

https://dspace.org/

Promotion of access to information through the courts: Case law and important developments in PAIA litigation

Klaaren, Jonathan

2010-02-09
http://hdl.handle.net/10539/9207

Downloaded from a DSpace repository. https://dspace.org/

PAIA Though the Courts: Case Law and Important Developments in PAIA Litigation

Jonathan Klaaren[1]

9 February 2010

Background to Recent PAIA Litigation

This paper is part of the effort to develop an Open Democracy Charter, envisioned as a declaration of intent on implementation of access to information principles. From the point of view of Open Democracy Advice Centre (ODAC), the Charter is an opportunity to "assert clear standards of compliance, while at the same time employ[ing] empathy and understanding of the depth of the challenge so that we can offer constructive solutions to the problems that we have diagnosed."[2] This paper aims to contribute to that goal both through the identification of best practices as well as through consideration of the efficacy of such a Charter.

The use of PAIA in the courts is bound to increase. This is particularly likely since, in an important recent development, the courts in which PAIA may be used have been significantly expanded. A sigh of relief went up from access to information advocates across South Africa when, on 9 October, rules of procedure were promulgated that set down the standards by which PAIA requests could be enforced in the Magistrates' Courts.[3] These rules fulfilled the last of the conditions necessary to enable enforcement of PAIA in the courts far more accessible to the majority of the national population than the High Courts.[4] The rules came into operation on 16 November 2009.[5] This development was long overdue.[6] While the rules were acknowledged by all only to be adequate rather than particularly well-suited, at least there is now a set of rules for such expanded enforcement action in place. As the National Assembly Portfolio Committee noted upon approving the Rules, 'These Rules have been outstanding for some time and the Committee finds this regrettable, as the absence of these Rules impacts on the effective implementation of the Promotion of Access to Information Act[,] an Act which lies at the heart of our constitutional democracy.'[7] The still-outstanding PAJA Rules will also increase the opportunities for disclosure once they take effect.[8]

---

[1] School of Law, University of the Witwatersrand, Johannesburg: jonathan.klaaren@wits.ac.za. This paper has been prepared at the request of the Open Democracy Advice Centre (ODAC) as part of the campaign for and launch of the Open Democracy Charter.

[2] ODAC Charter Concept Paper, p. 5.

[3] Rules of Procedure for Application to Court in Terms of the Promotion of Access to Information Act 2 of 2000, Government Notice No. R. 965, Government Gazette No. 32622 (9 October 2009) ('The Promotion of Access to Information Rules').

[4] PAIA section 79 (requiring the Rules Board to make rules of procedure for PAIA section 78 enforcement applications); see also PAIA section 91A (providing for the designation and training of presiding officers).

[5] Promotion of Access to Information Rules, Rule 7.

[6] The Rules and the Committee Report on the Rules were adopted in the Portfolio Committee on Justice and Constitutional Development of the National Assembly on 19 November 2008.

[7] Report of the Portfolio Committee on Justice and Constitutional Development on the Draft Rules of Procedure for Applications to Court in terms of the Promotion of Access to Information Act, 2000 (Act No 2 of 2000), dated 19 November 2009. Although this is not mentioned in the minutes, according to the Report of the Committee, the Committee required the Rules Board to consider four submissions made to the Committee

Even without the potential surge in the use of PAIA, the question of PAIA through the courts is a significant topic. One could say that there are two dimensions of the topic: the enforcement of PAIA in the courts and the extension or elaboration of PAIA through the courts. Essentially, this is the difference between routine enforcement and elaboration of PAIA's content through either strategic litigation or unintentional cases of first impression.

