup> Bovens (note 1) at 327.

<sup>6</sup> For different definitional approaches to privacy and critics see O’Brien, David M ‘Privacy and the Right of Access: Purposes and Paradoxes of Information Control’ (1978) 30 *Administrative Law* 45 at 63 ff.

## B. The Constitutional Framework of Transparency

To bolster transparency between the state and individuals is quite a young concept even in many mature democracies.<sup>7</sup> Formerly, the *arcane-principle* has dominated public authorities' behaviour: Information held by the state was in principle considered confidential and individuals usually had to prove a sufficient interest to gain access to information.<sup>8</sup> Moving away from that concept, many countries recently<sup>9</sup> shifted from a 'need to know'-basis to a 'right to know'-basis.<sup>10</sup>

This chapter will show that the concept of transparency is deeply entrenched in the young South African democracy considering the Interim Constitution of 1993<sup>11</sup> and the 1996 Constitution. Both Constitutions contain a right of access to information as part of the Bill of Rights and include various provisions with the purpose to enforce transparency. PAIA must be tested against that constitutional background to determine whether the constitutional right of access to information has been 'given effect' properly by the legislation.

## I. The Interim Constitution

Shaken by the experiences of iron-tight secrecy during Apartheid,<sup>12</sup> South Africa decided to make the society transparent in large leaps.<sup>13</sup> It was believed that this change

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<sup>7</sup> Ackermann, JM/Sandoval-Ballesteros, IE 'The Global Explosion of Freedom of Information Laws' (2006) 58 *Administrative Law Review* 85 at 85 f registered an incline in specific access to information laws from 10 nations worldwide in 1985 to 66 nations in 2005. Also see Mendel, Toby 'Freedom of Information: A Comparative Legal Survey' (2003), available at <http://portal.unesco.org/ci/en/filedownload.php> [accessed 3 July 2007] at iii ff.

<sup>8</sup> The administrative practise in the United States of America until the enactment of the United States FOIA in 1966 may serve as an example; see O'Brien (note 6) at 59 f. An exception can be found in the Scandinavian countries which look upon a long tradition of openness; Sweden enacted its freedom of information-act ("Tryckfrihetsförordningen") in 1766, 13 years before the French revolution, Ackermann/Sandoval-Ballesteros (note 7) at 88.

<sup>9</sup> Ackermann/Sandoval-Ballesteros (note 7) at 97 ff provide a table of all nations with freedom of information-laws. It is a rapid development as two thirds of those laws have been enacted during the last five years. Also see Balisar, David 'The Freedominfo.org Global Survey: Freedom of Information and Access to Government Record Laws around the World' (2004), available at <http://www.freedominfo.org> [accessed 6.7.2007] at 2 ff; Mendel (note 7) at 16 ff.

<sup>10</sup> Ackermann/Sandoval-Ballesteros (note 7) at 93.

<sup>11</sup> Act 2 of 1994, herein forth 'Interim Constitution'.

<sup>12</sup> See the preamble of PAIA. Also see Ackermann/Sandoval-Ballesteros (note 7) at 112; Currie, Ian/Klaaren, Jonathan 'An update on Access to Information in South Africa: New directions in transparency' in (2003) 107 *Freedom of Information Review* 72 at 73; McKinley, Dale T 'The State of Access to Information in South Africa' (2005), available at <http://www.csvr.org.za> [accessed 21 August 2007] at 1 f; Mendel (note 7) at 69.

<sup>13</sup> Merely regard the significant shift from the 'Protection of Information Act 84 of 1982' to the 'Promotion of Access to Information Act of 2000'. During Apartheid there was a plethora of provisions prohibiting the disclosure of information without permission and rendering such a

could only be achieved by emphasising ‘the notions of “accountability, responsiveness and openness” at all levels of government’.<sup>14</sup> The new government itself almost immediately recognised open debate and transparency as ‘crucial elements’.<sup>15</sup> The 1993 Interim Constitution recognized openness as a core value to a democratic society.<sup>16</sup> Negotiators of the Interim Constitution encompassed two measurements in the constitutional text to make sure the ‘almost claustrophobic culture of secrecy’ would be overcome in the new South Africa. Section 23 granted access to information, and Constitutional Principle IX made sure that an equal right would find its way into the ‘final’ Constitution.<sup>17</sup>

The central provision to the core value of transparency is the Interim Constitution’s right to access to information. The provision grants access to information as a common right rather than a privilege, which constituted a dramatic reversal from the former state of secrecy.<sup>18</sup> The right of access to information as envisaged by the Interim Constitution was restricted to information held by the state. Furthermore, requesters had to show that they need the information for the protection or exercise of another right.

Other provisions of the 1993 Constitution are also linked to transparency. For *accused people* the Interim Constitution established a *lex specialis* to the general right to access to information: Section 25 (3) (b) grants everybody the right to be informed with sufficient particularity of the charge. Section 24 granted everybody the right to *administrative justice*. This included the right to procedural fairness<sup>19</sup> and the right to be given reasons in writing<sup>20</sup> which must be capable of justifying the administrative action.<sup>21</sup> Section 24 therefore envisaged an overall fair and comprehensible administrative process. Furthermore, the Interim Constitution ordered *public access* to the national Parliament<sup>22</sup> as well

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crime to be punished with imprisonment, see Corder, Hugh ‘Administrative Justice: A Cornerstone of South Africa’s Democracy’ in (1998) 14 *South African Journal of Human Rights* 38 at 43. For the history of the act also see Currie, Ian/Klaaren, Jonathan ‘*The Promotion of Access to Information Act Commentary*’, Claremont (2002) at 1.1 ff.

<sup>14</sup> Corder (note 13) at 43.

<sup>15</sup> African National Congress ‘The Reconstruction and Development Programme: A Policy Framework’ (1994) at § 5.14.1.

<sup>16</sup> Section 35 (1) of the Interim Constitution, see Johannessen, Lene/Klaaren, Jonathan/White, Justin ‘A Motivation for Legislation on Access to Information’ (1995) 112 *South African Law Journal* 45 at 45.

<sup>17</sup> Currie/Klaaren (note 12) at 73.

<sup>18</sup> Currie/Klaaren (note 12) at 73.

<sup>19</sup> Section 24 (b) of the Interim Constitution.

<sup>20</sup> Section 24 (c) of the Interim Constitution.

<sup>21</sup> Section 24 (d) of the Interim Constitution.

<sup>22</sup> Section 67 of the Interim Constitution.

as to provincial legislatures.<sup>23</sup> Section 13 of the Interim Constitution grants everybody the *right to privacy* and therefore is capable of justifying limitations regarding the right of access to information. Schedule four of the Interim Constitution provides 34 principles that the final Constitution of 1996 had to comply with. When certifying the final Constitution, the Constitutional Court stated that it is a general and ‘implicit requirement of the [Constitutional Principles]’ to have an ‘open and accountable administration’.<sup>24</sup> The principles also explicitly demanded transparency: Principle II states that the given rights, freedoms and civil liberties shall be protected by entrenched and *justiciable* provisions in the Constitution, a goal that naturally requires transparency. Furthermore, Principle VI discusses separation of powers as well as checks and balances which are meant to secure *openness*. The Principles VI and IX have been especially vital for installing participatory democracy.<sup>25</sup> The central principle regarding transparency is Principle IX which made clear that the drafters of the Constitution wanted the right of access to information amplified and extended in the final Constitution.<sup>26</sup>

## II. The Final Constitution

Transparency has been deeply entrenched in the final constitution of 1996 which is demonstrated by the extended right of access to information as well as by various other provisions.

The central column of the Constitution’s system of transparency is the right of access to information as granted by s 32. The wording of the provision is defined, yet there are three textual indications that it has to be interpreted widely. First, ‘*any* information’ indicates that there generally is no such information which can be withheld solely due to its character or content. Second, the group of *subjects* of the right (‘the state’, ‘another person’) as well as the group of *claimants* (‘everyone’) is interpreted very broadly. The term ‘the state’ is not defined in the Constitution itself, but it surely must be interpreted broader than the term ‘organs of state’ which is defined in s 239.<sup>27</sup> Due to the

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<sup>23</sup> Section 142 of the Interim Constitution.

<sup>24</sup> *In re: Certification of the Constitution of the Republic of South Africa 1996*, 1996 (10) BCLR 1253 (CC) at para 285.

<sup>25</sup> Corder (note 13) at 42.

<sup>26</sup> White, Justin ‘Open Democracy: Has the Window of Opportunity Closed?’ in (1998) 14 *South African Journal of Human Rights* 65 at 67 f.

<sup>27</sup> Baxter, LG ‘The State and other Basic Terms in Public Law’ (1982) 99 *South African Law Journal* 212 at 220 ff. defines ‘the state’ as a conglomeration of organs, instruments, and institutions that have as their common purpose the management of the public affairs and the public interest of

fact that ‘everyone’ and not merely ‘every citizen’ is entitled to information held by the state, the interpretation of s 32 is that the state holds information not only on behalf of its citizenry but on behalf of ‘everyone’ within its borders. Third, the claimant only has to prove a specific interest - the need of the information for the exercise or protection of any right - to receive information from a person other than the state.<sup>28</sup> Information held by the state and its organs therefore underlies a constitutional presumption that it must be granted to requesters on a simple request and without a ‘need to know’.

It is important to note, that s 32 significantly differs from its predecessor, s 23 of the Interim Constitution.<sup>29</sup> The latter did not envisage the gain of privately held information and as a result did not state the different requirements depending on the nature of the requested body. Furthermore, s 23 stipulated *higher obstacles* for access to publicly held information, as requesters always had to indicate a ‘need to know’, a condition that now is only needed for access to privately held information.

The significance of the right of access to information is stressed by the constitutional limits contained in s 32 (2) which appear narrow when compared to the wide application scope set out in subsection (1). Subsection (2) obliges the state to enact national legislation to ‘give effect’ to the right of access to information and allows for reasonable measures to alleviate the administrative and financial burdens associated with accessing information. The wording ‘must be enacted to give effect to this right’<sup>30</sup> does not intend to regard s 32 as a ‘nascent, or almost-right’. Rather it demands that the national legislation must provide procedures, statutory mechanisms, tribunals’ and any other measures to easily and more effectively implement those rights.<sup>31</sup> Such legislation had to be enacted within three years; otherwise, the subsection would have lapsed.<sup>32</sup> The

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the residents of South Africa as well as those of the citizens of abroad, in their relations with the South African government.

<sup>28</sup> Section 32 (1) (b) of the Constitution.

<sup>29</sup> Currie/Klaaren (note 13) at 1.3 f.

<sup>30</sup> Section 32 (2) of the Constitution.

<sup>31</sup> Corder, Hugh ‘Administrative Justice in the Final Constitution’ (1997) 13 *South African Journal of Human Rights* 28 at 33 f. Other authors see the right deriving from section 32 only to be exercised in terms of national legislation, see for instance Davis, Dennis ‘Access to Information’ in South African Constitutional Law: The Bill of Rights, LexisNexis Butterworths (ed.), available at <http://Butterworths.nct.ac.za>, Chapter 26, p 1 [accessed 20 August 2007] at 26-9.

<sup>32</sup> *In re: Certification of the Constitution of the Republic of South Africa 1996* (note 24) at para 83 on item 23 in schedule 5 of the Constitution, also see Corder (note 31) at 32 f. for the historical background of the interim construction.

Constitutional Court also regarded this period necessary<sup>33</sup> because legislation for access to information would have to supply ‘detailed and complex provisions defining the nature and limits of the right and the requisite conditions for its enforcement.’<sup>34</sup> The three year period was considered consistent with the Constitutional Principles because the right of access to information was not a ‘universally accepted fundamental human right but [was] directed at promoting good government.’<sup>35</sup> In case federal legislation would not have been enacted in time, the interim right granted in s 23 (2) (a) of Schedule 6 would not have complied with Constitutional Principle IX.<sup>36</sup> In that case, s 32 (1) of the Constitution would have come into direct operation.<sup>37</sup>

Additional to s 32, openness and transparency is repeatedly protected and promoted by the 1996 Constitution.<sup>38</sup> Section 1 (d) stipulates that the Republic of South Africa is founded on the value of openness. By this section, the 1996 Constitution enshrined the values demanded by the constitutional principles VI and IX.<sup>39</sup> The importance of this ‘building block’<sup>40</sup> of the South African constitutional democracy is emphasized by the fact that a qualified<sup>41</sup> 75 per cent majority of the National Assembly plus a 2/3 majority of the National Council of Provinces is needed in order to change the provision.<sup>42</sup> Transparency is also demanded by the right of just administrative action.<sup>43</sup> Obviously, any information officer’s decision to grant or deny access to information is an administrative act, so PAIA’s procedure is closely linked with s 33 and the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’).<sup>44</sup> The matter of *procedural fairness*<sup>45</sup> is especially related to transparency. The term cannot be confined ‘to the rules of natural justice’; it moreover refers to ‘the idea of a general duty to act fairly in a procedural

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<sup>33</sup> Still the Constitutional Court regarded the period ‘a long time for the necessary legislation to be put in place’, *In re: Certification of the Constitution of the Republic of South Africa 1996* (note 24) at para 87.

<sup>34</sup> *In re: Certification of the Constitution of the Republic of South Africa 1996* (note 24) at para 83.

<sup>35</sup> *In re: Certification of the Constitution of the Republic of South Africa 1996* (note 24) at para 85.

<sup>36</sup> The Constitutional Court regarded the limitation of access to state-held information that is required for the exercise and protection of any right as unconstitutional, *In re: Certification of the Constitution of the Republic of South Africa 1996* (note 24) at para 83.

<sup>37</sup> *In re: Certification of the Constitution of the Republic of South Africa 1996* (note 24) at para 86.

<sup>38</sup> Corder (note 13) at 43.

<sup>39</sup> Corder (note 13) at 42 f.

<sup>40</sup> Corder (note 13) at 43.

<sup>41</sup> Needed is a 75per cent of the National Assembly’s *members* which refers to all members and not only to those *attending* the respective meeting.

<sup>42</sup> Section 74 (1) (a).

<sup>43</sup> Section 33 of the Constitution.

<sup>44</sup> McKinley (note 12) at 8 criticises the possible exception of PAIA-decisions as set out in section 1 (i) (b) (hh) PAJA. The exception however covers only persons that are ‘other than organs of state’.

<sup>45</sup> Section 33 (1) of the Constitution.

sense'.<sup>46</sup> An important part of procedural fairness is the right to receive written reasons,<sup>47</sup> which forms one of the core values of democracy by stating the need for justification of an administrative action.<sup>48</sup> Administrative action becomes transparent from an ex post-perspective because the public administration must give reasons for its actions no matter if it is rule-making, adjudicating or making general administrative decisions.<sup>49</sup> Another element of administrative transparency envisioned by s 33 is the call for the *publication of* at least all binding if not also interpretative *guidelines*.<sup>50</sup> Section 41 (1) (c) can be regarded as the blanket clause obliging the executive to provide a transparent government.<sup>51</sup> Section 195 of the Constitution sets out the basic values and principles that govern public administration. It highlights the importance of transparency as a general principle of public administration and states how the rather undefined goal of transparency can be achieved by stipulating that the provided information has to be not only accessible but also timely and accurate. It therefore adds substance to the aim of an open democracy.<sup>52</sup> Public administration must follow the values set out in s 195 as they form 'justiciable standards, albeit somewhat broadly stated, against what the validity of administrative action is potentially reviewable.'<sup>53</sup> According to subsection 195 (2), the administration in every sphere of government, organs of state and public enterprises are subjected to the principles of s 195. Nevertheless, the provision appears surplus regarding s 41 (1) (c). Subsection 195 (3) pledges the national legislator to promote the principles of subsection (1). The Constitution provides for '*access and involvement of the public*' concerning the statutory bodies of the National Assembly,<sup>54</sup> the National Council of Provinces,<sup>55</sup> the provincial legislatures,<sup>56</sup> and municipal councils.<sup>57</sup> Those provisions are *leges speciales* to the general principle of openness as set out in ss 41 (1) (c) and 195. It has been called a violation of ss 41 (1) (c) and 195 that there still hasn't been any legislative

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<sup>46</sup> Corder (note 13) at 48.

<sup>47</sup> Section 33 (2) of the Constitution.

<sup>48</sup> Corder (note 13) at 41. For a determination of the scope of 'administrative action' see Corder (note 13) at 45 ff.

<sup>49</sup> Corder (note 13) at 50.

<sup>50</sup> White (note 26) at 71 f. regards every unpublished decision-making guideline that is used by the executive as secret law in violation of the rule of law.

<sup>51</sup> White (note 26) at 70.

<sup>52</sup> White (note 26) at 68.

<sup>53</sup> Corder (note 13) at 53.

<sup>54</sup> Section 59 (1).

<sup>55</sup> Section 72 (1).

<sup>56</sup> Section 118 (1).

<sup>57</sup> Section 160 (7).

implementation of ss 59 (1), 72 (1), 118 (1) and 160 (7).<sup>58</sup> The *business rules* of the National Assembly,<sup>59</sup> the National Council of Provinces<sup>60</sup> and the Provincial Legislatures<sup>61</sup> have to be made with ‘due regard to [...] transparency and public involvement.’ Furthermore, transparency has to be assured in *financial matters* as ‘[n]ational, provincial and municipal budgets and budgetary processes must promote transparency [...]’.<sup>62</sup> To ensure transparency, ‘[n]ational legislation must establish a national treasury and prescribe measures [...]’.<sup>63</sup> In addition, organs of state that want to *contract for goods and services* have to do so in accordance with a transparent system.<sup>64</sup>

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<sup>58</sup> The drafted Open Democracy Bill included an ‘open meetings chapter’ implementing public access to governmental meetings. This chapter however has been deleted in the political process of the enactment; see White (note 26) at 70 f.

<sup>59</sup> Section 57 (1) (b) of the Constitution.

<sup>60</sup> Section 70 (1) (b) of the Constitution.

<sup>61</sup> Section 116 (1) (b) of the Constitution.

<sup>62</sup> Section 215 (1) (b) of the Constitution.

<sup>63</sup> Section 216 (1) (b) of the Constitution.

<sup>64</sup> Section 217 (1) (b) of the Constitution.

### C. The Promotion of Access to Information Act No. 2 of 2000

PAIA has been enacted to comply with the constitutional demand of giving effect to the right of access to information.<sup>65</sup> The statutory right of access to information supplements the constitutional right contained in s 32 of the Constitution. National legislation for access to information was demanded soon after the Interim Constitution came into force.<sup>66</sup> The process of drafting began as early as 1994<sup>67</sup> and the act finally came into operation on the 9<sup>th</sup> of March 2001 in a worldwide climate of freedom of information-enactment.<sup>68</sup> Certain parts of the freedom of information legislation of Australian, Canadian, Ireland, New Zealand and the U. S. have been used as models for PAIA.<sup>69</sup> The act has been amended twice<sup>70</sup> and in terms of the act,<sup>71</sup> the minister may make and has made various *regulations*.<sup>72</sup>

The foremost *object of the act* is to ‘give effect’ to s 32 of the Constitution.<sup>73</sup> PAIA has to be interpreted purposively<sup>74</sup> because of its special status as statute *and* supplementation of the constitutional right in s 32.<sup>75</sup> Active implementation is essential as such right does not grow organically due to economical development but is rather a ‘political creature’ which has to be nourished and bolstered by and within civil society.<sup>76</sup> The object of the act includes the ‘general promotion of transparency’ as it is envisaged by several

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<sup>65</sup> Section 32 (1) of the Constitution, see B.II.

<sup>66</sup> See eg *ANC - RDP*, § 5.9.1; Johannessen/Klaaren/White (note 16) at 45 ff.

<sup>67</sup> In the drafting process the bill carried the name ‘Open Democracy Bill’; after withdrawal, changes and then re-introduction it has been given its actual name, see Currie/Klaaren (note 13) at 1.7 ff.

<sup>68</sup> See the table of nations with freedom of information laws worldwide at Ackermann/Sandoval-Ballesteros (note 7) at 97 f. Also see Balisar (note 9) at 3; Mendel (note 7) at 18 ff; Open Society Institute ‘Transparency & Silence: A Survey of Access to Information Laws and Practices in Fourteen Countries’ (2006), available at <http://www.justiceinitiative.org> [accessed 24 August 2007] at 21 ff, 66 ff.

<sup>69</sup> Ackermann/Sandoval-Ballesteros (note 7) at 111; Currie/Klaaren (note 12) at 72.

<sup>70</sup> The amendments by the Judicial Matters Amendment Act 42 of 2001 and the Promotion of Access to Information Amendment Act 54 of 2002 can be considered technical, Currie/Klaaren (note 12) at 74; Currie/Klaaren (note 13) at 1.13.

<sup>71</sup> Section 92 PAIA.

<sup>72</sup> See Reg No 187/2002, Reg No 1244/2003, Reg No 990/2006 and 466/2007, all available at [www.info.gov.za](http://www.info.gov.za).

<sup>73</sup> Section 9 (a) PAIA.

<sup>74</sup> Section 2 (1) PAIA; *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) at para 9.

<sup>75</sup> Currie/Klaaren (note 13) at 2.1.

<sup>76</sup> Ackermann/Sandoval-Ballesteros (note 7) at 115 f; Balisar (note 9) at 7; Roberts, Alasdair ‘Access to Government Information: An Overview of Issues’ in Public Management. Electronic journal, Issue 2, 22 October 2003, available at <http://www.aroberts.us-research.htm> [accessed 10 July 2007] at 5.

provisions of the Constitution.<sup>77</sup> These are useful for interpreting the act's provisions as well as clarifying conflicts between openness and other public interests.<sup>78</sup>

The right of access to information is commonly recognized as a *fundamental human right*.<sup>79</sup> It is usually seen as a part of the right to freedom of expression,<sup>80</sup> a notion that is backed up by the wording of s 16 (1) (b) of the Constitution as well as by the Universal Declaration on Human Rights ('UDHR') and the International Covenant on Civil and Political Rights ('ICCPR').<sup>81</sup> However, the fact that the right of access to information is explicitly acknowledged by the Constitution renders it somewhat independent from the right to freedom of expression.<sup>82</sup> The right to access one's *personal* information (habeas data) is associated with the right of human dignity.<sup>83</sup> Although a constitutionally granted right of access to information has been conceived as unusual,<sup>84</sup> it is explicitly recognized as a human right in over 40 countries' constitutions.<sup>85</sup>

Access to information is not only a human right itself but also essential for the exercise of a variety of other fundamental rights.<sup>86</sup> It is particularly important for the use of civil and political rights and for any *democratic participation* in society.<sup>87</sup> Effective access to information transforms a 'mere' representative democracy into a participatory democracy that is not restricted to participation via election every X years.<sup>88</sup> Individuals can only form and utter opinions that are worthy of being expressed if they have access

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<sup>77</sup> See above B.II.

<sup>78</sup> Mendel (note 7) at 124.

<sup>79</sup> Article 19 (Ed.), 'The Johannesburg Principles on National Security, Freedom of Expression and Access to Information' (1996), available at <http://article19.org> [accessed 10 July 2007] at Preamble; Bovens (note 1) at 338 ff; McKinley (note 12) at 33; United Nations, General Assembly, 'Resolution No. 59 (I), 14<sup>th</sup> December 1946, Calling of an International Conference on Freedom of Information', available at <http://www.un.org/documents/ga/res/1/ares1.htm> [accessed 7 July 2007].

<sup>80</sup> Ackermann/Sandoval-Ballesteros (note 7) at 88; Article 19 (note 79) at Principle 1 (b); Davis (note 31) at 26-1; Johannessen/Klaaren/White (note 16) at 46; Mendel (note 7) at 1 f (providing international jurisprudence on that notion at 16 ff); Rautenbach, IM 'Introduction To The Bill Of Rights' in Bill of Rights Compendium, LexisNexis Butterworths (ed.), available at <http://Butterworths.uct.ac.za>, Chapter 1A1 [accessed 21 August 2007] at 1A78.1; Roberts (note 76) at 1; Roberts, Alasdair 'Structural Pluralism and the Right to Information' (2001) 51 *University of Toronto Law Journal* 243 at 259 ff.

<sup>81</sup> See art 19 UDHR and art 19 (2) ICCPR.

<sup>82</sup> Johannessen/Klaaren/White (note 16) at 50.

<sup>83</sup> Mendel (note 7) at iv.

<sup>84</sup> Currie/Klaaren (note 12) at 72.

<sup>85</sup> Balisar (note 9) at 4.

<sup>86</sup> Like the right to freedom of religion, thought, belief and opinion, and to the political and educational rights, McKinley (note 12) at 33; Rautenbach (note 80) at 1A78.1; Roberts (note 76) at 1.

<sup>87</sup> Ackermann/Sandoval-Ballesteros (note 7) at 92; Article 19 (note 79) at Preamble; Corder (note 13) at 41; Davis (note 31) at 26-2; McKinley (note 12) at 1; Mendel (note 7) at iii; O'Brien (note 6) at 59; Rautenbach (note 80) at 1A78.1; Roberts (note 76) at 1.

<sup>88</sup> Ackermann/Sandoval-Ballesteros (note 7) at 92; Johannessen/Klaaren/White (note 16) at 47.

to relevant governmental information.<sup>89</sup> Thus, access to information is a prerequisite to making informed choices.<sup>90</sup> In this context, the right of access to information can even be seen as a *duty and responsibility*, an ‘obligation to monitor the conduct of [governmental] agencies’,<sup>91</sup> and especially as a countermeasure concerning corruption, hidden agreements and actions.<sup>92</sup> General access to information is the only effective countermeasure against censorship and ‘behind-the-scenes-channelling of vast amounts of state-controlled information’.<sup>93</sup> It helps with encountering any kind of arbitrary state action and is necessary for building a system of citizenry consent.<sup>94</sup> Therefore, the right of access to information generally helps to achieve what is commonly referred to as ‘good governance’.<sup>95</sup> Access to information has also been acknowledged as a means to *promote third generation rights* such as the socioeconomic rights established by the Constitution.<sup>96</sup> Another central rationale for access to information is *state accountability*,<sup>97</sup> which can only be achieved if citizens know what their government is doing and why, without being dependent on state-controlled information.<sup>98</sup> This rationale was emphasized in Principle IX.<sup>99</sup> Only through encouraging participation and strengthening accountability the administrative process can be improved. Additionally, to share information helps to guarantee that it is genuine and accurate as it is scrutinized by different individuals and therefore from different angles.<sup>100</sup> Furthermore, a constant and trustworthy flow of information is indispensable for *economy* - there is no shorter way to put it than *Ackermann/Sandoval-Ballesteros* do: ‘[T]he market lives and dies on information.’<sup>101</sup> Information is regarded as one of the keys for economic growth in developing countries.<sup>102</sup> Another importance lies in the right to publish information and the right to freely distribute it

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<sup>89</sup> Ackermann/Sandoval-Ballesteros (note 7) at 88.

<sup>90</sup> Bovens (note 1) at 324; Mendel (note 7) at iii f.

<sup>91</sup> Roberts (note 80) at 263 f. Different view: Bovens (note 1) at 332.

<sup>92</sup> Ackermann/Sandoval-Ballesteros (note 7) at 92; Balisar (note 9) at 2 f; Mendel (note 7) at iv.

<sup>93</sup> Johannessen/Klaaren/White (note 16) at 47.

<sup>94</sup> Lidberg, Johan/Phillips, Gail/Tanner Stephen ‘The Freedom of Information Index: Measuring the gap between the promise and practise of freedom of information legislation’ (2003) 108 *Freedom of Information Review* 88 at 88; Roberts (note 76) at 1.

<sup>95</sup> *In re: Certification of the Constitution of the Republic of South Africa 1996* (note 24) at para 85; Currie/Klaaren (note 13) at 2.4.

<sup>96</sup> Klaaren, Jonathan ‘A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights’ (2005) 27 *Human Rights Quarterly* 539 at 554 ff.

<sup>97</sup> Ackermann/Sandoval-Ballesteros (note 7) at 86 f; Lidberg/Phillips/Tanner (note 94) at 88; Mendel (note 7) at iv.

<sup>98</sup> Johannessen/Klaaren/White (note 16) at 47 f.

<sup>99</sup> See B.I.

<sup>100</sup> Johannessen/Klaaren/White (note 16) at 48.

<sup>101</sup> Ackermann/Sandoval-Ballesteros (note 7) at 92.

<sup>102</sup> Johannessen/Klaaren/White (note 16) at 48 f.

without undue governmental restrictions.<sup>103</sup> Besides, not only do citizens benefit from access to information, governments do as well: Openness and transparency help to develop and strengthen citizens' trust in governments' actions and therefore is a matter of political marketing.<sup>104</sup> These perspectives invite us to see the right to access to information as a *positive freedom* and not merely as a negative right.<sup>105</sup>

## I. Scope

PAIA impresses with its generally wide scope.<sup>106</sup> Its application is outstanding as it covers both public *and* private bodies.<sup>107</sup> Furthermore it mostly uses *broad definitions*. Nearly everything is defined as 'record', regardless of the information's form or medium, origin or age, as long as the information is *recorded*.<sup>108</sup> Information is deemed to be a public record if it is under the possession or control of a public body.<sup>109</sup> Records concerning pending civil or criminal procedure that can be obtained in other ways are excluded.<sup>110</sup> PAIA does not refer to 'the state' but distinguishes between '*public bodies*' and '*private bodies*'.<sup>111</sup> The definition of 'public bodies' does not include private bodies which are substantially publicly funded. However, the latter are encompassed by the definition of 'private bodies', which only excludes non-commercial private activities of natural persons; a limitation that is justifiable in terms of the right to privacy.<sup>112</sup> The broad definitions of PAIA are welcome as they give effect to the principle of maximum disclosure.<sup>113</sup> Another reason for the PAIA's broad application is found within the *power to override* former secrecy law,<sup>114</sup> which is an important but quite unusual feature compared to the worldwide situation on FOI-laws.<sup>115</sup>

PAIA's broad scope supports the general *principles of its interpretation* which include: Access to information as the rule, withholding of information as the exception which

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<sup>103</sup> Johannessen/Klaaren/White (note 16) at 45.

<sup>104</sup> Balisar (note 9) at 3.

<sup>105</sup> Ackermann/Sandoval-Ballesteros (note 7) at 90.

<sup>106</sup> See the exceptions, C.III and the constitutional concerns they raise, C.V.2.a).

<sup>107</sup> Ackermann/Sandoval-Ballesteros (note 7) at 100, 112 regard PAIA as 'a model FOI-law.' Also see Balisar (note 9) at 77; Currie/Klaaren (note 13) at 2.6 f; Currie/Klaaren (note 12) at 72; McKinley (note 12) at 32; Mendel (note 7) at 69, 126; Roberts (note 76) at 2.

<sup>108</sup> This is subject to criticism, see C.V.2.a)aa).

<sup>109</sup> Sections 1, 3 PAIA.

<sup>110</sup> Section 7 PAIA. Further regarding access to information in the context of litigation see C.V.2.a).

<sup>111</sup> Both are defined in section 1 PAIA.

<sup>112</sup> Currie/Klaaren (note 12) at 72; Mendel (note 7) at, 70.

<sup>113</sup> Mendel (note 7) at 69.

<sup>114</sup> Section 5 PAIA.

<sup>115</sup> Mendel (note 7) at 131.

has to be interpreted narrowly, and the burden of proof rests on the party resisting disclosure.<sup>116</sup>

## II. Procedure

The PAIA is regarded as ‘one of the more complex and technical pieces of legislation that has come into operation since 1994.’<sup>117</sup> It is characterised by a system of exceptions and counter-exceptions and strongly formalised procedures.

The procedures of access to publicly and privately held information are largely overlapping. Therefore, the procedure will generally be outlined regarding publicly held information; thereupon the procedural differences of access to privately held information will be examined.<sup>118</sup>

### 1. Records held by Public Bodies

Everybody has the right to access the requested information as long as they comply with the procedural requirements set out by PAIA and no exception applies.<sup>119</sup> A requester of publicly held information neither has to show, nor to prove any ‘need to know’.<sup>120</sup>

#### a) General Procedure

The central procedural institutions envisaged by PAIA are the *information officers* (‘IOs’). They have to be appointed by every public body and carry the responsibility for informational requests. The name and contact details of every IO must to be *published* in every general use telephone book.<sup>121</sup> Furthermore, there has to be a sufficient number of *deputy IOs* appointed to render the public body as accessible as reasonably possible.<sup>122</sup>

The request must allow the IO to *identify* the sought after information and determine the manner of access. Requests can be submitted *in writing or orally*. However, if submitted orally, IOs have to write the request down and must furnish requesters with a copy.<sup>123</sup> Information officers have a *duty to assist* the requester - without assistance no request shall be turned down.<sup>124</sup> Requesters have to be informed in writing about the

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<sup>116</sup> Currie/Klaaren (note 13) at 2.10.

<sup>117</sup> McKinley (note 12) at 11.

<sup>118</sup> See C.II.2.

<sup>119</sup> Section 11 PAIA.

<sup>120</sup> Currie/Klaaren (note 13) at 5.6.

<sup>121</sup> Section 16 PAIA.

<sup>122</sup> Section 17 PAIA.

<sup>123</sup> Section 18 PAIA.

<sup>124</sup> Section 19 PAIA.

outcome of their requests and if the request is granted, the notice shall stipulate such, the fees to be charged, the form in which access will be given and the right to appeal the fee. If the request is refused, in whole or in part, the notice must include adequate reasons for the denial, along with the provision of the Act relied upon, as well as the right to appeal the decision.<sup>125</sup>

If the record in question is not in the possession of the body where the request has been filed or the record is more closely connected with another body, the request must be transferred as quickly as possible to the correct body, in any event within 14 days (not additional to the overall time limit) and the requester has to be notified.<sup>126</sup> In case the record cannot be found, the requested body has to take all reasonable steps to find the record; if it still cannot be found, the requester has to be notified which is then deemed to be a refusal.<sup>127</sup>

The PAIA provides in detail for the *form of access* that can be granted, including inspection or viewing of the record, (electronic or photomechanical) copies, transcripts, or extraction of the information from the record by a machine.<sup>128</sup> Generally, access must be granted in the form and language requested.<sup>129</sup>

Information officers of public bodies must publish *manuals* on how to access information.<sup>130</sup> Furthermore, information might be published and made available without request, although the act encompasses no such duty to publish certain information.<sup>131</sup>

The act includes a *system of graded fees* regarding the search, preparation and reproduction of information requested from public and private bodies.<sup>132</sup> The Minister can enact regulations concerning the fee system, especially to alleviate the burden on requesters where necessary.<sup>133</sup> Records have to be made accessible to the handicapped without extra charge.<sup>134</sup> The applied fees are subject to internal and external review.<sup>135</sup>

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<sup>125</sup> Section 25 (3) PAIA (records of public bodies) and section 56 (3) PAIA (records of private bodies).

<sup>126</sup> Section 20 PAIA.

<sup>127</sup> Section 23 PAIA.

<sup>128</sup> Section 29 (2) PAIA.

<sup>129</sup> Section 29 (3) PAIA.

<sup>130</sup> Section 14 PAIA.

<sup>131</sup> Section 15 PAIA.

<sup>132</sup> Section 22 PAIA (records of public bodies) and section 54 PAIA (records of private bodies). A graded system of fees has been suggested early, see Johannessen/Klaaren/White (note 16) at 55.

<sup>133</sup> Section 22 (8) PAIA

<sup>134</sup> Section 29 (6) PAIA.

<sup>135</sup> Section 74 (1) (b) PAIA read together with Section 22 PAIA.

b) Remedies against Non-disclosure

PAIA provides two levels of remedies against a non-disclosure decision. After a first internal appeal is exhausted, the requester can approach the courts in a second step.

aa) Internal Appeal

The internal appeal applies only to national government departments, provincial government departments and local authorities.<sup>136</sup> Furthermore, it is only possible to appeal against the types of decisions contemplated in s 74 (1). The appeal is conducted by the responsible Cabinet Minister as the ‘relevant authority’ in terms of PAIA.<sup>137</sup> It can be lodged by the requester or a third party and can include various things such as the non-disclosure itself, imposed fees, form of access or extension of time limits.<sup>138</sup> The appeal must be lodged within 60 days<sup>139</sup> and in the prescribed form. There are detailed provisions concerning third party intervention.<sup>140</sup> The appeal has to be decided as soon as possible, latest within 30 days.<sup>141</sup> The decision has to give reasons and must be provided to both the appellant and any third party along with their right to appeal to the courts.<sup>142</sup>

bb) Applications to Court

Court applications aim for ‘appropriate relief’ and have to be lodged within 30 days<sup>143</sup> after receiving the negative decision of the internal appeal. Both, requesters as well as involved third parties have *locus standi*.<sup>144</sup> Non-disclosure proceedings before court are of a civil character.<sup>145</sup> The judicial review is confined to certain decisions made in terms of the PAIA.<sup>146</sup> The court has the power to review for *lawfulness*, *reasonableness* and *procedural fairness*, but *not* for the *merits* of the decision.<sup>147</sup> It further is enabled to examine any of the records in question but is not allowed to disclose them to the requester during the proceedings.<sup>148</sup> The *onus* is on the body that insists on non-disclosure.<sup>149</sup>

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<sup>136</sup> Section 74 (1) PAIA read together with section 1 PAIA, definition of ‘public body’, (a).

<sup>137</sup> Currie/Klaaren (note 13) at 9.3. McKinley (note 12) at criticises the lack of clarity as it comes to internal departmental accountability.

<sup>138</sup> Section 74 (1) PAIA.

<sup>139</sup> Section 75 (1) (a) PAIA. It has to be lodged within 30 days if third party notification is required.

<sup>140</sup> Sections 74-76 PAIA.

<sup>141</sup> Section 77 (3) (a) PAIA.

<sup>142</sup> Section 77 (4), (5) PAIA.

<sup>143</sup> Within 30 days if third party notification is required.

<sup>144</sup> Section 78 (2), (3) PAIA.

<sup>145</sup> Section 81 (1) PAIA.

<sup>146</sup> Section 78 (2), (3) PAIA.

<sup>147</sup> Currie/Klaaren (note 13) at 9.9, 9.13.

<sup>148</sup> Section 80 PAIA.

<sup>149</sup> Section 81 (3) PAIA.

In its decision, the court may grant *any order that is just and equitable*. It can either confirm or set aside the internal decision of the body. Notably, the court can *substitute* an official's decision instead of just remanding it.<sup>150</sup> It may also require an information officer to take or refrain from certain actions within a certain period of time and can grant an interdict, interim or specific relief, a declaratory order or compensation and order as to costs.<sup>151</sup> When *interpreting* the PAIA, courts have to prefer any reasonable interpretation which is consistent with the objects of the Act over any other interpretation.<sup>152</sup>

## 2. Records held by private Bodies

Section 50 of PAIA requires *private corporations* and *non-profit organizations* to establish transparency.<sup>153</sup> This makes the question of whether there is horizontal application of s 32 of the Constitution irrelevant.<sup>154</sup> The right to access *privately-held information* is referred to as '*tertiary information right*' because the role of the government is restricted to establishing a suitable legal framework.<sup>155</sup>

This right's potential is crucial as it can help to prevent the government from finding 'a way to slip out the back door' by transferring public powers or surrendering former knowledge monopolies onto private entities.<sup>156</sup> Nevertheless, access is not limited to information held by private persons that exercise public power.<sup>157</sup> It has been noted positively that the PAIA covers most parastatal entities.<sup>158</sup> On the other side of the coin, the extension of the right of access into private bodies also allows public bodies to seek privately held information. This is a considerable expansion and not required to 'give effect' to s 32 (1).<sup>159</sup>

The classification of private bodies seems to be somewhat blurred. Judge *Cameron J* pointed out that economically important companies, which are providing essential services to the public,

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<sup>150</sup> Currie/Klaaren (note 13) at 9.16.