Enforcement of access to information legislation may take any of several different models.[9] With respect to enforcement, a choice was initially made with PAIA to opt for enforcement through the judicial system rather than through an independent tribunal. To some extent, the South African Human Rights Commission – an independent state institutional supporting constitutional democracy -- has indeed played an enforcement role but it has never seen itself nor been seen as primarily charged with or executing that role. Instead, its role has been primarily one of promotion. Over the past several years, the NGO access to information community has increasingly called for a change to the enforcement structure of PAIA, demanding an Information Commissioner. While seriously entertained both by the SAHRC and by the Asmal Parliamentary enquiry into Chapter 9 institutions, this demand appears to have fallen on deaf ears. The choice of government to continue with enforcement through the judicial system seems to be made clear by two events: the much-delayed extension of enforcement jurisdiction to the Magistrates' Courts (see above) and by the very limited jurisdiction granted to the Information Tribunal that is envisioned in the current draft of the Protection of Personal Information draft legislation developed by the South African Law Reform Commission and currently before Parliament.

In respect of PAIA in the courts, it would be instructive to take a look at the number of PAIA applications made and enforced.[10] In 2003, 6000 PAIA applications were made.[11] However, it appears that there is not as yet comprehensive research on the number and variety of PAIA enforcement applications made, such as has recently been conducted in India. Such research could

---

(by ODAC, by the South African Human Rights Commission, by ESKOM, and by the South African History Archive), review the content and implementation of the Rules and report back to the Committee within 6 months of the new term of Parliament in 2009. It may be the case that the Committee intended to place this condition on its approval thinking that the Rules would be implemented within the first 6 months of 2009. It does not appear that the Rules Board reported back to the Portfolio Committee on this matter in 2009. On 17 February 2009, the Committee approved its Committee Report of the same date on the PAJA Rules, 'request[ing] that the Minister reviews the implementation of these [PAJA] Rules within 24 months of their approval by Parliament and reports-back to this House on their implementation and any amendments that may be necessary. Report of the Portfolio Committee on Justice and Constitutional Development dated 17 February 2009, comment 2. The model of reporting back referred to in 2009 with respect to the PAJA Rules appears to be discretionary in contrast to the mandatory phrasing of the model of reporting back referred to in 2008 with respect to the PAIA Rules.

[8] Rule 4 of the PAJA Rules considered and approved by the Portfolio Committee in February 2009 will introduce a new disclosure mechanism into the rules for judicial review, providing citizens with an opportunity to access documents held by an administrator in order to determine whether the administrative decision was properly taken.

[9] See e.g. L Neuman 'Enforcement Models: Content and Context' World Bank Institute Working Paper Series (March 2009) (identifying three different models of access to information enforcement: judicial proceedings, information commission(er) or tribunal: order-making powers, and information commissioner or ombudsman: recommendation power).

[10] PAIA requires information officers to annual submit reports to the SAHRC. PAIA section 32. On 26 January 2009, the SAHRC website was not available.

[11] ODAC 5-Year Review, p. 7.

use the partial coverage provided in the required PAIA s 32 reports to the SAHRC as an initial basis but would need to go considerable beyond the information available there.[12]

In addition to some degree of routine enforcement, PAIA has also been the target of a fair amount of strategic litigation.[13] In some ways, this is hardly surprising since there are at least two civil society organizations and one public sector one with specific mandates and funding to engage in such litigation (ODAC, SAHA, and the SAHRC). Indeed, it might well have been more noteworthy if there were not such a pattern of strategic litigation. These cases of strategic litigation together with other reported cases – some of first impression, some consisting of significant decisions, some neither – constitute the body of reported PAIA cases, five years of which this paper covers as set out below.

There is a growing but still patchy literature on the use and interpretation of PAIA and section 32 of the Bill of Rights in the courts. The leading monograph on the interpretation of the Act itself dates from March 2002 and, apart from a number of textual corrections made in 2001, does not take into account the several (albeit relatively minor) amendments to the Act since its passage.[14] ODAC has published a survey of PAIA jurisprudence up to 2005.[15] Several of the treatises on South African constitutional law cover access to information in discrete and helpful chapters.[16] Several edited volumes and monographs have touched upon or taken as their basis the PAIA, two of which are discussed further in the conclusion to this paper.[17]

---

[12] PAIA s 32 mandates the content of annual reports that the information officers of public bodies must submit to the SAHRC. Of the statutorily required information, only the item in PAIA s 32 (f) is of direct assistance. This provision mandates reporting on "the number of internal appeals lodged with the relevant authority and the number of cases in which, as a result of an internal appeal, access was given to a record." PAIA s 32 (h) does mandate reporting on applications made to court but only in relation to internal appeals dismissed on the grounds of deemed refusals (PAIA s 77(7)).

[13] For an analysis of strategic litigation in South Africa from an informed litigator's point of view, see G Marcus and S Budlender 'An evaluation of Strategic Public Interest Litigation in South Africa' unpublished report, Atlantic Philanthropies, June 2008).

[14] I Currie and J Klaaren, The Promotion of Access to Information Act Commentary (SiberInk, 2000). The textual corrections were made in the Judicial Matters Amendment Act 42 of 2001. The additional amendments to the PAIA from passage to the present include the Financial Intelligence Centre Act 38 of 2001, Promotion of Access to Information Amendment Act 54 of 2002, the Judicial Matters Second Amendment Act 55 of 2003, and the Judicial Matters Amendment Act 66 of 2008.

[15] T Makhalemele 'Summary of Case Law in terms of the Promotion of Access to Information Act – The South African Experience' (25 November 2005).

[16] 'Access to Information' 683-702 in I Currie & J de Waal *The Bill of Rights Handbook* (5th ed, Juta, 2005) (covering case law through March 2005); J Klaaren and G Penfold 'Access to Information' chapter 62 in S Woolman et al. (eds) *Constitutional Law of South Africa* (Juta, 2002). See also M du Plessis & G Penfold 'Bill of Rights Jurisprudence' 27 in *Annual Survey of South African Law 2005* (Juta) (discussing access to information at 84-90); M du Plessis & G Penfold 'Bill of Rights Jurisprudence' 45 in *Annual Survey of South African Law 2006* (Juta) (discussing access to information at 79-83); M du Plessis & G Penfold 'Bill of Rights Jurisprudence' 67 in *Annual Survey of South African Law 2007* (Juta) (discussing access to information at 99-102).

[17] R Calland and A Tilley (eds) *The Right To Know, the Right to Live: Access to Information and Socio-Economic Justice* (ODAC, 2002). For a comparative survey, see T Mendel *Freedom of Information: A Comparative Legal Survey* (United Nations Educational Scientific and Cultural Organisation, 2003). The South African literature has surged forward with two publications in 2009: C Darch & P Underwood *Freedom of Information in the Developing World: Demand, Compliance and Democratic Behaviours* (Oxford: Chandos Publishing, 2009) and K Allan (ed) *Paper Wars: Access to Information in South Africa* (Wits University Press, 2009).

This paper does not intend to provide a detailed account of PAIA litigation. Instead, the first section has two goals: to overview PAIA litigation from start 2005 to end 2009[18] and to point out some trends in that litigation, both doctrinal and those of strategic litigation. The conclusion then uses a couple of recent publications to consider the efficacy of the proposed Open Democracy Charter in the light of the preceding discussion of PAIA through the courts.

Section One: Recent Significant Litigation and Trends

An Overview of PAIA Enforcement and Litigation, 2005-2009.

In 2005, five reported cases turned on PAIA. In *Minister for Provincial & Local Government v Unrecognised Traditional Leaders, Limpopo Province, Sekhukhuneland* 2005 (2) SA 110 (SCA), the Supreme Court of Appeal determined that provisions in the PAIA limiting access to information should be construed in light of the Constitution. Thus, on a proper and purposive interpretation of PAIA s 44(1)(a), the relevant document, a report held by the particular office not for the purpose of formulating policy, needed to be disclosed. This case thus reached and narrowly construed one of the substantive exemptions.