<sup>151</sup> Section 82 PAIA.

<sup>152</sup> Section 2 (1) PAIA.

<sup>153</sup> Ackermann/Sandoval-Ballesteros (note 7) at 100.

<sup>154</sup> This has been denied by *Griesel J* in *Institute for Democracy in South Africa (IDASA) and Others v African National Congress and Others* 2005 (10) BCLR 995 (C).

<sup>155</sup> Bovens (note 1) at 327.

<sup>156</sup> Ackermann/Sandoval-Ballesteros (note 7) at 123 f; Bovens (note 1) at 325, 335; McKinley (note 12) at 6 f; Open Society Institute (note 68) at 153 ff; Roberts (note 80) at 243 f.

<sup>157</sup> This had been proposed by Johannessen/Klaaren/White (note 16) at 53 f, yet s 50 PAIA knows no such limitation.

<sup>158</sup> Open Society Institute (note 68) at 153 f.

<sup>159</sup> Currie/Klaaren (note 13) at 2.6.

*'though not 'public bodies' under PAIA, should be treated as more amenable to the statutory purpose of promoting transparency, accountability and effective governance'.<sup>160</sup>*

This would lead to a category of 'rather public private [bodies]'.<sup>161</sup>

a) General Procedure

The general procedure of access to information held by private bodies is similar to the procedure concerning information held by public bodies as outlined above.<sup>162</sup>

b) Qualification

Requesters of privately held information have to show that they require it for the exercise or protection of any of their rights.<sup>163</sup> This constitutional limit is needed because s 8 (2) of the Constitution otherwise would have caused broad application of the right in private relations.<sup>164</sup> Its purpose is to 'avoid burdening private bodies with a duty to provide [information] to the merely curious.'<sup>165</sup>

The qualification raised several issues regarding the interpretation of the terms 'rights' and 'required'. The former must not be construed in a narrow way as 'needed for litigation';<sup>166</sup> there are other contexts giving a justified interest in information. The judgements decided on issues of s 23 of the Interim Constitution remain relevant for the interpretation of s 32 of the Constitution or s 50 PAIA as far as their wording is the same.<sup>167</sup> Nevertheless, as the qualification now only is needed in regard to privately held information, ie in cases of horizontal application, the terms 'required' and 'rights' might be interpreted narrower than in cases of vertical application.<sup>168</sup> It has been stated that the term 'required'

*'should be given a generous and purposive interpretation. It should not be restrictively interpreted [...]. While it [...] does not mean 'dire necessity' or 'desired', it is not possible to give the word a precise meaning. The enquiry in each case should be a factual one: is the information required for the protection or exercise of a person's rights?'*<sup>169</sup>

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<sup>160</sup> *Unitas Hospital v Van Wyk* [2006] SCA 32 (RSA) at para 40.

<sup>161</sup> *Unitas Hospital v Van Wyk* (note 160) at para 42.

<sup>162</sup> See C.II.1.a).

<sup>163</sup> Section 32 (1) (b) of the Constitution, section 50 (1) (a) PAIA.

<sup>164</sup> Rautenbach (note 80) at 1A78.2.

<sup>165</sup> Currie/Klaaren (note 13) at 5.7.

<sup>166</sup> *Uni Windows CC v East London Municipality* 1995 (8) BCLR 1091 (E), 1095 F–H; Johannes- sen/Klaaren/White (note 16) at 49 f.

<sup>167</sup> *Clutchco (Pty) Ltd v Davis* [2005] 2 All SA 225 (SCA), paras 11 ff; *Unitas Hospital v Van Wyk* (note 160) at para 15; Davis (note 31) at 26-9 and 26-13.

<sup>168</sup> Davis (note 31) at 26-9 suggests the approach found in *Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Another* 2000 (5) BCLR 534 (C) at 135; Currie/Klaaren (note 13) at 5.12 submit that merely fundamental rights should be protected.

<sup>169</sup> *Khala v Minister of Safety and Security* 1994 (4) SA 225 (W).

This notion has been supported.<sup>170</sup>

*Narrower interpretations* of the term ‘required’ have been suggested as well. It was held that the term ‘required’ ‘conveys an element of need: the information does not have to be essential, but it certainly has to be more than “useful”’.<sup>171</sup> Today it can be regarded as settled that the information is needed to be ‘of assistance’ to the requester.<sup>172</sup> The word ‘required’ has to be construed as ‘reasonably required’,<sup>173</sup> which again can only be done with close reference to the specific facts of each case.<sup>174</sup> For disclosure the applicant has to show ‘what the right is that he wishes to exercise or protect, what the information is which is required and how that information will assist him in exercising or protecting that right.’<sup>175</sup> Therefore, requesters have to elaborate on the fact of what benefit can be derived from the requested record.<sup>176</sup> Requesters have to ‘show a risk of harm to a right if there is no transparency.’<sup>177</sup> This requirement is naturally eased by the fact that requesters have no insight into the record when requesting it. Therefore the IO can only oblige requesters to bring forth reason why they *think* or *hope* the record may be of some benefit.<sup>178</sup>

Another important question has been how the term ‘rights’ must be interpreted. It has been stated that as the right of access to information is included in the Bill of Rights, it only provides means for protecting *fundamental rights* which therefore should be the only ‘rights’ referred to.<sup>179</sup> This narrow interpretation must be criticised because the wording of s 32 is broad and unlimited (‘*any* rights’) and its purpose is to promote open and accountable government.<sup>180</sup> The corresponding right does not even have to be one of the requester - as s 50 stipulates ‘any right’ to be sufficient it might also be a right of a

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<sup>170</sup> *Truth and Reconciliation Commission v Du Preez and Another* 1996 (8) BCLR 1123 (C) at 1134.

<sup>171</sup> *Shabalala and Others v The Attorney-General of Transvaal and Others* 1994 (6) BCLR 85 (T), 101 A-B.

<sup>172</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (10) BCLR 1026 (SCA) at para 28; *Unitas Hospital v Van Wyk* (note 160) at 16.

<sup>173</sup> *Institute for Democracy in South Africa (IDASA) and Others v African National Congress and Others* (note 154) at para 34; *Norje and Another v Attorney-General of the Cape and Another* 1995 (2) BCLR 236 (C), 250 H-J; *Van Huyssteen NO and Others v Minister of Environmental Affairs and Tourism and Others* 1995 (9) BCLR 1191 (C); *Clutchco (Pty) Ltd v Davis* (note 167) at para 13.

<sup>174</sup> *Unitas Hospital v Van Wyk* (note 160) at para 18; Currie/Klaaren (note 13) at 5.11.

<sup>175</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* (note 172) at para 28.

<sup>176</sup> *Unitas Hospital v Van Wyk* (note 160) at para 11.

<sup>177</sup> Currie/Klaaren (note 13) at 2.8.

<sup>178</sup> *Unitas Hospital v Van Wyk* (note 160) at paras 23 f.

<sup>179</sup> *Directory Advertising Cost Cutters CC v Minister for Posts, Telecommunications and Broadcasting and Others* 1996 2 All SA 83 (T) at 94.

<sup>180</sup> *Van Niekerk v City Council of Pretoria* 1997 1 All SA 305 (T) at 312.

third person or a right of ‘the public’.<sup>181</sup> In the judgement of *Institute for Democracy in South Africa (IDASA) and Others v African National Congress and Others*, Judge Griesel J adopted a narrow approach in two regards. First, it was stated that ‘rights’ would not include mere ‘values’ because the latter were directed at the government and not obliging private bodies in any way.<sup>182</sup> Second, the right the requester seeks to protect would have to correspond with a duty imposed on the requested body at the same time.<sup>183</sup> The connection between right and duty, however, must not be interpreted too narrowly. The wording of s 50 PAIA and s 32 of the Constitution clearly allows the protection of ‘any’ right. This must include such rights that are imposing duties on *other* bodies than those requested. The section’s purpose is not only to use disclosure to prevent *the requested body* from infringing on one’s right but to allow the requester to exercise and protect *the right in question* efficiently. The right might be exercised elsewhere and might need to be protected from other persons than the requested body. If one agrees with Judge Griesel demanding a strict right-duty-relationship, the possible outcome would be paradox: the perpetrating person could evade disclosure simply by transferring the sought record to another body because then the infringing body on the one side and the information holding bodies on the other side would be different persons. Therefore, the right sought to be protected or exercised and the duty would not correspond anymore and the request could be turned down. Consequently, other judgements have stated that *every right* is included, regardless of which origin<sup>184</sup> and whether or not it is directed against the state or a private person.<sup>185</sup>

### III. Grounds for Refusal

There is broad consent that access to information cannot be granted without limits.<sup>186</sup> Legitimate interests of the government (such as matters of defence or national security) as well as of private persons (such as privacy and trade secrets) deserve protection from

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<sup>181</sup> Currie/Klaaren (note 13) at 5.7, 5.12.

<sup>182</sup> *Institute for Democracy in South Africa (IDASA) and Others v African National Congress and Others* (note 154) at para 40 and *Minister of Home Affairs v National Institute for Crime Prevention (NICRO) and Others* 2004 (5) BCLR 445 (CC) at para 21 considered sections 1, 41(1)(c), 152(1)(a) and 195(1) to be such values.

<sup>183</sup> *Institute for Democracy in South Africa (IDASA) and Others v African National Congress and Others* (note 154) at para 47.

<sup>184</sup> *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape* 1997 (7) BCLR 907 (C) at 915 f; *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust and Another*, 1999 (8) BCL 908 (I) at 915; *Van Niekerk v City Council of Pretoria* (note 180) at 309 f; *Nisec (Pty) Ltd v Western Cape Provincial Tender Board and Others*, 1998 (3) SA 228 (C) at 237 B-E.

<sup>185</sup> *Le Roux v Direkteur-Generaal van Handel en Njwerheid* 1997 (8) BCLR 1048 (I) at 1055 f.

<sup>186</sup> Johannessen/Klaaren/White (note 16) at 55 f; Mendel (note 7) at 28; Roberts (note 76) at 2.

interminable access by citizens or competitors.<sup>187</sup> The protection and balance of other fundamental rights and important aspects of the public interest represent a legitimate purpose.<sup>188</sup>

One central concern is the abuse of access to information by powerful private organizations.<sup>189</sup> Another concern is that disclosure of governmental information will eventually undermine the authority of government and its efficiency.<sup>190</sup> Regarding administration efficiency, exemptions are likely to become a big part of any freedom of information legislation because although

*‘in the long run [access to information] significantly improve[s] governance, [it does] not represent an immediate benefit for those who are in power. FOI laws open the government to external scrutiny, making elites much more vulnerable to outside criticism [...]. [...] Government leaders ‘as a group’ do not favour FOI laws because it is not in their interest to do so.’<sup>191</sup>*

Nevertheless, limitations generally should adhere to certain standards to be justifiable and to leave an FOI-act capable. Such standards are suggested by the *Johannesburg Principles* which stipulate that limitations should be exercised narrowly,<sup>192</sup> be subject to a necessity of harm-test<sup>193</sup> as well as to a public interest-override<sup>194</sup> and an independent review in case of denial.<sup>195</sup>

The PAIA allows refusal on various grounds for both publicly<sup>196</sup> and privately<sup>197</sup> held records. The act encompasses grounds of refusal rooted in the *nature* of the information<sup>198</sup> and it stipulates the need for *balancing* the right to information with other rights of the Bill of Rights.<sup>199</sup> Furthermore, there are *institutional exceptions* excluding the cabinet and its committees,<sup>200</sup> courts and certain special tribunals as far as their judicial

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<sup>187</sup> For a list of commonly found exemptions (‘international standard exemptions’) see Open Society Institute (note 68) at 148.

<sup>188</sup> Currie/Klaaren (note 12) at 73.

<sup>189</sup> Johannessen/Klaaren/White (note 16) at 49, 51 f.

<sup>190</sup> Johannessen/Klaaren/White (note 16) at 52.

<sup>191</sup> Ackermann/Sandoval-Ballesteros (note 7) at 121.

<sup>192</sup> Article 19 (note 79) at Principle 12.

<sup>193</sup> Article 19 (note 79) at Principle 15.

<sup>194</sup> Article 19 (note 79) at Principle 13.

<sup>195</sup> Article 19 (note 79) at Principle 14.

<sup>196</sup> Sections 33-46 PAIA.

<sup>197</sup> Sections 62-70 PAIA.

<sup>198</sup> Section 9 (b) (i) PAIA names the protection of privacy, commercial confidentiality and effective and good governance. Other purposes envisaged by the act include the protection of life and physical safety, the security and protection of buildings and security systems, law enforcement, criminal and civil procedure, privilege, defence, security and international relations, the economic interests and financial welfare of the state and research information, see Rautenbach (note 80) at 1A78.3.

<sup>199</sup> Section 9 (b) (ii) PAIA.

<sup>200</sup> Section 12 (a) PAIA.

functions are concerned<sup>201</sup> and individual members of parliament or a provincial legislature in their capacity.<sup>202</sup> Various grounds of refusal apply regardless if the information is privately or publicly held, so does the exception for the protection of the *privacy* of a third party being a natural person,<sup>203</sup> *commercial information* of a third party,<sup>204</sup> *confidential information*,<sup>205</sup> *safety and property* of individuals,<sup>206</sup> *records privileged from production* in legal proceedings<sup>207</sup> and *research information* of third parties and public bodies.<sup>208</sup> Other grounds of refusal only apply to information held by public bodies. Such grounds include the protection of certain records of the *South African Revenue Service*,<sup>209</sup> police dockets in bail proceedings and *law enforcement and other legal proceedings*,<sup>210</sup> *matters of defence, security and international relations* of the state,<sup>211</sup> *economic interests and financial welfare* of the state and *commercial activities of public bodies*,<sup>212</sup> *commercial information*<sup>213</sup> and *public bodies' operations*.<sup>214</sup> Furthermore, requests that are manifestly *frivolous or vexatious*, or form a substantial and unreasonable diversion of resources can be turned down.<sup>215</sup> There are no substantial grounds for refusal that solely apply to private bodies. There are *mandatory and discretionary* grounds for refusal concerning publicly<sup>216</sup> and privately<sup>217</sup> held information. The PAIA is 'both an access law and a secret law' because it encompasses mandatory refusal grounds.<sup>218</sup> The phrase 'may not' must be interpreted as 'must not', forming a mandatory ground of refusal.<sup>219</sup> This makes most grounds mandatory,<sup>220</sup> so the previously arrogated<sup>221</sup> general discretionary disclosure of records has not become law. Some limita-

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201 Section 12 (b) (i) to (iii) PAIA.

202 Section 12 (c) PAIA.

203 Section 34 PAIA (records of public bodies) and section 63 PAIA (records of private bodies).

204 Section 36 PAIA (records of public bodies) and section 64 PAIA (records of private bodies).

205 Section 37 PAIA (records of public bodies) and section 65 PAIA (records of private bodies).

206 Section 38 PAIA (records of public bodies) and section 66 PAIA (records of private bodies).

207 Section 40 PAIA (records of public bodies) and section 67 PAIA (records of private bodies).

208 Section 43 PAIA (records of public bodies) and section 69 PAIA (records of private bodies).

209 Section 35 PAIA.

210 Section 39 PAIA.

211 Section 41 PAIA.

212 Section 42 PAIA.

213 Section 42 (3) PAIA (records of public bodies) and section 68 PAIA (records of private bodies).

214 Section 44 PAIA.

215 Section 45 PAIA.

216 *Mandatory grounds*: Sections 34 (1), 35 (1), 36 (1), 37 (1) (a), 38 (a), 39 (1) (a), 40 and 43 (1) PAIA read together with section 33 (1) (a) PAIA.

*Discretionary grounds*: Sections 37 (1) (b), 38 (b), 39 (1) (b), 41 (1) (a) and (b), 42 (1) and (3), 43 (2), 44 (1) and (2) and 45 PAIA read together with section 33 (1) (b) PAIA.

217 *Mandatory grounds*: Sections 63 (1), 64 (1), 65, 66 (a), 67, 69 (1) PAIA.

*Discretionary grounds*: Sections 66 (b), 68 (1), 69 (2) PAIA.

218 Mendel (note 7) at 73.

219 Currie/Klaaren (note 13) at 7.7.

220 See Chapter 4 of PAIA.

221 Johannessen/Klaaren/White (note 16) at 56.

tions can be found outside PAIA.<sup>222</sup> Most, but not all<sup>223</sup> of the exceptions are subject to some kind of *necessity of harm clause*. Those clauses are incorporated into the specific provision. The phrases ‘likely to’ and ‘reasonably expected to’ are used to describe the likelihood of the harmful consequences triggered by the disclosure. The former phrase calls for a narrower test than the latter.<sup>224</sup>

All grounds of refusal are subject to a *public interest override*,<sup>225</sup> a *severability clause*<sup>226</sup> and to *independent review*.<sup>227</sup> PAIA’s grounds of refusal are *exhaustive* and the act itself provides for their *narrow interpretation*.<sup>228</sup> The *onus* is on the refusing body.<sup>229</sup> It has been positively remarked, that in international comparison PAIA’s limitations are narrowly drawn and often subject to counter-exceptions to limit the scope of non-disclosure.<sup>230</sup>

#### IV. Enforcement

Any right of access to information is only as valuable as it is enforceable,<sup>231</sup> especially ‘since the culture of bureaucracy typically works against the automatic implementation of openness.’<sup>232</sup> Therefore, the PAIA depends strongly on institutional support by its very nature.<sup>233</sup> Preferably, access to information should be enforced by a special independent institution,<sup>234</sup> as enforcement by the courts is slow and cost intensive.<sup>235</sup> Nevertheless, it is more important to vest whatever enforcement institution with appropriate powers than to insist on a special body.<sup>236</sup> Furthermore, it is important to guard that

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<sup>222</sup> See for instance the Protected Disclosures Act 26 of 2000 which is concerned with the protection of whistleblowers.

<sup>223</sup> Section 44 (1) (a) PAIA (operation of public bodies) is not, while Section 44 (1) (b) PAIA again encompasses some kind of harm test.

<sup>224</sup> For further interpretation of these phrases see Currie/Klaaren (note 13) at 3.

<sup>225</sup> Section 46 PAIA (for public records) and section 70 PAIA (for private records).

<sup>226</sup> Section 28 PAIA (records of public bodies) and section 59 PAIA (records of private bodies).

<sup>227</sup> Currie/Klaaren (note 13) at 7.2.

<sup>228</sup> Section 33 PAIA, see Currie/Klaaren (note 13) at 7.4.

<sup>229</sup> *Ferreira v Levin* NO 1996 (1) SA 984 (CC) at para 44. Currie/Klaaren (note 13) at 9.15. At 7.3 however they note that the onus may be ‘more lenient’ in case of ‘important’ rights or interest that are protected. This raises the question where and by whom the line should be drawn between ‘important’ and ‘not so important’ grounds of refusal. Furthermore it remains unclear what a ‘lenient onus’ is supposed to be.

<sup>230</sup> Mendel (note 7) at 73.

<sup>231</sup> McKinley (note 12) at 29; Roberts (note 76) at 4; White (note 26) at 74.

<sup>232</sup> Ackermann/Sandoval-Ballesteros (note 7) at 105.