In *Clutcho v Davis* 2005 (3) SA 486 (SCA), the Supreme Court of Appeal also laid down an important rule with respect to the relationship of PAIA and company law. Considering a PAIA request for access to financial records of a private body by a member of the body, the Court held that the evidence advanced in this case failed to lay a foundation for request for accounting books. The mere whiff of impropriety was not enough. In principle and on appropriate facts, such a request could be granted according to a test of "substantial advantage or element of need".

In *IDASA v ANC* 2005 (5) SA 39 (C), the Cape High Court considered a test case requesting access to records of donations from private persons to political parties. Here, the High Court judge held that PAIA the exclusive mechanism for access to information and that there was no parallel mechanism under s 32 even for exceptional cases outside of coverage of PAIA. Further, since political parties were not exercising public functions when receiving donations, the request should be judged in terms of a request to a private body. Since there was no foundation laid for the generalized request (para 47) – that is no evidence showed that the requests were unable to exercise the rights on which they depended such as freedom of expression -- access was refused to records of donations. This case was not taken on appeal.

In *Trustees, Biowatch Trust v Registrar: Genetic Resources & Others* 2005 (4) SA 111 (T), a NGO applying for access to information in a campaign to monitor the risks of genetically modified organisms (GMOs) was ordered to pay hefty courts costs. This case was appealed to the SCA and eventually to the CC.

In *Treatment Action Campaign v Minister of Health* 2005 (6) SA 363 (W), the issue of costs was also addressed, where the respondent department's conduct was the fundamental cause of the

[18] It seems reasonable to choose start 2005 since the Currie chapter and the Makhalemele survey both cover partially through 2005. On the Lexis/Nexis Butterworths database (accessed 26 January 2010), there are 18 separate citations of consideration of the PAIA in matters reported in 2005-2009: 5 in 2005, 6 in 2006, 3 in 2007, 3 in 2007, and 1 in 2009.

action. Costs were awarded to the applicant who had applied for an order compelling access to documents regarding the timeline of the government HIV/AIDS plan for response.

In 2006, another five cases were reported that turned on PAIA. In *Unitas v van Wyk* 2006 (4) SA 436 (SCA), the facts concerned a request by a widow for access to information from a private hospital concerning the care given to her now-deceased husband. In a split decision affirming the *Clutcho v Davis* standard of "substantial advantage or element of need", the Court made a distinction between "useful and relevant" for the exercise or protection of rights and "essential or necessary". The latter was required. Thus, 'of assistance' is a necessary though not sufficient requirement for satisfaction of the PAIA s 50 standard.

In *MEC for Roads & Public Works, Eastern Cape & Another v Intertrade (Pty) Ltd* 2006 (5) SA 1 (SCA), the Court upheld the previous case of *van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) dealing with legal professional privilege. Granting the request for documents, the court slated 'technical' objections to disclosure.

In *DPP (Western Cape) v Midi Television t/a E TV* 2006 (3) SA 92 (C), the High Court dismissed denied access to information (argued for in the alternative) where the procedural requirements of the request in terms of PAIA ss 7 & 50 had not been complied with. This issue in the case was persisted with but the decision upheld on appeal to the SCA in 2007.

In *Transnet Ltd and Another v SA Metal Machinery Co (PTY) Ltd* 2006 (6) SA 285 (SCA), the Supreme Court of Appeal delivered another progressive decision on the extent of an exemption. The Court held that the confidentiality clause in the tender at issue does not carry through after award of tender as a matter of interpreting PAIA s 37(1)(a). Further, the Court held that the pricing schedule used in the submitted tender would not probably cause harm in terms of PAIA s 36 (1)(c)).

In *Earthlife Africa (Cape Town Branch) v Eskom Holdings Ltd* [2006] 2 All SA 632 (W), the first skirmish occurred in litigation that is still ongoing. On subsequent appeal to the Supreme Court of Appeal, this matter saw the invocation of Supreme Court Rule 19bis to determine whether the documents requested fell within the PAIA exemptions.