<sup>233</sup> Currie/Klaaren (note 13) at 10.3.

<sup>234</sup> Balisar (note 9) at 5 f; Mendel (note 7) at 32.

<sup>235</sup> Ackermann/Sandoval-Ballesteros (note 7) at 104.

<sup>236</sup> Mendel (note 7) at 33; also see the international comparison at Ackermann/Sandoval-Ballesteros (note 7) at 105 f.

body from political interference as it is primarily public bodies that are subject to enforcement.<sup>237</sup>

The PAIA itself provides two overseers for its implementation, the *South African Human Rights Commission* ('HRC') and the *High Courts*. Special institutions have not been established.<sup>238</sup> The HRC is entrusted with various tasks, for instance, it must publish an easily understandable guide on how to use PAIA<sup>239</sup> and provide an annual report to the National Assembly on the functioning of the Act.<sup>240</sup> Furthermore, it is collecting manuals on access to information which must be issued by public bodies.<sup>241</sup> Nevertheless, as the HRC is 'cash-strapped, [...] notoriously understaffed and overstretched' and at the same time not additionally funded for its newly designated tasks, it is virtually incapable of effective enforcement of the PAIA.<sup>242</sup> In its 5<sup>th</sup> Annual Report, the Commission had to admit that it has not had the capacity to do *any* work relating to PAIA due to lack of funding.<sup>243</sup> While underfunding is a general problem of the Chapter 9-institutions,<sup>244</sup> it has been noted that the 'HRC has failed even to partially fulfil [its] mandate'.<sup>245</sup> The problem of sufficient funding is addressed by the PAIA itself because it obliges Parliament to allocate funds needed for purposes of the PAIA.<sup>246</sup> On the one hand this has the potential of undermining the goals of the PAIA as it creates the ironical situation that the enforcing institution is dependent on the fiscal goodwill of the government which, at the same time, is subject to that enforcement.<sup>247</sup> On the other hand, there is no real alternative because any state enforcement agency depends on the state for funds. Even if one would incorporate a provision stipulating a certain or relative amount of funds this provision could be amended by Parliament again. Therefore, sufficient funding will always depend on government's goodwill. The implementation outcome of

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<sup>237</sup> Mendel (note 7) at 32 f.

<sup>238</sup> The suggested Open Democracy Commission as well as specialised Information Courts have not been established, White (note 26) at 74.

<sup>239</sup> Section 10 PAIA; South African Human Rights Commission 'The Guide on how to use the Promotion of Access to Information Act - Act 2 of 2000 -', available at <http://www.sabrc.org> [accessed 6 July 2007] at 8 ff.

<sup>240</sup> Section 84 PAIA.

<sup>241</sup> For further tasks see Section 83 PAIA and Currie/Klaaren (note 13) at 11.3 ff.

<sup>242</sup> Balisar (note 9) at 78; White (note 26) at 74 f.

<sup>243</sup> South African Human Rights Commission '5<sup>th</sup> Annual Report: January 2000-March 2001', available at <http://www.sabrc.org> [accessed 6 July 2007] at 6 f.

<sup>244</sup> Corder (note 13) at 44.

<sup>245</sup> McKinley (note 12) at 10, 14.

<sup>246</sup> Section 85 PAIA.

<sup>247</sup> McKinley (note 12) at 6.

PAIA is worrisome: In average only 23 per cent of the requests have been fulfilled in South Africa so far.<sup>248</sup>

## V. Evaluating PAIA

This chapter will briefly outline the constitutional test that has to be applied to the PAIA. Thereupon criticism regarding the act's scope, its refusal grounds and its procedure will be examined to isolate problems of constitutionality.

### 1. Scope of the Constitutional Test

The constitutional test regarding the PAIA consists of two provisions of the Constitution: s 32 (2) as internal limitation and s 36 as general limitation clause. Additionally, PAIA's public interest override<sup>249</sup> has to be taken into account because it is working as a last 'safety valve'<sup>250</sup> that allows disclosure of (generally 'protected') records in certain cases of hardship. Whenever the constitutionality of the PAIA is tested for certain reasons, ss 46 and 70 have to be applied first to see if the outcome is capable of justifying the limit itself.<sup>251</sup> While the constitutional test can only be outlined briefly here, it will be applied on limitations in detail at the respective chapters.

#### a) Section 32 (2) of the Constitution

Section 32 (2) obliges the law-giver to 'give effect' to the right of access to information. That constitutional mandate necessarily raises the question what kind of 'effect' is meant. Section 32 (2) cannot be viewed on its own. To answer this question one has to bear in mind the culture of transparency as it is entrenched in several provisions of the two Constitutions.<sup>252</sup> In this context, 'to give effect' is to be understood as "make effective", "promote" or "implement" which encompasses the duty to set out enforcement procedures.<sup>253</sup> PAIA therefore has to be *substantially effective as the central instrument for achieving transparency*. Furthermore, s 32 (2) serves as a *special limitation clause* which supplements the general limitation clause of s 36. The clause makes limitation of the right easier in certain regards.<sup>254</sup> It explicitly allows the law-giver to 'provide *reasonable measures*

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<sup>248</sup> Compared to for instance 41 per cent in Armenia, see Ackermann/Sandoval-Ballesteros (note 7) at 126.

<sup>249</sup> Section 46 PAIA (public records) and section 70 PAIA (private records).

<sup>250</sup> Davis (note 31) at 26-12.

<sup>251</sup> Davis (note 31) at 26-12.

<sup>252</sup> See B ff.

<sup>253</sup> Currie/Klaaren (note 13) at 2.2.

<sup>254</sup> Currie/Klaaren (note 13) at 2.16.

to alleviate the administrative and financial burden on the state<sup>255</sup> that is caused by access to information. The subsection expressively allows administrative and financial considerations to serve as purposes for limitation, ends that otherwise would be of little persuasion for the limitation of a fundamental right.<sup>256</sup> The concept of reasonability is also enclosed in s 36; subsection (2) therefore is to be read as *lex specialis* when dealing with limitations that are made for the purpose of alleviating the administrative or financial burden.<sup>257</sup> Any limitation, however, must leave the right intact - otherwise it would not have been given 'effect' to. With regards to limitations not apparently related to the administrative or financial burden, s 32 (2) does not apply but the limitation has to be tested against the general limitation clause of s 36.<sup>258</sup> After all, the subsection primarily exists to justify PAIA's fee system.<sup>259</sup>

b) Section 36 of the Constitution

Any limitations of the rights in the Bill of Rights have to comply with s 36 of the Constitution. Section 36 supplements the internal limitation of s 32 (2) PAIA. Section 36 (1) (a) stipulates that such limitation by the state must be reasonable and justifiable in an open and democratic society based on freedom and equality.<sup>260</sup>

The constitutional test of s 36 consists of two parts: First, a value based determination of the ambit of a fundamental right must be made; it must be shown that the conduct in question falls within that ambit and that the right has been limited. Second, it must be examined if the limitation can be justified in terms of s 36.<sup>261</sup> During that stage, right and limitation must be balanced according to s 36,<sup>262</sup> which demands that limitations have to be of general application and must be tested taking into account the nature of the right,<sup>263</sup> the importance of the purpose of the limitation,<sup>264</sup> the nature and extent of the limitation,<sup>265</sup> the relation between the limitation and its purpose<sup>266</sup> and less restric-

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<sup>255</sup> Emphasis added.

<sup>256</sup> Rautenbach (note 80) at 1A78.3.

<sup>257</sup> Currie/Klaaren (note 13) at 2.16.

<sup>258</sup> Currie/Klaaren (note 13) at 2.16; Davis (note 31) at 26-12.

<sup>259</sup> Currie/Klaaren (note 13) at 2.16.

<sup>260</sup> One example is the refusal of a suspect's access to a police file during investigations, see *Khala v Minister of Safety and Security* (note 169) at 236 f.

<sup>261</sup> *S v Makwanyane and Another* (note 74) at paras 100 ff; Woolman, Stu/Botha, Henk, 'Limitations' in Woolman, Stuart/Roux, Theunis/Bishop, Michael, '*Constitutional Law of South Africa*', 2<sup>nd</sup> edition, loose leaf (Service: March 2007), Chapter 34 at 34-3 ff.

<sup>262</sup> Woolman, Stu/Botha, Henk (note 261) at 34-18 ff.

<sup>263</sup> Further see Woolman, Stu/Botha, Henk (note 261) at 34-70 ff.

<sup>264</sup> Further see Woolman, Stu/Botha, Henk (note 261) at 34-73 ff.

<sup>265</sup> Further see Woolman, Stuart/Botha, Henk (note 261) at 34-79 ff.

<sup>266</sup> Further see Woolman, Stuart/Botha, Henk (note 261) at 34-84 f.

tive means to achieve the purpose.<sup>267</sup> The competing values listed in s 36 (1) have to be weighed and assessed based on proportionality.<sup>268</sup> PAIA can be used to limit s 32 because the act fulfils all criteria of a ‘law of general application’ (parity of treatment, non-arbitrariness, accessibility or public availability and clarity).<sup>269</sup> In order to limit the right of access to information, the state has to discharge a heavy onus.<sup>270</sup>

## 2. Constitutionality

Some tend to say that ‘the gap between the promise and the practise of information legislation’ generally tends to be rather big,<sup>271</sup> but there are also more tangible features to measure the effectiveness against. *Mendel* has stipulated nine basic principles which are supported by various international instruments.<sup>272</sup> These principles include the principle of *maximum disclosure*,<sup>273</sup> the *obligation to publish* key information,<sup>274</sup> an active *promotion of open government*,<sup>275</sup> *clearly and narrowly drawn exceptions*,<sup>276</sup> *fair and rapid processes* facilitating access,<sup>277</sup> *unprohibitive costs*,<sup>278</sup> *open public body meetings, disclosure taking precedence over conflicting laws*<sup>279</sup> and *protection for whistleblowers*.<sup>280</sup> Those FOI-values help to interpret the act according to its purpose and as far as they are incorporated and protected by the Constitution, they help determine its constitutionality.

### a) Criticising PAIA’s Scope and Grounds of Refusal

Despite the voices lauding PAIA’s progressiveness, the act is often criticised for its grounds of refusal. While concerns about the latter’s *amount and scope* are alleviated by the fact that all exemptions are subject to a public interest override,<sup>281</sup> one nevertheless has to bear in mind that disclosure is stipulated as the rule and non-disclosure as the exemp-

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<sup>267</sup> Further see Woolman, Stuart/Botha, Henk (note 261) at 34-85 ff; Rautenbach (note 80) at 1A66 ff.

<sup>268</sup> *S v Makwanyane and Another* (note 74) at para 104; *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (5) BCLR 491 (CC) at para 32; *S v Bhulwana* 1995 (12) BCLR 1579 (CC) at paras 17 f.; *Prince v President of the Cape Law Society and Others* 2002 (3) BCLR 231 (CC) at para 45.

<sup>269</sup> Woolman, Stu/Botha, Henk (note 261) at 34-47 ff.

<sup>270</sup> Davis (note 31) at 26-3; Woolman, Stu/Botha, Henk (note 261) at 34-42 ff, 34-61 ff.

<sup>271</sup> Lidberg/Phillips/Tanner (note 94) at 88.

<sup>272</sup> See Mendel (note 7) at 23 f.

<sup>273</sup> Mendel (note 7) at 25 f.

<sup>274</sup> Mendel (note 7) at 26 f.

<sup>275</sup> Mendel (note 7) at 27 f.

<sup>276</sup> Mendel (note 7) at 28 ff.

<sup>277</sup> Mendel (note 7) at 31 ff.

<sup>278</sup> Mendel (note 7) at 33.

<sup>279</sup> Mendel (note 7) at 34 f.

<sup>280</sup> Mendel (note 7) at 35 f.

<sup>281</sup> Ackermann/Sandoval-Ballesteros (note 7) at 103; Mendel (note 7) at 30 sees a public interest override as mandatory condition to any limitation.

tion by PAIA and s 32 of the constitution. Otherwise, the act reprobates to an instrument of limitation instead of the promotion of freedom of information.<sup>282</sup> Therefore, limitations to the right of access to information generally have to be interpreted narrowly,<sup>283</sup> which includes for instance, the duty to partial disclosure if parts of the record are severable from exempted information.<sup>284</sup>

The justification of limitations depends on various issues as the *concept* of the specific limitation itself, the question of *who* decides over it or *on what grounds*,<sup>285</sup> and whether there is a *public interest override* as a safeguard.<sup>286</sup> Limitations by the nature of information generally can be justified easier than such by its class or source.<sup>287</sup> *Conflicting interests* of the informant, the requester and third parties must also be balanced. When requesting information from private bodies, additional limitations might emanate from the Bill of Rights' horizontal application. For instance, the right to privacy might have to be considered to determine how much and which information can be collected, filed or published.<sup>288</sup>

aa) No Access to 'Any Information'

The most basic criticism is directed at PAIA's object itself. The act grants access to any 'records'.<sup>289</sup> Despite the broad definition of 'record',<sup>290</sup> this term apparently only includes recorded information. The Constitution, however, obliges the legislation to establish access to 'any information', a wording that also includes information, which is not physically recorded.<sup>291</sup> Leaving unrecorded information completely out of PAIA's scope opens up a loophole that allows one to evade the act's purpose, eg by issuing guidelines or orders not to record sensible information. Such an order or guideline wouldn't even constitute an offence in terms of the act because s 90 merely sanctions any negative conduct regarding *existing records* but not the omission of producing them (except for

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<sup>282</sup> As it has happened in Zimbabwe, Serbia and Paraguay, see Ackermann/Sandoval-Ballesteros (note 7) at 109, 114 f; Balisar (note 9) at 7, 96; Mendel (note 7) at vi.

<sup>283</sup> Currie/Klaaren (note 13) at 2.10; Johannessen/Klaaren/White (note 16) at 46, 56.

<sup>284</sup> Johannessen/Klaaren/White (note 16) at 56; Mendel (note 7) at 31.

<sup>285</sup> For example if there is a 'necessity of harm' clause.

<sup>286</sup> Ackermann/Sandoval-Ballesteros (note 7) at 101 f; Mendel (note 7) at 30.

<sup>287</sup> Johannessen/Klaaren/White (note 16) at 56.

<sup>288</sup> Johannessen/Klaaren/White (note 16) at 46 f consider this the main problem which had to be dealt with by a 'carefully drafted instrument'.

<sup>289</sup> Section 11 PAIA (records of public bodies) and section 50 PAIA (records of private bodies).

<sup>290</sup> Section 1 PAIA.

<sup>291</sup> Section 32 (1) of the Constitution.

section 14 manuals).<sup>292</sup> The PAIA does not ‘give effect’ to s 32 insofar as it does not encompass unrecorded information.<sup>293</sup>

However, this limitation of PAIA’s scope is justifiable by the nature of the right and the limitation. Any right of access to information must be workable. Merely memorized information is difficult to locate because the requested official can neither know whether that information exists at all nor in whose head it can be found. Even if it can be ‘located’, say by referring the requester to an official with expertise on the requested field of information, there is still no guarantee that the information will be replicated correctly by that person. Furthermore, there is no evidence or control about information that just exists in somebody’s head. Despite the wording ‘any information’, the restriction to recorded information is needed in practical terms considering the nature of the right and is therefore justified.

bb) Institutional Exceptions

Section 12 PAIA provides institutional limitations. Records of cabinet and its committees, courts and certain special tribunals as far as their judicial functions are concerned and individual members of parliament or a provincial legislature in their capacity cannot be accessed via PAIA.

(1) Problem

Although South Africa is in good company regarding institutional exceptions,<sup>294</sup> an effective FOI-law should generally

*‘cover all bodies that receive public money, including all branches of government [...]. It would also open up to public scrutiny any “body” that carries out a function vital to the public interest (for example, private hospitals, schools, prisons), regardless of whether it receives government funding.’<sup>295</sup>*

Government should be prevented from the use of secret law and governmental information should be managed in order to foster development and bring transparency into governmental conduct.<sup>296</sup> Therefore, FOI-legislation should not only cover access to ‘information *about government* but also access to any information *held by government*.’<sup>297</sup>

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<sup>292</sup> See s 90 (2) PAIA).

<sup>293</sup> McKinley (note 12) at 6, 33.

<sup>294</sup> For instance Australia, Canada, Sweden, the UK and the USA know institutional exceptions, see Ackermann/Sandoval-Ballesteros (note 7) at 99 f; Currie/Klaaren (note 13) at 4.17 [footnote 39].

<sup>295</sup> Ackermann/Sandoval-Ballesteros (note 7) at 97.

<sup>296</sup> Johannessen/Klaaren/White (note 16) at 53.

<sup>297</sup> Johannessen/Klaaren/White (note 16) at 48, emphasis added.

Section 12 PAIA is problematic because it removes whole areas of strong public interest from the public eye.<sup>298</sup> In the historical context, it is especially worrisome that the provision makes no difference between pre- and post-1994 records, which impedes on coming to terms with the Apartheid era.<sup>299</sup> Moreover, s 12 is not subject to the public interest override because s 46 PAIA only applies to the grounds of refusal in chapter 4. This is irritating since it makes no difference for requesters if they cannot rely on PAIA because of a general limitation of the application (s 12) or because of grounds of refusal (ss 33 ff, 66 ff). In addition, general limitations of the scope are even worse for requesters because while they can appeal against non-disclosure relying on grounds of refusal using the act's instruments, this is not possible if PAIA is not applicable. It is 'unfair' in a sense, that Cabinet is not simultaneously excluded from the definition of 'requester'.<sup>300</sup> This 'one way track' informational flow in favour of Cabinet contradicts PAIA's purpose because the act's purpose is *to subject* public bodies to public scrutiny *not to empower* them to retrieve information.<sup>301</sup>

## (2) Justification

The institutional exceptions must be justified in terms of s 36. Their common purpose is that the state's institutions must be able to function efficiently. Limiting the right according to the type of public body instead of the class of information sought constitutes a broad exception. Broad exceptions can only be justified if they reflect the complexity of certain problems.<sup>302</sup>

The exception of *judicial records* is justified in light of the protection of the efficient functioning of the courts, the fairness of litigation and the finality of judicial decisions.<sup>303</sup> Less restrictive means are not apparent. Despite of their institutional character, the limitation appears to be reasonably balanced: neither records relating to administrative functions of courts,<sup>304</sup> nor records that are not in sole control or possession of the court are exempted.<sup>305</sup> The remaining records are those that emanate from litigation. The persons affected (mainly the litigants themselves and third parties that intervene) have a right to access those records via the rules of discovery.

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<sup>298</sup> Ackermann/Sandoval-Ballesteros (note 7) at 100.

<sup>299</sup> McKinley (note 12) at 33 f.

<sup>300</sup> Section 2 (2) PAIA.

<sup>301</sup> See the Preamble of PAIA.

<sup>302</sup> O'Brien (note 6) at 52 names 'national security' and 'criminal law enforcement' as examples.

<sup>303</sup> Currie/Klaaren (note 13) at 4.18.

<sup>304</sup> Nevertheless it will be difficult to draw a line between administrative and judicial functions.

<sup>305</sup> Currie/Klaaren (note 13) at 4.18.

The exemption of records in the sole possession of *members of Parliament* is justified in light of the protection of freedom of speech and political activity in the legislatures.<sup>306</sup> Concerns are alleviated because of the general publicity of Parliament: Records that emanate from the legislative process like bills, statutes, regulations and so on are fully accessible. Furthermore, the public must be involved and has access to the National Assembly and its Committees, s 59 (1). Although that access can be limited again (ss 59 (1) (b) (i) and 59 (2)) it cannot be refused fully so there is still enough public scrutiny and participation possible.

It is questionable if the categorical exclusion of *Cabinet's records* via s 12 can be justified. Some arguments militate in favour of the limitation: It is infused by notions like 'the convention of collective ministerial responsibility' and the 'fiction of cabinet unanimity' from Westminster constitutionalism. Although hard to impart in the days of public crucifixion of ministers, the Constitution explicitly retains these principles.<sup>307</sup> Furthermore, Cabinet members may enjoy privileges prescribed by national legislation, s 58 (2). Additionally, the limitation's scope is lessened by Cabinet's duty to provide Parliament with full and regular reports concerning matters under their control, s 92 (3) (b) as such reports are subject to PAIA. Therefore, some note that the limitation is constitutional as long as it is interpreted extremely narrow:<sup>308</sup> They argue, that it would not apply to records which are not in the *sole* possession or control of Cabinet.<sup>309</sup> It seems doubtful if such a narrow interpretation alone can save the exception. First of all, PAIA's exceptions are listed exhaustively and *generally* must be interpreted narrowly so the narrow interpretation-argument is not very persuasive. Second, narrow interpretation does still not encompass 'true' records of Cabinet. It merely re-encompasses records that have been held by other bodies while the very core of Cabinet decisions and politics are likely to be records in the sole possession of Cabinet. Furthermore, privileges like s 58 (2) still must comply with the Bill of Rights. There are further arguments speaking against the exception's justification: *Historically*, the exception does not comply with Constitutional Principle IX which explicitly demands access to information at '*all levels*' of '*government*'. The Principle's wording makes clear that at least *some* access to records of the Cabinet must be provided. This demand is not sufficiently met by the right

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<sup>306</sup> Currie/Klaaren (note 13) at 4.19.

<sup>307</sup> See s 92 (2)

<sup>308</sup> Davis (note 31) at 26-12; Rautenbach (note 80) at 1A78.2.

<sup>309</sup> Currie/Klaaren (note 13) at 4.16 state that requests can be directed to bodies that prepared and submitted the requested record to Cabinet.

to access parliament's records because 'parliament' encompasses both, 'government' and 'opposition' so it does not apply to the more specific rules regarding 'Cabinet'. Regarding the nature of the right, s 36 (1) (a), one has to bear in mind the importance of access to information particularly in terms of political participation. Cabinet is the central body of the government and together with the President is head of the executive, s 85 (2). Cabinet has strong influence on the legislation because it dominates the ruling majority of parliament.<sup>310</sup> *McKinley* notes that '[h]uman rights [...] cannot be exercised fully when access to the key decisions and processes that provide the foundation for both legislation and administrative action by government is denied.'<sup>311</sup>

Of course the importance of Cabinet also bears on the nature, extent and purpose of the limitation, s 39 (1) (c) and (d). Without a well functioning Cabinet democracy does not work and the state literally becomes 'ungovernable'. The limitation's purpose is to make sure that Cabinet can fulfil its executive functions as assigned by the Constitution. The executive must be able to make decisions, especially if they are hard to make or unpopular. Fear and pressure coming from public scrutiny could make that decision-making impossible *ex ante*. The democratic duty to be accountable for political decisions can be fulfilled *ex post*.

The protection of Cabinet's functions is strongly linked to the *protection of its deliberative process*.<sup>312</sup> The problem is that this purpose can be achieved with less restrictive means, s 36 (1) (e). The standard of 'less restrictive means' is not one of unattainable norm of perfection, but reasonableness.<sup>313</sup> One cannot viably argue that the exemption is necessary. That argument is not very convincing because the provincial equivalents of Cabinet (the Executive Councils of the Provinces, 'ECP') are not encompassed by the exemption despite they perform similar functions and enjoy the same importance, but only on a different level of government. One might argue that this difference is justified because Cabinet is acting on a 'higher level of governance' than the ECPs, therefore is 'more important' and in need of more protection from disclosure. Nevertheless, the limitation is 'overbroad' because it exempts records that can be disclosed without leaving Cabinet's functions in jeopardy.<sup>314</sup> This can be said without 'unduly narrowing the

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<sup>310</sup> See White (note 26) at 73.

<sup>311</sup> McKinley (note 12) at 7.

<sup>312</sup> Currie/Klaaren (note 13) at 4.16.

<sup>313</sup> *S v Mamabolo (E TV and Others Intervening)* 2001 (5) BCLR 449 (CC) at 49.

<sup>314</sup> Compare *Case and Another v Minister of Safety and Security and Others*; *Curtis v Minister of Safety and Security and Others* 1996 (5) BCLR 609 (CC) at 48 ff; *Coetzee v Government of the Republic of South Af-*

range of policy choices'.<sup>315</sup> There is a means that must be chosen because it is not only less restrictive, but at the same time also *not less effective*.<sup>316</sup> The deliberative process of Cabinet (if it was within the act's ambit) would be explicitly guarded by s 44 PAIA.<sup>317</sup> Cabinet's deliberations can be sufficiently protected on a case-by-case basis, because s 44 is worded broadly<sup>318</sup> and partially<sup>319</sup> is not even restricted by any kind of necessity of harm-test.<sup>320</sup> Such a case-by-case protection would not impose significant administrative burdens on the state as Cabinet could deal with requests.<sup>321</sup> The effectiveness of the protection of sensitive records would depend on the skills of the IO appointed by Cabinet, who could use s 44 together with the above mentioned arguments which kind of create an assumption speaking for non-disclosure.

It is generally less harsh to make use of a ground of refusal than limiting the scope of PAIA right away: In the former case, the exception can be overturned by public interest<sup>322</sup> and PAIA can be used for an appeal against the non-disclosure decision while in the latter, the act is not applicable so there is no chance for public scrutiny from the start.

This leads to the conclusion that the categorical exception of Cabinet's records is inconsistent with the limitation clause. Section 12 of PAIA is unconstitutional because it does not 'give effect' to the right of access to information insofar as Cabinet's records are concerned. This 'failure to regulate cabinet records' causes direct application of s 32 of the Constitution, unmediated by PAIA.<sup>323</sup>

#### cc) Protection of International Relationships

According to s 41 (1) (a) (iii) PAIA, an information officer may refuse disclosure if it could reasonably be expected to cause prejudice to the international relations of South Africa. As only information officers will know the content of the requested record, it is

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*rica; Matiso & Others v Commanding Officer, Port Elizabeth Prison* 1995 (10) BCLR 1382 (CC) at 13, 32; *S v Manamela and Another (Director-General of Justice Intervening)* (note 268) at 43 ff.

<sup>315</sup> *S v Manamela and Another (Director-General of Justice Intervening)* (note 268) at 95; *S v Mamabolo (E TV and Others Intervening)* (note 313) at 49.

<sup>316</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2003 (12) BCLR 1333 (CC) at para 81.

<sup>317</sup> Section 44 PAIA.

<sup>318</sup> Currie/Klaaren (note 13) at 8.98 f submit that it is drafted wider than any of its models.

<sup>319</sup> While subsections 44 (1) (a) and 44 (2) (c) do not contain any necessity of harm-restriction, the other subsections do.

<sup>320</sup> Mendel (note 7) at 130; Roberts (note 76) at 3 criticise the provision as it can seriously undermine the principle of maximum disclosure and allows government to evade accountability.

<sup>321</sup> See Woolman, Stu/Botha, Henk (note 261) at 34-89.

<sup>322</sup> Section 46 PAIA.

<sup>323</sup> Currie/Klaaren (note 13) at 4.17.

only them who can assess the likelihood of harm and determine the scope of the limitation, which is a problematical situation.<sup>324</sup> The provision also has the potential to insulate intergovernmental organisations completely from disclosure as any information they hold will typically affect international relations.<sup>325</sup>

When considering the purpose of the limitation, one must keep in mind that international relations are a very sensitive field. Furthermore, the exception is alleviated in two ways: it is partly subject to a necessity of harm-clause as disclosure must reasonably be expected to ‘cause prejudice’.<sup>326</sup> Additionally, s 44 (a) (iii) is weakened by subsection (3) which leads to mandatory disclosure 20 years after the record came into existence. Therefore, while the ‘immediate’ handling of international relationships can be kept in camera, every record eventually becomes subject to public scrutiny. These mitigating factors leave the exception justified against the constitutional background of s 36.

dd) Integrated ‘Necessity of Harm’-Clauses

The drafted proposal of PAIA suggested a ‘necessity of harm’-clause included with every limitation. To refuse access, such a clause requires the information officer to prove reasonably expected harm if access would be granted.<sup>327</sup> Such condition is needed to keep exceptions from turning out to be very broad,<sup>328</sup> and is believed to be a general principle of access to information legislation.<sup>329</sup> Although the South African government proclaimed that ‘[i]nformation will be available unless there is a *good* reason to withhold it’,<sup>330</sup> the ‘necessity of harm’-clause has been axed from the draft. This deletion significantly shifted the balance between the principle (access) and the exemption (refusal) towards intransparency.<sup>331</sup>

Nevertheless, ‘necessity of harm’-clauses have found their way into most provisions of the act in a more integrated style.<sup>332</sup> The consequences of disclosure are all subject to an *objective* test and require more than an individual opinion, suspicion or speculation about the harmful consequence; therefore, they all are subject to review.<sup>333</sup> While some

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<sup>324</sup> Mendel (note 7) at 130.

<sup>325</sup> Mendel (note 7) at 130.

<sup>326</sup> Section 44 (1) (a) PAIA.

<sup>327</sup> White (note 26) at 72 f.

<sup>328</sup> Mendel (note 7) at 75.

<sup>329</sup> Mendel (note 7) at 25 f.

<sup>330</sup> African National Congress (note 15) at § 5.9.2. Emphasis added.

<sup>331</sup> White (note 26) at 72 f.

<sup>332</sup> See e.g. in case of protection of operations of public bodies the incorporated ‘necessity of harm’-clause in section 44 (b) (i) PAIA.

<sup>333</sup> Currie/Klaaren (note 13) at 7.2 f.

grounds of refusal are solely based on a *categorical approach* without the need to prove the consequence of ‘likelihood of harm’,<sup>334</sup> this does not seem critical as the disclosure of some types of information *typically* bear the danger of harm. Particularly information that is primarily of great economic value will usually trigger competition when shared, and while competition certainly is good for the consumer, it equates to harm for the now-competitor and former information-monopolist. Therefore, the way PAIA deals with necessity of harm is considered constitutional.

ee) Public Interest Override

PAIA’s public interest override is limited to information which discloses evidence of a breach of law or a serious risk to public safety or the environment.<sup>335</sup> This bears the advantage of being clear but is also narrow in its scope.<sup>336</sup> It especially must be criticised that the institutional exemptions<sup>337</sup> are not subject to any public interest override.<sup>338</sup>

The narrow scope of the override however is justified as the override is only applied when a ground of refusal applies, which again must be interpreted narrowly. Thus, the override is meant to operate as a ‘last safety valve’. As such, it needs to be narrowly defined. Although the expenditure of the clause to all grounds of refusal would be favourable because it would facilitate access,<sup>339</sup> it is not constitutionally indicated.

b) Criticising PAIA’s Procedure

In addition to the concerns related to its scope and limitations, the PAIA must also be criticised for its procedure.

aa) Interpretation

It is doubtful that s 2 (1) PAIA merely provides *courts* to interpret the act according to its objects while the definition of ‘court’ in s 1 leaves out the bodies that decide the internal appeal.<sup>340</sup>

The Constitutional Court made clear that whenever the legislature enacts legislation ‘to meet its constitutional obligations and does so within constitutional limits, courts must

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<sup>334</sup> For instance see section 36 (1) (a) and section 64 (1) (a) which prohibit disclosure of trade secrets.

<sup>335</sup> Section 46 (a) PAIA (for public records) and section 70 (a) PAIA (for private records).

<sup>336</sup> McKinley (note 12) at 7; Mendel (note 7) at 129.

<sup>337</sup> See C.V.2.a)ee).

<sup>338</sup> Currie/Klaaren (note 13) at 4.14 ff.

<sup>339</sup> McKinley (note 12) at 35.

<sup>340</sup> For the procedure of remedies see C.II.1.b).

give full effect to the legislative purpose.<sup>341</sup> This demand must *a minore* be true for the internal appeal bodies as they exercise a court-like function. To the requester it does not matter which institution or person is ruling over his appeal. There is no apparent reason why the requester should enjoy less intense protection on the first level of remedies. On the contrary, there is a strong incentive to settle disputes at the first stage as courts are overburdened.

Nevertheless, s 2 (1) of PAIA is not unconstitutional. It may be interpreted widely to allow it to encompass agencies that are exercising their adjudicational duties as set out by PAIA. Despite the clear wording of the definitions in s 1 this can be done according to the principle of *argumentum a maiore ad minus*. If courts are obliged to interpret the act to be disclosure friendly, agencies exercising an adjudicational function are *a fortiori* obliged to do so.

bb) Deemed Refusal

Criticism is directed at the act's '*deemed refusal*'-provisions.<sup>342</sup> By these, PAIA allows information holders the option of simply ignoring 'unpopular' requests.<sup>343</sup> The proposed change of the provision into a '*deemed approval*'<sup>344</sup> would certainly be very requester-friendly and would help motivate to speed up the process. On the other hand, it would very likely be incapable of dealing with at least some agency's realities, thus producing huge backlogs. A system where backlogs leave requesters without any decision to appeal against is even worse, so the actual mechanism appears to be the lesser of two evils. Ultimately, the nature of the right and of the limitation justify ss 27 and 58.

cc) Fees

With regards to PAIA's *fee-system*, some claim that fees generally are too high and that some even have a prohibitive character.<sup>345</sup> It has also been critically remarked that the minister - despite explicitly empowered<sup>346</sup> - has made no effort whatsoever to alleviate the financial burden on poor requesters.<sup>347</sup>

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<sup>341</sup> *Nebavu v University of Cape Town and Others* 2003 (2) BCLR 154 (CC) at para 14.

<sup>342</sup> Section 27 PAIA (records of public bodies) and section 58 PAIA (records of private bodies).

<sup>343</sup> McKinley (note 12) at 6.

<sup>344</sup> McKinley (note 12) at 34.

<sup>345</sup> McKinley (note 12) at 34 for instance names the fee of R60 for the reproduction of a single photo.

<sup>346</sup> See section 22 (8) PAIA, read together with section 92 PAIA.

<sup>347</sup> McKinley (note 12) at 27 speaks of the 'commodification' of PAIA.

Section 32 (2) of the Constitution allows to alleviate the financial burden on the state. Thus, the limitation of access to information by imposing fees is constitutionally justifiable.<sup>348</sup> Nevertheless, measures to keep agencies functional must be ‘reasonable’.

The *ratio* of s 32 (2) is that in a social-democratic constitution ‘a balance needs to be struck between the recognition and promotion of the rights of each individual and the financial constraints within which the state must function.’<sup>349</sup> On the one hand, processing requests is costly, so one might consider a right of access to information a flight of fancy regarding the overall developmental needs of South Africa. Within developmental countries collected fees can even facilitate access as they can be used to enhance the agency’s answering capacity.<sup>350</sup> On the other hand, the statement of *Ackermann* that the ‘amount of fees charged is crucial for determining the real level of accessibility of information’<sup>351</sup> is even more true for developing countries. If fees are not carefully balanced they are likely to exclude large parts of the population. It is commonly noted that the fees must not be too high as to deter requests.<sup>352</sup> Some submit that the fee schedule cannot be designed on a cost-recovery basis as this would deter all but a handful of requests.<sup>353</sup> This notion is evidenced by the wording ‘to alleviate’ which means to ‘make a difficulty [...] less severe’ but not to get rid of a difficulty at all.<sup>354</sup>

It is difficult to determine when a fee is too high to still be constitutional, but it seems unfair to calculate fees on the basis of costs instead of the status of requesters. The primary statement of s 32 is to establish a right; the fact that the provision allows for alleviation of the financial burden is an annex to that right. The established fees must not be of a character that reverses this correlation, thus leading to a system where one has to be able to ‘afford’ one’s right of access to information. Certainly a system of flexible fees that responds to the requesters’ financial capabilities would be easier to justify than the current rigid fees. Again it seems difficult to account for the enormous gap between rich and poor in South Africa. One would have to differ between ‘rich’ and ‘poor’ requesters to be capable of subsidising the latter with part of the fees collected

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<sup>348</sup> Currie/Klaaren (note 13) at 5.13; Davis (note 31) at 26-13.

<sup>349</sup> Davis (note 31) at 26-10.

<sup>350</sup> Johannessen/Klaaren/White (note 16) at 52 remark that costs first should and can be reduced significantly by using existing structures.

<sup>351</sup> Ackermann/Sandoval-Ballesteros (note 7) at 109.

<sup>352</sup> Balisar (note 9) at 7; Bovens (note 1) at 330; Currie/Klaaren (note 13) at 2.16, 5.13; Mendel (note 7) at 33.

<sup>353</sup> Roberts (note 76) at 4.

<sup>354</sup> Oxford Dictionary Online, Oxford University Press (2007), available at <http://www.askoxford.com> [accessed 15 September 2007].

from the former. Determining the financial capabilities of a requester would raise additional procedural efforts and prolong the already excessive time frame.<sup>355</sup> A more efficient way would be to allow requesters to apply for financial aid in case they need it. This way requesters could decide if they want to take the risk of prolonged procedures on a case-to-case basis.

Such a requester-dependent fee system forms a less restrictive means to achieve the goal of keeping agencies functional as it is capable of the same alleviation while deterring less requesters. Therefore, the current system is difficult to justify in terms of s 36 (1) (e). Nevertheless, it must be taken into account that one is dealing with a legislative omission. According to ss 22 (8) and 92 (1) (b), regulations have to be made in consultation with the minister of finance and must be passed through Parliament. The time needed for that must be granted. Furthermore, the act itself does not provide for a *terminal* system of fees as it heavily relies on regulations in this regard. Therefore, the act is not unconstitutional in terms of its fees.

#### dd) Access in the Context of Litigation

Access to information in the context of litigation is a very controversial issue. It has been brought forth that the '*nature of litigation*' itself forms a valid reason contra prelitigational discovery of information. This argument has to be rejected firmly. There is no such thing as an 'element of surprise' in litigation that is capable of forming a justifiable restraint to access information. In civil proceedings, this notion has been abandoned for the reason that 'justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met.'<sup>356</sup> To negate this would equal negating the proceedings' efficiency as a desirable goal.

As soon as information is taken into a courtroom it becomes public anyway because courtrooms are public venues by definition.<sup>357</sup> The main question is how one can discover information *prior* to any litigation, mainly to assess the litigation's chance of success. The common law of both *USA* and *Australia* denies prelitigational access to information.<sup>358</sup> In South Africa, the matter had been discussed early as the question

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<sup>355</sup> See C.V.2.b)dd)(2)(aa).

<sup>356</sup> *R. v. Stinchcombe* [1991] 3 S.C.R. 326.

<sup>357</sup> For the specialties of classified litigation, see Colley, Mark D 'Litigation Under the "Cone of Silence"' (2005-2006) 32 *Litigation* 32 at 8 ff.

<sup>358</sup> See *Khala v Minister of Safety and Security* (note 169).

already arose regarding the Interim Constitution.<sup>359</sup> Most of the early judgements have been ruled in the context of access to police dockets.<sup>360</sup> One must bear in mind that an accused person enjoys special rights when applying those cases to the general question of access to information for litigation. The South African High Court ruled that information contained in a police docket that is needed for another civil action has to be disclosed to enable the litigant to assess his chances.<sup>361</sup> On the other hand, it refused to rule pro disclosure regarding criminal trials as long as investigations are not completed.<sup>362</sup> The court also refused to grant blanket privileges to whole dockets; it stated that one has to distinguish between *privileged* (which must not be disclosed) and *unprivileged* information (which has to be disclosed) even if that is within one file;<sup>363</sup> a ruling that matches PAIA's severability clause.