In 2007, there were two reported cases. In *Mittal Steel SA Ltd (Formerly Iscor) v Hlatshwayo* 2007 (1) SA 66 (SCA), the Court, using the control test (but noting that this test was not appropriate in all circumstances), determined that Mittal Steel was a public body at the time of record creation and thus a public body for purposes of the request made in terms of PAIA.

In *Claase v Information Officer, SAA (PTY) Ltd* 2007 (5) SA 469 (SCA), the Court interpreted the agreement at issue to provide a contractual right to the applicant for information. The Court then determined that South African Airways should be treated as a private body. The requisite standard met, the Court ordered disclosure and imposed punitive costs on SAA. Along the way, the Court bemoaned the costs of pre-trial litigation seemingly resulting from the PAIA.

In 2008, there was also just one reportable (but in fact unreported) case turning on PAIA.[19] In *Public Service Accountability Monitor & Another v Director-General, Office of the Premier, Eastern Cape Provincial Government* (Case No. 6407/07) (Eastern Cape High Court, 29 May 2008), the High Court appropriately rendered a restrictive interpretation made of PAIA s 44 and ordered full disclosure.

Finally, in 2009, there were three reported cases concerning PAIA. In *Brümmer v Minister of Social Development & Others* (SA History Archives Trust & SAHRC as Amicus Curiae) 2009 (6) SA 323 (CC); [2009] ZACC 21, the CC considered a major component of the PAIA enforcement regime in a case notable for the high participation by amici curiae. The Court considered the interpretation of PAIA s 78(2) and whether the time periods for lodging applications to court in respect of refusals were a justifiable restriction on s 32 and 34 rights. The Court confirmed the order made in the Western Cape High Court and, pending legislative amendment, determined appropriate time periods for lodging enforcement applications to court in terms of PAIA.

In *Sumbana v Head, Department of Public Works, Limpopo Province* 2009 (3) SA 64 (V), a High Court considered the constitutionality of the internal appeal requirements of PAIA in respect of a public body. The Court dismissed challenges to PAIA ss 25(1)(b) and (c), 27, and 78(1).

In *Garden Cities Inc v City of Cape Town and Another* 2009 (6) SA 33 (WCC), the High Court determined that the failure of internal system on the part of a municipality receiving a request for access was an invalid ground for refusal of access to record in terms of PAIA.

As of early February, there are at least ten matters that are in the pipeline for likely litigation or continued litigation in 2010, based on reports from several of the most active NGOs in this field. *Fortuin v Minister of Science and Technology* (ODAC, 2010); *Brummer v Department of Social Development* (merits) (ODAC, 2010); *Earthlife Africa (CT) v ESKOM* (ODAC, November 2009, 2010) (Supreme Court Rule 19bis); *South African History Archive v National Conventional Arms Control Committee* (ODAC & SAHA, 2010) (PAIA s 80); *Mojalefa Murphy v National Research Foundation* (ODAC, 2010); and *Malcolm Langford v Johannesburg Water (Pty) Ltd* (ODAC, potential settlement); and *Centre for Applied Legal Studies v Moses Kotane Municipality* (ODAC & CALS, 2010); *SAHA and South African Centre for Survivors of Torture v President & Others* (SAHA & Southern African Litigation Centre (SALC), 2010); *SAHA & Others v Department of Justice and Constitutional Development* (SAHA, 2010); *PSAM v [Cape Town Public Entity]* (PSAM, 2010) .[20]

Significant and Identifiable Trends Drawn From PAIA in the Courts, 2005-2009

From an advocacy and litigation perspective, it is interesting to note the relative dip in the reported cases in 2007 and 2008. After years in 2005 and 2006 where there were five cases reported each year, there were only four reportable cases taking 2007 and 2008 together (and one is

[19] In addition, see the order granted in favour of the PSAM in *Public Service Accountability Monitor v Head: Department of Housing, Local Government and Traditional Affairs: Eastern Cape Provincial Government* (Case No. 6025/2007, 21 February 2008, Plasket J).