(1) Aligning PAIA with Rule 35 of the High Court

A central issue of pre-litigational discovery is the relationship between the rules of discovery and access to information legislation.<sup>364</sup> The scope of s 32 of the Constitution and PAIA on the one side and the scope of rule 35 of the High Court on the other side have to be balanced. There is no *threshold* beneath which requests can be considered 'informal' and do not fall within the scope of s 7.<sup>365</sup> Generally, the PAIA governs requests of any type. There is no distinction between 'formal' and 'informal' requests because this would directly contravene the objects of PAIA as set out in s 9. Furthermore, it remains completely unclear where one would have to draw the line making that distinction; certainly the *form* of the request cannot serve that purpose as s 18 (3) PAIA even stipulates oral requests to be sufficient when justified. Nevertheless, if the two spheres are not separated properly there is the danger that deciding discovery related

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<sup>359</sup> See the case law quoted at *Khala v Minister of Safety and Security* (note 169) at 226.

<sup>360</sup> See *S v Fani and Four Others* 1994 (1) BCLR 43 (E); *S v Smith and Another* 1994 (1) BCLR 63 (SE); *S v James* 1994 (1) BCLR 57 (E); *S v Majavu* 1994 (2) BCLR 56 (CkGD); *Qoꝛꝛeleni v Minister of Law and Order and Another* 1994 (1) BCLR 75 (E); *Khala v The Minister of Safety and Security* (note 169); *S v Botha and Others* 1994 (3) BCLR 93 (W); *Shabalala and Others v The Attorney-General of Transvaal and Others* (note 171); *Phato v Attorney-General, Eastern Cape and Another, Commissioner of South African Police Services v Attorney-General, Eastern Cape and Others* 1994 (5) BCLR 99 (E); *Nortje and Another v Attorney-General of the Cape and Another* (note 173); *Shabalala and Others v Attorney-General of the Transvaal and Another* 1995 (12) BCLR 1593 (CC).

<sup>361</sup> *Khala v Minister of Safety and Security* (note 169) at 226 f.

<sup>362</sup> *Khala v Minister of Safety and Security* (note 169) at 236 f.

<sup>363</sup> *Khala v Minister of Safety and Security* (note 169) at 229 ff.

<sup>364</sup> For the United States see eg Levine, David I 'Using the Freedom of Information Act as a Discovery Device' (1980) 36 *The Business Lawyer* at 45 ff.

<sup>365</sup> *MEC for Roads & Public Works v Intertrade Two (Pty) Ltd* [2006] SCA 34 (RSA) at para 19.

matters via FOI-legislation might lead to crippling delays in administrative procedures while the courts review the agency's records.<sup>366</sup>

The relationship between rule 35 and PAIA is determined by s 7 PAIA which stipulates that access to information via PAIA cannot be sought if

- (a) *that record is requested for the purpose of criminal or civil proceedings;*
- (b) *so requested after the commencement of such criminal or civil proceedings, as the case may be; and*
- (c) *the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.*

Section 7 (a) - (c) are clearly worded as *additional* conditions.<sup>367</sup> The section grants priority to specific provisions (like rule 35) which are embedded into court proceedings. Considering *pre-litigational situations* rule 35 is not interfering with the concept of access to information via PAIA. Discovery via rule 35 is only possible from the moment litigation commenced. Judge *Cameron J* noted that '[o]nce court proceedings between the parties have commenced the rules of discovery take over'. This, however, does not exactly meet the provision's purpose and wording. If information is sought for litigational purposes and proceedings have already commenced, s 7 (c) makes clear that a request via PAIA is still possible as a subsidiary means as long as other laws do not '*provide*' for access.<sup>368</sup> The term 'provide' can be construed twofold: Either narrowly in a sense that as soon as any law is *generally* providing for litigational access to information PAIA is not applicable, or in a wide sense that if the *specific* requester cannot successfully rely on any other law for any reason they can still successfully lodge a request using PAIA. The latter interpretation suits the value assigned to the right of access to information better. Nevertheless that interpretation is quite broad. There are situations imaginable where requesters should not be allowed to rely on PAIA anymore, for instance, if they waived the right or would have had the possibility to rely on other provisions but didn't do so for their own fault. Except for such extreme cases PAIA must be available as subsidiary means. The purpose of s 7 as interpreted here is to establish a 'safety net' which contributes to fair proceedings.<sup>369</sup> Therefore, the argument that information cannot be

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<sup>366</sup> Levine (note 364) at 46.

<sup>367</sup> Currie/Klaaren (note 13) at 4.15.

<sup>368</sup> *Unitas Hospital v Van Wyk* (note 160) at para 46.

<sup>369</sup> Currie/Klaaren (note 13) at 4.15 oppose this notion and interpret the provision more narrowly. This mainly because the litigant otherwise would be forced to make difficult distinctions between the rules of discovery and PAIA. The difficulty of the applicable law however seems to be of little argumentative persuasion as this usually does not affect a law's applicability (for instance see tax law), no matter how desirable clear and precise laws are.

sought under s 32 if it can be obtained later by the rules of discovery has rightfully been rejected by the High Courts.<sup>370</sup> The Constitutional Court has left this question open.<sup>371</sup> In some cases courts ruled that the litigant may seek information relying on s 32 *additionally* to the right of discovery set out in Rule 35.<sup>372</sup> This approach suits s 7 PAIA as it is construed here. However, other judgements have objected this notion.<sup>373</sup>

The main objection against pre-litigational disclosure based on the right of access to information has been that it would call for ‘fishing expeditions’.<sup>374</sup> Such expeditions are undesirable because they are designed to find something that would initiate proceedings which otherwise would have never commenced. The underpinning notion of prelitigational discovery is to be able to verify a specific claim that becomes apparent but not to dig out possible claims which one would not have noticed otherwise. A pre-litigational ‘fishing expedition’ could have the potential to force persons to give the initial reason for a proceeding against them. *Judge Davis J* noted:

*I have serious doubts as to whether s 32 should be used to justify a principle of discovery before the time provided in Rule 35(1) of the High Court Rules. It would mean that a defendant who falls within the scope of s 32 must lay bare its entire case before any action is in fact launched.*<sup>375</sup>

The argument of *Davis J* was rejected by *Van Dijkhorst* who rendered it invalid in case the requester has a *prima facie claim* which needs to be bolstered by the information sought.<sup>376</sup> One may argue that a potential defendant could be obliged to expose facts which the potential plaintiff would have to prove in case of an actual proceeding and therefore be given an unfair advantage over the future defendant. However, this is a matter of the onus of proof in the first place. The order does not depend on whether the requested person refuses to give information (or gives wrong or fragmentary information) *prior* to the litigation (via PAIA) or *during* the litigation (via the rules of discovery). If the facts are uncertain or improvable the judgement will depend on the onus in

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<sup>370</sup> *Khala v Minister of Safety and Security* (note 169) at 225 f.; also see *Unitas Hospital v Van Wyk* (note 160) at para 22.

<sup>371</sup> In *Ingledeu v Financial Services Board* 2003 (8) BCLR 825 (CC) at paras 29 ff the Court solely dismissed the case because the sought information was not ‘required’ by the applicant.

<sup>372</sup> *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 320.

<sup>373</sup> See *Alliance Cash and Carry Ltd v CSARS* 2002 (1) SA 789 (T); *Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Others* (note 168) at 135.

<sup>374</sup> *Unitas Hospital v Van Wyk* (note 160) at para 21; Christie, RH ‘The Law of Contract and the Bill of Rights’ in *Bill of Rights Compendium*, LexisNexis Butterworths (ed.), available at <http://Butterworths.uct.ac.za>, Chapter 3H1 [accessed 27 August 2007] at 3H36.

<sup>375</sup> *Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Others* (note 168) at 135 f.

<sup>376</sup> *Korf v Health Professions Council of South Africa* 2000 (3) BCLR 315 f (T).

both cases - no matter *when* access is granted. *Currie/Klaaren* note that as far as public records are concerned ‘fishing expeditions’ are unlikely anyway.<sup>377</sup> This is questionable as the state increasingly engages in commercial activity and therefore could be targeted by competitors as well. On the bottom line the potential defendant’s privacy, commercial secrets and various other issues are guarded by PAIA itself, on the one hand by its exemptions (which mostly serve both public and private bodies)<sup>378</sup> and on the other hand by the qualification to comply with<sup>379</sup> when requesting privately held information.<sup>380</sup> These prerequisites to disclosure help to prevent a potential defendant from being obliged to ‘lay bare its entire case’ as feared by Judge *Davis J.*

Meanwhile one has to yield the *merits of pre-litigational discovery*: It enables pre-litigational conflict resolution through evaluation of facts. Either the information sought is supplementing the plaintiff and therefore suitable to facilitate the proceedings; or it is not which then helps to prevent litigation. A well-informed requester will not litigate on shaky grounds. Judge *Traverso* points out that the applicant is

*‘entitled to all such information as may be reasonably required by it to establish whether or not its right [...] has been violated. The applicant will reasonably require this information to make an informed decision on the future conduct of the matter. If it is shown that the tenders were properly considered, the applicant can abandon any proposed application for a review of the decision. If not, the information will enable the applicant to properly formulate the grounds.’*<sup>381</sup>

This is a main reason why *Cameron JA* substantially differed from his colleagues’ judgement in *Unitas Hospital v Van Wyk*. He stated that

*‘Litigation involves massive costs, time, personnel, effort and risks. Where access to a document can assist in avoiding the initiation of litigation, or opposition to it, the objects of the statute suggest that access should be granted.’*<sup>382</sup>

The pre-litigational use of PAIA can help to facilitate procedure’s efficiency as well as to relieve court dockets. This of course only works out as long as the request does not protract litigation. If the latter is likely, it is better to rely on the rules of discovery.<sup>383</sup>

Courts did not hesitate to attach importance to proceedings’ economy: In *Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others*, the ap-

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<sup>377</sup> Currie/Klaaren (note 13) at 4.15 [Footnote 29].

<sup>378</sup> See sections 63 ff PAIA.

<sup>379</sup> See C.II.2.b).

<sup>380</sup> Currie/Klaaren (note 13) at.15.

<sup>381</sup> *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape* (note 184) at 915 f.

<sup>382</sup> *Unitas Hospital v Van Wyk* (note 160) at para 31 (c).

<sup>383</sup> Levine (note 364) at 48.

pellants had at first instance refused to furnish the respondents with the necessary information and documentation of a tendering process although it had been requested via PAIA. According to *Judge Scott JA*, this forced the respondents to take the risk of launching proceedings without even being able to substantiate their grounds of review. He clearly regarded this behaviour as a delay tactic and the Judge explicitly made the appellants face the music for causing such a delay: Although successful in their appeal, the appellants were ordered to bear the respondents' costs of all instances.<sup>384</sup>

Against that precedent and while simultaneously opposing the justification of 'fishing expeditions', Judge *Cameron JA* argued that access had to be granted if the plaintiff has

*established a clear and substantial connection between [...] claim [...] and the contents of the [information sought].*<sup>385</sup>

and further concluded that

*[PAIA] affords an opportunity to broaden the approach to pre-action access. It does so on a basis that is flexible and accommodating without threatening [...] boundless exposure [...]. The key lies in a case-by-case application of whether a litigant "requires" a record. [...] [I]t is a legitimate and beneficial approach to the statute to apply it so that where a record will assist a party in evaluating a potential claim this will count as advantage or need for statutory purposes.*<sup>386</sup>

This broad approach to pre-litigational use of PAIA has quite recently been approved, but at the same time also has been restrained by Judge *Brand JA* who took the position that

*[...] reliance on s 50 is [not] automatically precluded merely because the information sought would eventually become accessible under the rules of discovery, after proceedings have been launched. What I do say is that pre-action discovery under s 50 must remain the exception rather than the rule; that it must only be available to a requester who has shown the "element of need" or "substantial advantage" of access to the requested information [...].*<sup>387</sup>

Judge *Brand JA* further considered the use of PAIA as legitimate to 'identify the right defendant' but not to obtain 'all information which will assist in evaluating one's prospects of success against the only potential defendant'.<sup>388</sup> At the same time *Brand JA* leaves it unclear which types of information should be discoverable via PAIA and which

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<sup>384</sup> *Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others* [2005] 4 All SA 487 (SCA) at para 30.

<sup>385</sup> *Unitas Hospital v Van Wyk* (note 160) at para 44.

<sup>386</sup> *Unitas Hospital v Van Wyk* (note 160) at para 45; also see the reasoning of *Van Niekerk v Pretoria City Council* (note 180) at 313.

<sup>387</sup> *Unitas Hospital v Van Wyk* (note 160) at para 22.

<sup>388</sup> *Unitas Hospital v Van Wyk* (note 160) at para 22, emphasis added.

should not. This is not plausible: First, to sue the ‘right’ defendant is as essential for successful litigation as various other prerequisites are. Plaintiffs do not care why they will lose a case; to somebody who claims a right every single prerequisite to a winning order is of the same importance. There is no way to make plaintiffs understand that they are entitled to use PAIA to identify the right defendant but not to find out, for instance, if a known defendant can rely on benefits or defences that would render the claim and the action obsolete or unviable, eg because the defendant is insolvent. On the other side of the coin, to the defendants it makes no difference why they are not being sued successfully – as long they win. Additionally, *Brand JA*’s notion contradicts the abovementioned pre-litigational conflict resolution capacity of PAIA. Another argument against a narrow interpretation of s 7 PAIA is that the provision is determining the overall scope of PAIA. To interpret it narrowly means to generally withhold a wide range of application without offering any counter-exception. Such a narrow interpretation contravenes the principle of maximum disclosure and appears to be disproportionate and unnecessary in terms of the limitation clause. Justified interests of requested bodies can still be protected by use of PAIA’s exemptions. Therefore, there is no need for such broad general restraint.

It has to be mentioned though that the matter is often likely to be a sham fight: It has been stated that

*[t]he rules of [...] discovery and the aims of [PAIA] will mostly not be at odds, and much of what is subject to disclosure under the act would also be subject to disclosure for litigational purposes.*<sup>389</sup>

Ultimately, it can be said that access to information prior to certain litigation has been acknowledged, thus in a narrow context: Pre-trial discovery by means of PAIA should remain the exception rather than the rule. It is restricted to requesters who can show an *element of need* or *substantial advantage*. Those cases significantly differ from a pure ‘fishing expedition’ insofar as the applicants sought information in regard to *one specific proceeding* and not just in general to find out if there might be any reason for proceeding.

Concerning *privately held information*, this approach matches s 50 (1) (a) PAIA which demands that the record is required for the exercise or protection of any rights; it is part of that qualification that the applicant proves ‘what the right is that he wishes to exercise or protect, what the information is which is required and how that information will as-

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<sup>389</sup> Currie/Klaaren (note 13) at.15.

sist him in exercising or protecting that right'.<sup>390</sup> There is an assumption that the request is not a 'fishing expedition' if a requester gives detailed and unanswered reasons for believing in a right's violation.<sup>391</sup> The requester of privately held information has to show a *right-information-relation*, a condition that can and should be interpreted in a way that renders 'fishing expeditions' impossible.

However, a qualification is not a premise for the disclosure of information held by *public bodies*.<sup>392</sup> Because of the clear wording of s 32 (1) (a) of the Constitution such a qualification cannot be read into s 11 PAIA either. Therefore, no such qualification can be used to prevent 'fishing expeditions'. The body ought not to be concerned at all with the fact of whether litigation is intended because requesters for public records are not obliged to furnish *any* reasons for the request. This of course makes the application of s 7 (1) PAIA difficult if not impossible for public bodies as they have no chance to determine the request's background;<sup>393</sup> however, this is intended. The valuation of s 32 (1) of the Constitution and of PAIA is clear: The state has been imposed with a greater burden than private bodies to endure and grant information requests. Notwithstanding, 'fishing expeditions' for public records are unwanted as well. Public bodies don't have to tolerate abuse of PAIA. The act itself provides measures to deal with such requests without infringement of s 32 (1) of the constitution: The information officer can rely on s 45 (a) PAIA<sup>394</sup> to refuse disclosure because an obvious 'fishing expedition' can be regarded as either 'vexatious', 'frivolous' or both. The onus in this matter is on the body that is relying on s 45 PAIA. As a public body's information officer cannot exact any 'need to know' by the requester (s 11 (3)) the former will only be able to turn down suspected 'fishing expedition'-requests in obvious cases.<sup>395</sup> This outcome might be subject to criticism as well but one has to bear in mind that the (unqualified!) right to access publicly held information is the rule, not the exception. *Levine* is on point when he notes

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<sup>390</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* (note 172) at para 28; also see *Unitas Hospital v Van Wyk* (note 160) at para 6.

<sup>391</sup> *Christie* (note 374) at 3H36.

<sup>392</sup> See section 11 PAIA.

<sup>393</sup> *Currie/Klaaren* (note 13) at.15.

<sup>394</sup> Section 45 PAIA reads

'The information officer of a public body may refuse a request for access to a record of the body if—

(a) the request is manifestly frivolous or vexatious; or

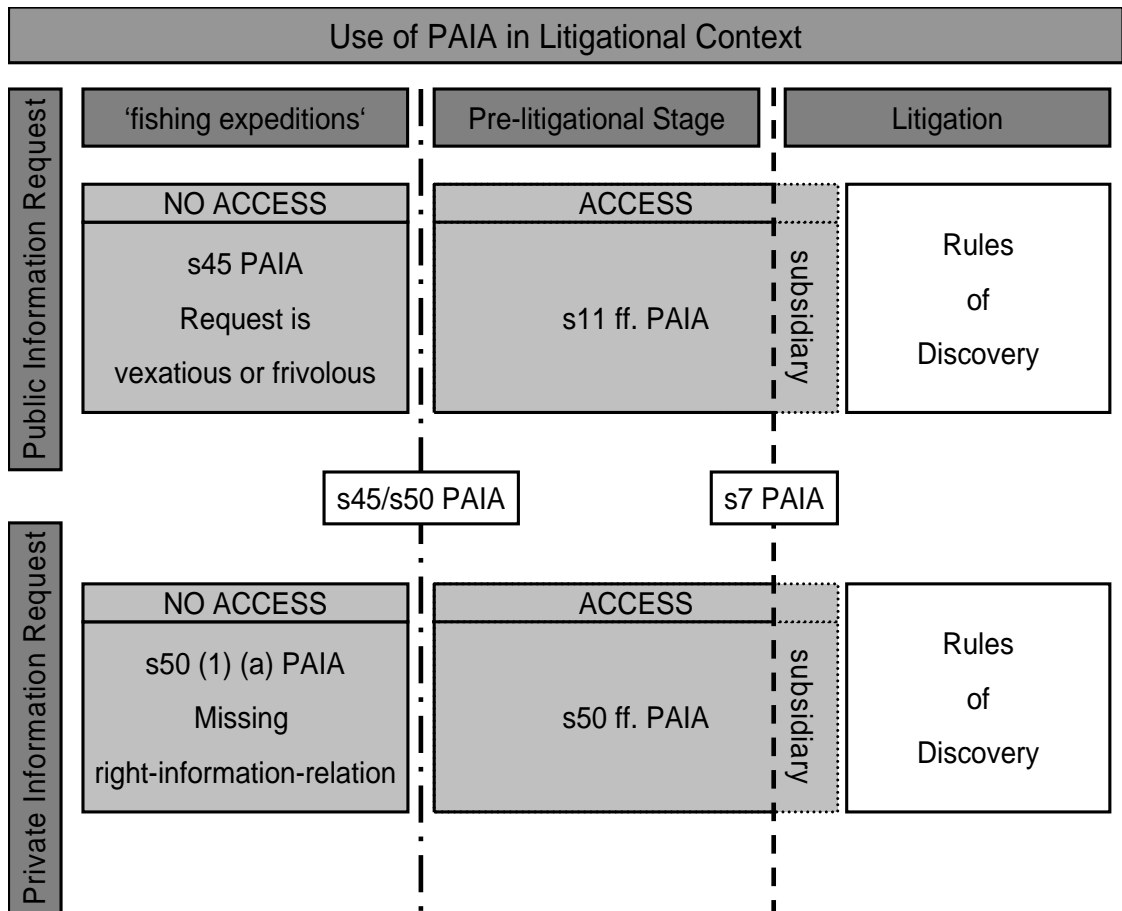
(b) the work involved in processing the request would substantially and unreasonably divert the resources of the public body.'

<sup>395</sup> Regarding the problems to reconcile section 11 (3) with section 45 see *Currie/Klaaren* (note 13) at 8.108 f.

that '[i]nvolvement in litigation does not harm a person's right of access to information [...]'] under freedom of information legislation.<sup>396</sup>

Requests via PAIA on litigational purposes should be launched well in advance as it will be difficult to interrupt a proceeding and wait for the result of the request as soon as litigation has commenced.<sup>397</sup>

The overall possibilities and limits of PAIA's use in litigational context are illustrated below:



(2) Response Times and Matters of Urgency

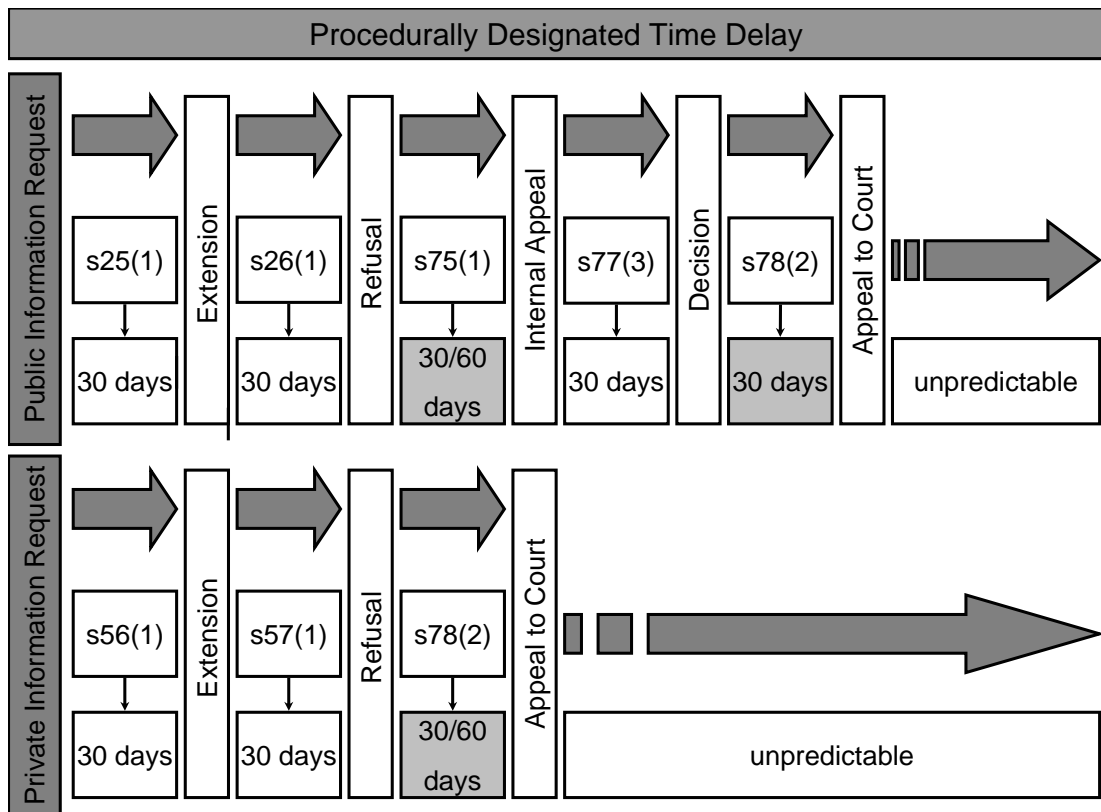
The most dreadful problem is PAIA's long response times. There is no possibility of achieving disclosure in time for urgent matters.

<sup>396</sup> Levine (note 364) at 45.

<sup>397</sup> Levine (note 364) at 48.

(aa) PAIA's Time Frame

The possible delay of requests is illustrated below:



Time periods granted in favour of the requester are highlighted in grey. Although the purpose of those periods is to assist requesters by granting them enough time to lodge an appeal, periods still have to be taken into account fully as it is the requesters' right to exhaust them. PAIA therefore allows a delay of up to 180 days when requesting publicly held information and up to 120 days when requesting privately held information. That is merely the time needed to exhaust the procedure and enter into court litigation which thereupon takes an unpredictable amount of additional time. PAIA's procedure does not provide for any acceleration in case of an urgent application.<sup>398</sup> One positive note is that PAIA restricts the right to appeal against the internal appeal decision to the requester and third parties,<sup>399</sup> so disclosure cannot be delayed or prevented by an appeal of the requested body.

<sup>398</sup> Further see C.V.2.b)dd)(2).

<sup>399</sup> Section 78 PAIA.

(bb) The Importance of Time

While it is probably impossible to determine a specific ‘average period’ that indicates unconstitutionality it is common sense that only timely access to information is effective access to information: There are only few occasions to think of where access is not seriously time sensitive, for example, if a request is made out of pure curiosity. As soon as one is confronted with the need to decide in a certain matter, the available information determines the choices of action. Whenever a decision is time sensitive, the request for additional information automatically becomes time sensitive because information gained after the decision is worthless. This may be illustrated by an example from the field of public procurement: when a company tenders for public services it has to gain as much information as possible about its competitors, the service itself, unavoidable costs and expectable profits etc. to be able to determine the lowest bid it can afford to make. By the time offers are due any additional information becomes worthless, no matter how valuable it would have been only one day earlier because there is no way to integrate the information into the company’s offer. This leads to the conclusion that access to information is only effective if it happens in time.

That is why especially in economical context the extent to which agencies can delay the disclosure of requested information is an important variable.<sup>400</sup> Excessive delays in responding to a request are often tantamount to a denial.<sup>401</sup> The very purpose of any access to information Act can only be to *deliver* the requested information unless it is exempt.<sup>402</sup> International experience has been that an access to information-law is toothless as long as it does not install a *fixed time frame and sanctions* for non-compliance.<sup>403</sup> Furthermore, extensions need to be restricted to a fixed period of a reasonable duration<sup>404</sup> and must be treated as exceptional means.<sup>405</sup> The provided timeframe has to show a balance between the requester’s right to receive information as rapidly as possible and the everyday demands of the requested body.<sup>406</sup>

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<sup>400</sup> Ackermann/Sandoval-Ballesteros (note 7) at 107.

<sup>401</sup> Sinrod (note 2) at 350 ff; Steinberg, Marc I ‘The 1974 Amendments to the Freedom of Information Act: The Safety Valve Provision § 552 (a) (6) (c) Excusing Agency Compliance with Statutory Time Limits - a Proposed Interpretation’ (1976-1977) 52 *Notre Dame Lawyer* 235 at 235; Open Society Institute (note 68) at 35.

<sup>402</sup> Grunewald (note 2) at 347.

<sup>403</sup> Ackermann/Sandoval-Ballesteros (note 7) at 118 f.

<sup>404</sup> Open Society Institute (note 68) at 16.

<sup>405</sup> Sinrod (note 2) at 333.

<sup>406</sup> Open Society Institute (note 68) at 174 f.

The delay of access to information is an issue of great concern - not only in South Africa.<sup>407</sup> Backlog and delay of access to information requests on agency level are typical problems of freedom of information legislation. While the response periods worldwide differ between 24 hours and 3 calendar months,<sup>408</sup> the global average is under 15 working days.<sup>409</sup> The instituted time frame for extensions ranges from 5 working days to 30 calendar days.<sup>410</sup> South Africa falls well below the global average since it has one of the longest response periods. The initial response period as well as the extension time frame of PAIA is very agency friendly. Additionally there is no incentive to act quickly because the request is deemed refused if there is no decision given within that time.<sup>411</sup>

The question is if PAIA's generous time frame is constitutionally justified. Concern especially in developing countries has been that short response periods may overburden already weak bureaucracies and consequently lead to overburdened court dockets.<sup>412</sup> This argument is of little persuasion as it is often young transitional democracies that have successfully established effective and timely access to information.<sup>413</sup> Regarding the 16 top-performing public bodies, not one is situated in a mature democracy.<sup>414</sup> Another argument is that there is no use for unrealistic timelines which are then frequently infringed upon as this would undermine the respect for the whole act.<sup>415</sup> The response period must be in conformity with agencies' reality.<sup>416</sup>

Other countries with FOI-legislation have been dealing with delay-problems for decades. Some ultimately prolonged the time frame but with little success.<sup>417</sup> Prolonging of timeframes on agencies' discretion has had no significant positive effect on their compliance.<sup>418</sup> Instead, experience has been that shorter periods actually have the effect

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<sup>407</sup> See Grunewald (note 2) at 345; Steinberg (note 401) at 235 ff.

<sup>408</sup> See the comparison at Ackermann/Sandoval-Ballesteros (note 7) at 107; Open Society Institute (note 68) at 147.

<sup>409</sup> Open Society Institute (note 68) at 175.

<sup>410</sup> Open Society Institute (note 68) at 184.

<sup>411</sup> Section 27 PAIA (records of public bodies) and section 58 PAIA (records of private bodies).

<sup>412</sup> Ackermann/Sandoval-Ballesteros (note 7) at 107.

<sup>413</sup> Open Society Institute (note 68) at 69. For instance, the time frame for refusal in Chile is 48 hours, in Spain (in environmental matters) three calendar months, see *ibid.*, 147. Of course one has to take into account that the *legal frame* not necessarily reflects the actual practise.

<sup>414</sup> Open Society Institute (note 68) at 132.

<sup>415</sup> Mendel (note 7) at 31.

<sup>416</sup> The United States' legislation therefore doubled the period from 10 to 20 days in 1974, Grunewald (note 2) at 350.

<sup>417</sup> The United States FOIA of 1966 was amended in 1974. Response time was doubled from 10 to 20 days which however did not speed up the average request process, see Grunewald (note 2) at 345; Steinberg (note 401) at ff.

<sup>418</sup> Sinrod (note 2) at 327 f.

of expediting agency response.<sup>419</sup> Countries with short response periods generally perform better in granting access to information than those with longer periods<sup>420</sup> because shorter periods encourage quicker release of information by sending out a clear signal to ‘prioritize and respect the right to know’.<sup>421</sup>

(cc) Ways to shorten Response Periods

The most common explanation for delay concerns the *limited resources* combined with a large *number* and great *volume* or *complexity* of requests.<sup>422</sup> Truly, it is essential to recognise that the availability of national resources limits the promotion and protection of rights, otherwise a realistic implementation is not possible.<sup>423</sup> Nevertheless, delays are often provoked by man-made procedural flaws like the quality of information management<sup>424</sup> or the lack of clarity regarding legal exemptions,<sup>425</sup> no matter if agencies are exercising ‘due diligence’ in processing incoming requests.<sup>426</sup>

Usually some delay reduction can be achieved without the (re-) allocation of resources.<sup>427</sup> This notion is supported by a broad survey showing that institutions which complied with the right of access to information generally did so quickly and thoroughly; meanwhile, non-compliance was mainly connected to procedural flaws that lead to ‘mute refusals’ (deemed refusals).<sup>428</sup> Therefore, access to information usually was either achieved timely - or not at all.<sup>429</sup> In 2004 in South Africa only 14 per cent of all requests received any information<sup>430</sup> in time, while 4 per cent were received late.<sup>431</sup> This percentage is only about half of the worldwide average in compliance.<sup>432</sup>

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<sup>419</sup> Open Society Institute (note 68) at 176.

<sup>420</sup> Open Society Institute (note 68) at 183 f.

<sup>421</sup> Open Society Institute (note 68) at 185.

<sup>422</sup> See e.g. Sinrod (note 2) at 326 f, 333 f; Steinberg (note 401) at 237 [referring to the American FBI].

<sup>423</sup> *Klaaren* in HumRQ 2005, 553.

<sup>424</sup> McKinley (note 12) at 14 ff, 31 f regards this the main reason.

<sup>425</sup> Open Society Institute (note 68) at 184.

<sup>426</sup> The definition of ‘due diligence’ in this regard is somewhat difficult further see the discussion at Steinberg (note 401) at 244 ff.

<sup>427</sup> Grunewald (note 2) at 347 f.

<sup>428</sup> Open Society Institute (note 68) at 127.

<sup>429</sup> Open Society Institute (note 68) at 174 found that 43 per cent received information on time and 50 per cent did not at all. Only 7 per cent of the requests have been answered, but late.

<sup>430</sup> This is including partial and inadequate information.

<sup>431</sup> Open Society Institute (note 68) at 179.

<sup>432</sup> The average in the 2006 survey was 26 per cent, see Open Society Institute (note 68) at 129.

It has been suggested that the establishment of *multi track systems*<sup>433</sup> and *prioritization* is suitable for speeding up access to information.<sup>434</sup> Furthermore, it has been recommended to establish agency-specific procedures for agencies that are confronted with an exceptional amount of requests.<sup>435</sup> The latter needs to be handled with care as it is likely to provoke inequalities and ambiguity; requesters need to be able to determine the applicable procedure solely by law; this is difficult enough considering PAIA's complexity. Other means which could have a positive effect on reducing agencies' response time include an effective *reporting system* which obliges agencies to show their performance ('naming and shaming' as an incentive).<sup>436</sup> Meanwhile, the suggestion to allow those agencies that comply in time to collect a larger amount of fees<sup>437</sup> must be rejected as this would disadvantage economically weak requesters.

The most effective way to reduce systemic delays would be to 'speed access by moving from a retail to a wholesale approach to information delivery.'<sup>438</sup> Therefore, *general publication* of often requested material ought to be bolstered because this helps to satisfy requests in advance which otherwise would have been lodged individually.<sup>439</sup> Additionally, facilities that are serving access to information like public reading rooms and access tools need to be expanded. Another effective way to reduce time delays is to make use of *electronic access* to information, mainly via the internet and email.<sup>440</sup> Digital requests remove physical and financial barriers of searching and reproducing information; nevertheless, the use of this medium in developing countries is limited.<sup>441</sup> Electronic access is no panacea as one has to bear in mind the so called 'digital divide' which describes the situation that large groups of the population are structurally incapable of gaining access to computer facilities.<sup>442</sup> The procedures established must be accessible to the whole population because access to information is a fundamental right. If the internet is intended to be used in a developing country, the government would have to provide public computing centres to meet that end.<sup>443</sup> Otherwise, disadvantaged groups (as

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<sup>433</sup> For an assessment of the merits and demerits of this approach see C.V.2.b)dd)(2).

<sup>434</sup> Sinrod (note 2) at 356.

<sup>435</sup> Sinrod (note 2) at 357 f.

<sup>436</sup> Sinrod (note 2) at 360 f.

<sup>437</sup> Sinrod (note 2) at 361 ff.

<sup>438</sup> Grunewald (note 2) at; similar McKinley (note 12) at 28.

<sup>439</sup> Currie/Klaaren (note 13) at 10.2; Grunewald (note 2) at 366 f.

<sup>440</sup> Bovens (note 1) at 324; Sinrod (note 2) at 359 f.

<sup>441</sup> The internet penetration of South Africa only amounted up to 7.3 per cent in 2004, Open Society Institute (note 68) at 143.

<sup>442</sup> Bovens (note 1) at 326; McKinley (note 12) at 28.

<sup>443</sup> As the government of Mexico has done, see Ackermann/Sandoval-Ballesteros (note 7) at 124 f.

they often exist in diverse countries like South Africa)<sup>444</sup> will not be integrated but further excluded. Besides organisational challenges one additionally has to keep in mind that '[w]hile posting materials on government websites clearly facilitates transparency, it is insufficient in itself to guarantee the right of access to information.'<sup>445</sup> Likewise, it is not sufficient to refer to a general homepage but officials have to furnish a precise URL to promote easy access.<sup>446</sup>

(b) No Access via Urgent Proceedings

While it is acknowledged that time is of the essence when litigation is pending,<sup>447</sup> it can be even more vital prior to litigation. That is *inter alia* whenever a person seeks an (intermediate) interdict in advance to an uncertain near future event which might result in irreparable damage. If persons in that situation have to request information to be able to determine if the assumed claim or the feared danger is substantial, they cannot adhere to PAIA's procedure because the response periods are ineligible for that purpose.<sup>448</sup> The right to receive information in time is within the ambit of the right of access to information<sup>449</sup> because of the strong linkage between information and time.

This right is significantly limited by ss 11 (1) (a) and 50 (1) (a) which stipulate that requesters, in order to receive a record, have to comply 'with *all* the procedural requirements in this Act' (records of public bodies),<sup>450</sup> respectively 'with the procedural requirements in this Act' (records of private bodies).<sup>451</sup> It remains unclear if it makes a difference to comply with *all* or just with *the* procedural requirements; although the word 'all' usually emphasises the fact that no exclusion may be made, '*the* procedural requirements' still encompasses all prerequisites. Therefore it appears as if 'all' is merely a surplus word. These provisions place the requester of urgently needed information in a serious dilemma: PAIA shows no means to expedite requests on agency level, no matter if the requester can prove urgency that is rendering priority handling obvious. According to the act *every* requester must stick with the procedure. The mere fact of ur-

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<sup>444</sup> See Open Society Institute (note 68) at 164 f.

<sup>445</sup> Open Society Institute (note 68) at 142.

<sup>446</sup> Open Society Institute (note 68) at 142 f.

<sup>447</sup> *Open America v. Watergate Special Prosecution Task Force* 547 F.2d 605, 178 USAppDeC. 308 (DCCir 1976) at 3.

<sup>448</sup> Concerning the procedurally foreseen time periods see the illustration at C.V.2.b)dd)(2)(aa).

<sup>449</sup> For the importance of the time factor see C.V.2.b)dd)(2)(bb).

<sup>450</sup> Section 11 (1) (a) PAIA emphasis added.

<sup>451</sup> Section 50 (1) (b) PAIA.

gency therefore *automatically* and *unintentionally* results in *non-compliance* with PAIA's procedure - without any fault on the requester's part.

(aa) Reconciling PAIA with Urgent Matters via Interpretation?

The question is if and how such a situation can be avoided.

At the litigational stage, courts may grant 'any order that is just and equitable, including orders [...] granting an interdict, interim or specific relief [...]'.<sup>452</sup> Thus one way to deal with matters of urgency would be to *directly* enter into litigation which would entitle the claimant to receive the information needed via the usual urgency *court discovery proceedings*. It would, however, simultaneously expose the now-litigant to a significant cost risk as the information obtained might show that an interdict cannot be granted. Furthermore such 'blind' litigation contributes to congestion of court dockets with unsubstantiated proceedings. To avoid these negative effects it is essential for litigants to gain access to the sought information prior to litigation<sup>453</sup> – especially regarding matters of urgency.

The fact that PAIA does not provide for an urgency procedure must be criticised. Access to information laws by their very nature must encompass a measure of urgency, even if it is just related to specific rights. Moreover, it is believed that requests regarding fundamental rights should *generally* be dealt with by way of urgent application.<sup>454</sup>

It should be sufficient in such circumstances if the applicant *tenders* to comply with the procedural requirements. There is no reason why in urgent matters the applicant should not be allowed to comply with the procedural requirements afterwards. This seems suitable at least when considering conditions such as the identification of the correct information officer, the payment of fees, or the completion of forms. Regarding matters of urgency, the procedural requirements need to be narrowed down to the very basic, as it is the fact in other fields of law, too (for instance considering the rules of proof and evidence). One has to agree with *Currie/Klaaren* when they note that '[t]he principal purpose of [PAIA] is not served by placing formalistic barriers in the way of requesters.'<sup>455</sup> Of course if applicants can't comply they have no right to receive that

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<sup>452</sup> Section 82 (c) PAIA; the wording 'including' makes clear that the list is not exhaustive.