[20] ODAC Litigation Report (November 2009); email from Gabriella Razzano to Jonathan Klaaren (26 January 2010); email from Jay Kruuse to Jonathan Klaaren (26 January 2010).

actually an unreported case, thus presumably not widely known outside the access to information community). While there were three reported cases in 2009 and there are at least ten matters currently in the pipeline, this recent activity would only take the field back to the levels of 2005 and 2006. Simply from the point of view of elaborating the regulatory regime and establishing stable and authoritative interpretations of the PAIA, it thus appears that there is ample scope for further litigation. It may well be that the extension of jurisdiction will have the effect to encourage further litigation and judicial decisions, but that remains to be seen. The SAHRC, the access to information advocacy community, and the foundations with mandates in this area should take note!

With respect to the access to information advocacy community, it may be possible to point to two incipient trends. One has been identified by Calland, pointing out the importance of coalitions. One example was the *Earthlife* matter, with "a specialist NGO working with a specialist ATI … organization."[21] A second might be exemplified by the *Brummer* matter. In that CC case, a number of amici joined the litigation in front of the Court and presented complementary analyses. This amici swarm may represent a mode of advancing in particular the issues of the PAIA enforcement and implementation through the courts, should that need continue.

It is worth noting both the groups who are and who are not heavy users of PAIA. While this is not reflected in the reported cases, according to media reports, political parties are heavy users of PAIA. To take just a recent example, on 21 January 2010, LegalBrief reported that leader of the Independent Democrats Patricia de Lille was on the scent of a new Parliamentary travel scandal involving MPs profiting from driving and claiming for trips between Johannesburg and Cape Town. De Lille was reported to have approached the Speaker of Parliament for access to a detailed breakdown of travel and accommodation expenditure but to have been refused access and advised to make use of the PAIA. She is reported to be planning both to direct a question to the Speaker and start a process in terms of PAIA. In a LegalBrief report of 10 December 2009, the Democratic Alliance was reported to be using PAIA to ask the Presidency, several government departments and the Industrial Development Corporation to get information relating to the now-cancelled plan to purchase eight Airbus A400M transport aircraft for a total of R47 billion.

In sharp contrast to this near-routine use of PAIA amongst the political parties (at least the opposition political parties), media groups and journalists are not heavy users.[22] While broadly supportive of the legislation, most journalists do not use its provisions. Even investigative journalists are apparently often put off by the lengthy timelines and do not make extensive use of requests for information, the Brummer case constituting an obvious exception.

On the whole, the experience of PAIA in the court shows the hallmarks of specialist and niche litigation strategy, rather than being a tool of normal professional practice.[23]

---

[21] R Calland 'Illuminating the Politics and the Practice of Access to Information in South Africa' in K Allan (ed) *Paper Wars: Access to Information in South Africa* 15.

[22] Roberts notes that media groups and journalists are not heavy users of the right to know legislation in India. Roberts 6.

[23] One exception to this conclusion may be in the area of public tenders. A number of reported cases reviewing or otherwise litigating in relation to public tenders do mention as part of the procedural and litigation history of the tender applications for information made in terms of or referencing PAIA. These cases

Further, it appears to be the case that that substance of PAIA law (understood here as both the content of the exemptions and the circumstances in which those exemptions apply (e.g. the public/private questions of *IDASA* and *Mittal Steel*) is no longer the focus of the reported cases. By and large, the reported cases (and some of the pipeline matters) are turning increasingly on issues of elaborating the regime – the Supreme Court Rule 19bis procedure of *Earthlife Africa*, the timelines issue of *Brummer*, the costs orders of *Claase* and *Biowatch*. If this observation is accurate, then it may be significant to note that the elaboration of the access to information regime appears to be taking place in the courts rather than in the legislative arena.

Conclusion

While not touching directly on the question, a couple of recent publications are useful in considering the place of litigation in the advancement of access to information and specifically in considering the proposed Open Democracy Charter.