<sup>453</sup> See C.V.2.b)dd)(1).

<sup>454</sup> Mendel (note 7) at 32 pleads for a 48 hours request mechanism when the information is needed to safeguard *life* or *liberty*; also see White (note 26) at 75.

<sup>455</sup> Currie/Klaaren (note 13) at 5.4 f.

record. The damage done cannot be reversed once the information is proliferated. However, such damage still can be compensated for in terms of money.

To insist on compliance with PAIA's procedure in urgent matters means to fundamentally undermine the act's purposes as well as the intent of s 32 of the constitution. As the preamble of PAIA states the latter has been enacted

*'in order to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information;'*

and to

*'actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights.'*

Moreover, the constitutional demand of s 32 (2) stating that '[n]ational legislation *must be enacted to give effect to this right*'<sup>456</sup> is contravened. The act therefore does not only fail to facilitate 'effective' access to information but even turns into an instrument of restricting it by automatically preventing requesters from gaining *any* access in time regarding urgent matters.

Section 39 (2) of the Constitution demands that such an interpretation must be avoided if possible. The question is if the interpretation of the act in matters of urgency can be aligned with the time that is at the applicant's disposal. To reconcile PAIA with s 32 of the constitution, ss 11 (1) (a) and 50 (1) (b) would have to be interpreted in a way that 'substantial compliance' with the minimum requirements of s 18 is sufficient. Such approach is supported by s 19 which is imposing a strong duty on information officers to assist requesters. Furthermore it has been ruled that the pure reliance on technical grounds has been considered wrongful delay tactics.<sup>457</sup>

The problem is that the wording of ss 11 (1) (a) and 50 (1) (b) is definite. There is no room for an urgency-friendly interpretation in the provisions because they clearly state compliance with the complete procedure as a prerequisite. The wording of a provision necessarily constitutes the limit of its interpretation. Otherwise, uncertainty among the addressees of the provisions would arise. There is no indication within the act that would allow an interpretation of the provisions in a sense of 'requesters must comply with this act's provisions prior to disclosure unless they can show urgency.' Furthermore, there is no provision that would coerce the respective information officer to grant

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<sup>456</sup> Emphasis added.

<sup>457</sup> *MEC for Roads & Public Works v Intertrade Two (Pty) Ltd* (note 365) at para 20.

the needed priority to urgent requests. Therefore, ss 11 (1) (a) and 50 (1) (b) cannot be reconciled with s 32 (1) of the constitution by means of interpretation. They infringe on requesters' right to disclosure *in time* in matters of urgency as part of the right of access to information.

(bb) Justification - Balancing Requesters' Rights

The question is if the lack of an urgent proceeding can be justified. It is hard to think of any purpose of such a limitation; in fact it appears more to be not intended at all.

An imaginable reason for not establishing priority access on an agency level might be difficulties in *how to balance the rights of all requesters*. The expedition of one request necessarily results in the delay of all other pending requests. The PAIA stipulates that there shall be sufficient personnel appointed to give effect to the right to access to information,<sup>458</sup> but personal and financial resources are limited and have to be allocated to and distributed between all requests.

Generally a system that is processing requests on a *chronological* basis can be considered 'fair'. But such 'first-in, first-out'-system will usually lead to major backlogs. Within such system, matters of urgency would have to face great delay leading to the described situation that requesters would be completely deprived of their right of access insofar as late information is usually worthless. Furthermore, the processing of requests is not a matter of equality in the first place. Every requester has the right to receive the sought information within the statutory time limits. Therefore, every request must be viewed separately rather than in conjunction with all other requests. It cannot viably argue for the agency if it failed to give effective access numerous times before, which then lead to a backlog.<sup>459</sup> Notwithstanding, if an agency is powerless in processing all requests timely - which the agency has to prove - it cannot be forced to do so. A pure chronological procedure is not always appropriate because there are reasons why certain requests need to be handled with priority.

A less restrictive means to secure fair treatment of requesters and still enable agencies to process requests in order could be achieved by granting priority to requests that are pending at the agency stage which *also have been filed to court*. Although the mere filing of a court action does not prove urgency, it is a priority-indicating factor of signifi-

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<sup>458</sup> Section 17 (1) PAIA.

<sup>459</sup> Steinberg (note 401) at 235.

cance.<sup>460</sup> On the other hand, this approach is likely to lead to a system where requesters who can afford triggering legal action to bolster their requests have more effective access to information than those who cannot.<sup>461</sup> Furthermore, it does not solve the problem of overburdened agencies and request backlogs but just protracts it to the court stage.<sup>462</sup> Even if one assumes that agencies would ultimately improve simply to avoid that courts are handling all their requests,<sup>463</sup> the filing of a court action *as a method* does not seem suitable for solving the problem.

Another less restrictive means might be to establish *multiple tracks*. Requests would be categorized to expedite urgent requests but also to prevent small, simple requests from becoming stalled behind larger, more complex cases.<sup>464</sup> Such a system does have disadvantages as well. Ironically experience has shown that multi track systems can be used in various ways to make access to information even more ineffective: Difficulties arise in how to draw the line between ‘simple’ and ‘complex’ cases.<sup>465</sup> Furthermore, the outcome strongly depends on how agencies are allocating their resources within the different tracks. Additionally, a ‘multiple track’-system will use more resources as any request has to be categorised and assigned to ‘its’ track first. Delay reduction also might be little to not gaugeable at agencies which handle requests decentralised and therefore process them concurrently. Requesters would depend on agencies’ expertise and good faith when it comes to the ‘track decision’ and these decisions would have a significant impact on the response time. At least a provisional notice of the decision would have to be given, maybe along with an opportunity for the requester to modify the request and make an assignment to a faster track possible. Of course this must be handled with care as it is the agencies that have oversight over its records, not the requester.<sup>466</sup> The incentive to speed up the request must not lead to a system where citizens are punished for making general requests as this is expressly allowed by the PAIA. Finally, in a multi

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<sup>460</sup> See the concurring opinion at *Open America v. Watergate Special Prosecution Task Force* (note 447); Levine (note 364) at 46 f; Steinberg (note 401) at 256.

<sup>461</sup> Grunewald (note 2) at 362; Steinberg (note 401) at 255 f.

<sup>462</sup> *Open America v. Watergate Special Prosecution Task Force* (note 447) at 3.

<sup>463</sup> One might agree with Grunewald (note 2) at, that finally such ‘learning by pain’ would benefit all requesters and this would make up the initial disadvantages.

<sup>464</sup> Sinrod (note 2) at 355.

<sup>465</sup> Sinrod (note 2) at 355 refers to the U.S.-American *Mayock settlement* which is defining inquiries requiring five days or fewer to process, seeking a limited number of documents, and involving minimal review for claims exemptions as ‘simple requests’ and inquiries requiring more than five days to locate, review, and prepare for disclosure, involving more than a limited number of documents, and requiring more than minimal review for claims exemptions as ‘complex requests’.

<sup>466</sup> Grunewald (note 2) at 358 f.

track system it is likely that requesters who are dissatisfied with the agency's discretion want to be 'upgraded' into a faster track. The tracking notice and the 'negotiations' regarding a track upgrade would provoke delays even before the agency has gone into *medias res* and as a result could make the situation even worse.<sup>467</sup>

All of these disadvantages lead to the conclusion that a multi track-system might be less restrictive than having no urgency proceeding at all because it would impose significant administrative burdens on the state. Even if a 'multi track'-system in general is rejected and a 'single track'-system is used, urgent requests need to be able to pass non-urgent requests on a 'fast track'<sup>468</sup> - this is the very concept of proven urgency as it is recognised widely. True urgency is an exceptional situation that needs exceptional treatment. To simply ignore it is grossly disproportionate. An agency that does not grant priority to requesters showing urgency but instead sticks to a strict chronological approach cannot claim to execute 'due diligence' in handling its request workload.

Of course the expedition of one request necessarily results in delaying all other requests. The danger following from that (especially taking into account the deemed refusal provisions) is that requests lodged to a much-requested public body have no chance of success as long as they are not filed as urgent matters and therefore enjoy preferential handling over all other requests. This could lead to the situation that every requester claims urgency to secure preferential treatment.

To protect and enhance fairness, the requester must *specify and prove* an urgent need for the information as an additional condition.<sup>469</sup> Agencies would only have to expedite the request in truly deserving situations to help prevent the most serious types of harm caused by delayed responses.<sup>470</sup> This is open to criticism insofar as it is the very spirit of freedom of information legislation to grant access to public records *without* proving a 'need to know'.<sup>471</sup> Nevertheless, the general concept of PAIA that no special interest has to be shown to gain access to publicly held information is not violated because the requester does not merely seek *any* access but wants to be entitled to *priority* over others. Thus the expedition of urgent matters is not about preferring 'substantial' requests over those that only serve individual 'curiosity'. Without any qualification as a prerequisite for

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<sup>467</sup> For the experience in the United States see Grunewald (note 2) at 349 ff.

<sup>468</sup> Steinberg (note 401) at 249.

<sup>469</sup> *Open America v. Watergate Special Prosecution Task Force* (note 447) at 2; *Unitas Hospital v Van Wijk* (note 160) at para 22.

<sup>470</sup> Sinrod (note 2) at 354.

<sup>471</sup> Steinberg (note 401) at 249.

expedition most certainly inequalities will arise and fair and equal treatment of all requests will be difficult to maintain. Therefore, it is justifiable to invoke requesters' 'need to know' if they are keen on expedition - even regarding publicly held information.

This does not constitute an infringement on s 32 (1) (a) of the Constitution as the provision merely frees requesters from showing any need regarding *general* - but *not expedited* - access to information. This approach has been opposed 'because priority of access is so interrelated to the right of access itself, it is illogical to permit inquiry into a person's need to know in either circumstance.'<sup>472</sup> While this is true in principal, it does not provide any help to deal with the realities. It implicates that there is no 'better right of access' - although the impact of urgency on administrative procedure is acknowledged in various fields. 'Another weakness of this rather ideological approach is that if it was implemented, every requester could just claim urgency and true matters of urgency would be inseparable from fake ones.'<sup>473</sup> One way to deal with that could be to punish requesters for grossly wrongful claimed urgency, possibly through the imposition of punitive fees.

Another reason why immediate access should require a proper proof of urgency is the *final character of disclosure*. Once granted, access to information cannot be reversed. One could point out that the potential for irreparable damage done to the agency or a third party due to 'hasty disclosure' is high. Although valid in theory it also must be said that expedition of requests does not necessarily mean that less diligence must be used. It only means that urgent request must be processed before non-urgent. Since 'interim disclosure' is not thinkable, one must admit that generally exceptional circumstances should be shown before urgent access is granted.

Again, the suggested ways to deal with urgent matters cannot be read into PAIA's procedure via interpretation. A workable proceeding for urgent matters simply is missing. The bottom line is, that ss 11 (1) (a) and 50 (1) (b) limit the right of access to information without any apparent justification.

#### ee) Appeal Process

PAIA has been criticised for its appeal process being 'unfair and unaffordable' due to its procedural and financial barriers.

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<sup>472</sup> Steinberg (note 401) at 250.

<sup>473</sup> Steinberg (note 401) at 252 f suggests solving this problem by leaving it to courts' discretion if the alleged urgency is truly given. This again does not solve the problem but just shift it to another level.

The first level of appeal is an internal review as is the case in most countries with FOI-legislation.<sup>474</sup> This system of appeal theoretically can lead to an inexpensive and quick review as well as having the capacity to disburden the courts; but experience has shown that in most cases refusals are upheld in the internal process and delays are more likely than enhancement.<sup>475</sup> Generally the internal processes' flaws can be corrected on the second level, at court stage. The problem is that bringing a case before court is costly and results in significant delays. This is likely to largely prevent citizens from invoking their right, especially in developing countries. Furthermore, courts are often deferential to state agencies, especially in matters of national security.<sup>476</sup> As the internal appeal process only applies to certain public bodies,<sup>477</sup> all requests to other public bodies as well as all requests to private bodies are reviewed directly by the courts.

It has also been proposed to establish special institutions to implement and enforce the right of access to information.<sup>478</sup> Nevertheless, it is questionable if the establishment of yet another institution (for instance, an 'Information Ombudsman' or 'Information Commissioner') might not simply extend the procedure - and therefore the response time (say: delay).<sup>479</sup> Furthermore, it will consume additional staff and financial resources that are simply not available. Instead it might be more viable to further pre-litigational conflict resolution through early disclosure to alleviate the courts' burden and strengthen the appeal process.

The appeal process at present shows flaws but nevertheless does not raise concerns regarding PAIA's constitutionality.

### **3. Implications of PAIA's Unconstitutionality**

It has been pointed out that s 12 (a) of PAIA does not pass the constitutional test of s 36.<sup>480</sup> To this extent PAIA does not give effect to the right of access to information. Thus, there is room for an *application of s 32 (1)* as an *independent right*,<sup>481</sup> which can sustain a cause of action. Section 32 (1) covers those aspects of the constitutional right of access

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<sup>474</sup> Balisar (note 9) at 6.

<sup>475</sup> Balisar (note 9) at 6.

<sup>476</sup> Balisar (note 9) at 6.

<sup>477</sup> Section 74 (1) PAIA read together with section 1 PAIA, definition of 'public body', (a).

<sup>478</sup> McKinley (note 12) at 30.

<sup>479</sup> McKinley (note 12) at 30 f.

<sup>480</sup> See C.V.2.a)bb).

<sup>481</sup> Davis (note 31) at 26-11.

to information not provided for by the PAIA.<sup>482</sup> Although the Constitutional Court stated that legislative regulation would be preferable, it also regarded s 32 (1) as directly enforceable.<sup>483</sup> Some object to this submission due to the reason that the ‘constitutional right is mediated by provisions of the common law or legislation.’<sup>484</sup> This argument, which is mainly based on s 8 (3), seems sweeping as s 32 (2) expressively demands to ‘give effect’ to the right of access to information. Therefore it must be possible to rely directly on s 32 (1) if provisions of PAIA are found unconstitutional.<sup>485</sup> The constitutionality of PAIA can be challenged via the *direct appeal procedure*, s 167 (6) (b) of the Constitution.<sup>486</sup>

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<sup>482</sup> Christie (note 374) at 3H36; Rautenbach (note 80) at 1A78.2.

<sup>483</sup> *In re: Certification of the Constitution of the Republic of South Africa 1996* (note 24) at para 86.

<sup>484</sup> Davis (note 31) at 26-13.

<sup>485</sup> Currie/Klaaren (note 13) at 2.12 ff.

<sup>486</sup> Currie/Klaaren (note 13) at 9.11.

## D. Conclusions

Transparency is a central constitutional value in the South African legal system. It is deeply entrenched in the Constitution. The right of access to information forms the central column to that constitutional building of transparency. PAIA has wide application, is drafted very progressively and carries high potential for bolstering participatory democracy although its procedures are complex. Instead of condemning the PAIA for being a ‘watered-down, apologetic and limping version of what was proposed before’,<sup>487</sup> it seems more appropriate see it as ‘a classic example of just how far South Africans must still travel to turn the corner from affirmation (of a human right) to realisation.’<sup>488</sup>

## I. Interpreting PAIA in Consistency with the Constitution

While some provisions appear unfortunate regarding the principle of maximum disclosure, they can still be interpreted in a way that is consistent with the constitution:

- Section 50 (1) (a), the *qualification* for requesting privately held information, must not be interpreted too narrowly. PAIA can be used for the protection and exercise of any right as long as the requester can reasonably think or hope the record is of help in this regard.<sup>489</sup>
- The PAIA’s numerous *grounds of refusal* (ss 33 ff and 63 ff) must be interpreted narrowly to leave the act’s purpose intact. This is particularly important for *institutional exceptions* as they remove whole areas from public scrutiny.<sup>490</sup>
- The PAIA’s *enforcement* lacks momentum. The HRC is not capable of any enforcement unless properly funded and staffed. Enforcement by the High Courts encounters the notorious problem of overburdened court dockets.<sup>491</sup>
- The PAIA’s *protection of international relationships* (s 41 (1) (a) (iii)), its *integrated necessity of harm clauses* and its *public interest override* (ss 46 and 70) are regrettable considering the general principle of maximum disclosure but still consti-

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<sup>487</sup> White (note 26) at 76.

<sup>488</sup> McKinley (note 12) at 9.

<sup>489</sup> See C.II.2.b).

<sup>490</sup> See C.V.2.a)bb).

<sup>491</sup> See C.IV.

tutionally justified considering the nature of the right of access to information and the nature of those limitations.<sup>492</sup>

- PAIA must be *interpreted disclosure friendly* (s 2) not only by courts but also by agencies that act in their adjudicational function.<sup>493</sup>
- Despite section 7 and the fear of ‘fishing expeditions’, PAIA can be used for *pre-litigational discovery*. The act does not infringe on rule 35 of the High Court as long as it is used as a subsidiary means. Moreover, it is desirable to achieve pre-litigational conflict resolution. ‘Fishing expeditions’ can be avoided using PAIA’s provisions: Regarding privately held information the requester has to prove a right-information-relation, s 50 (1) (a). Regarding publicly held information this is not possible as requesters are not obliged to show any ‘need to know’. Nevertheless, obvious ‘fishing expedition’-requests can be turned down as vexatious or frivolous using s 45.<sup>494</sup>

## II. Unconstitutional Provisions of PAIA

- The *categorical exception of Cabinet’s records*, s 12 (a), cannot be interpreted in accordance with the Constitution. Neither can it be justified as the limitation is not necessary in terms of s 36: the same purpose can be achieved using PAIA’s narrower exceptions, especially s 44, on a case by case basis. In this regard, the constitutional right of access to information is directly applicable.
- PAIA is *incompatible with urgent matters*. Requesters have no chance of disclosure in time because ss 11 (1) (a) and 50 (1) (b) force them to comply with a procedure that is so time-consuming that it turns into an instrument against ‘effective access to information’ in urgent matters. Requesters of urgently needed information should be allowed to comply with all but the most essential procedural requirements *after* disclosure. Urgent matters must be given priority by requested bodies. Misuse by requesters can be prevented by the obligation to show and prove urgency and the right of the agency to impose surcharges. To balance the right to timely disclosure of all requesters, they must show and prove urgency to be entitled to preferential treatment of their request. This requirement does not

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<sup>492</sup> See C.V.2.a)cc), C.V.2.a)dd), C.V.2.a)ee).

<sup>493</sup> See C.V.2.b)aa).

<sup>494</sup> See C.V.2.b)dd)(1).

contravene the dogma that no ‘need to know’ must be shown because it is not a prerequisite to disclosure itself, but merely applies to the grant of priority.<sup>495</sup> PAIA includes no explicit procedure of urgency or means of any kind to expedite access. Such a procedure cannot be read into PAIA’s provisions without transgressing the limitation set out by its wording. It appears as if the integration of an urgency procedure into the act simply has been forgotten. Pursuant to the PAIA, requesters are under no circumstances entitled to priority over others. The only imaginable purpose of the lack of a urgency procedure and the requesters’ obligation to comply with all procedural requirements might be equality and fairness: the right of all requesters to disclosure in time must be balanced. However, if one lets this purpose lead to the conclusion that urgent access is not recognised at all, ss 11 (1) (a) and 50 (1) (b) can only be considered grossly disproportionate regarding matters of urgency in terms of the limitation clause.

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<sup>495</sup> See C.V.2.b)dd)(2).

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