In an evaluation of the first four years of India's Right to Information Act, Alasdair Roberts draws upon a number of studies that examined the challenges in implementing India's right to know legislation, enacted in 2005.[24] In sharp contrast to the usage of the PAIA, the Indian uptake on their legislation from civil society has been massive.[25] Around two million requests for information were filed in the first two and a half years after the law was passed. Roberts' assessment is measured but hopeful: '[Indian] citizens and civil society organizations have been able to use the RTIA to fight mismanagement and corruption and improve governmental responsiveness. But there are still daunting barriers to use of the law because of poor planning and bureaucratic indifference or hostility. Provisions in the law to promote "proactive disclosure" of key information are often disregarded. Some of the commissions established to enforce the law are struggling with a growing caseload of complaints about non-compliance by public authorities.'[26]

In Roberts' view, with respect to the enforcement of the law, the Indian law suffers from an inherent problem in the widely diffused model of enforcement of right to know laws focusing on the resolution of a specific complaint -- what might be termed the perverse incentives of backlogs.[27] To address this and other problems of enforcement and implementation, several experimental practices have been implemented in various Indian locations including fast-tracking certain complaints, placing personal liability on non-performing information officers, and addressing

---

are not included in this paper since they only make cursory mention of PAIA and do not turn on PAIA. See e.g. *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality and another* [2008] 4 All SA 168 (NC).

[24] Alasdair Roberts 'A Great and Revolutionary Law? The First Four Years of India's Right to Information Act' (9 January 2010, Suffolk University Law School Research Paper). Roberts' assessment is based upon nine studies with varying methods conducted between 2007 and 2009. Seven of these studies were conducted in 2009, two of them large-scale, relying on surveys and interviews with thousands of Indian citizens and government officials. I am aware of only one focused study of the implementation of PAIA, the 2004 Open Society Institute Justice Initiative Monitoring Study on the state of access to information in 14 countries, which was conducted in South Africa by ODAC. However, ODAC and the SAHRC have combined forces to conduct the research and monitoring behind the Golden Key Awards. See eg ODAC and SAHRC, Golden Key Awards 2009. This research is conducted on a somewhat limited sample and is geared towards identifying the best performing responding organisations rather than overall systemic use and response.

[25] As far as I am aware, the comparable figure for PAIA is not available.

[26] Roberts 3-4.

[27] As identified by Roberts, 'as the number of complaints increases, the commission's ability to quickly resolve them declines, encouraging more non-compliance by authorities, and yet more complaints.' Roberts 18.

systemic problems directly. Of further relevance, according to Roberts, '[Indian] [g]overnment agencies and civil society organizations are also developing innovations in practice that might prove useful in other developing nations.'[28] These practices include the ability to obtain an automated update on the status of appeals by sending a text message from a cell phone, allowing individuals to make requests through a single toll-free number, the potential to mandate use of public authorities' rights to access information from private bodies, and the absorption of RTI principles into other legislation.[29]

Writing not in respect of access to information generally but rather in respect of its utility in the achievement of socio-economic justice, Mukelani Dimba has discussed the role of PAIA litigation.[30] Drawing on the argument of Saras Jagwanth that access to information primarily plays an instrumental role in the achievement of socio-economic rights, Dimba sees access to information as a necessary aid for either social mobilisation or for litigation in order to enforce socio-economic rights.[31]

While different in many ways from India, South Africa is, like that country, cannot be classified as a developed or First World nation. Thus, the focus on implementation and specifically on implementation in the specific context outside the circle of developed nations initially having developed access to information legislation must be right.[32] That emphasis leads one to question the relative lack of routine enforcement activity in South Africa the legislatively chosen arena of enforcement, the courts. The explanation for this paucity of enforcement action may be the high costs of High Court litigation.[33] If that is so, then the 16 November 2009 extension of jurisdiction would become highly significant. It is perhaps too soon to answer that particular question. What the stakeholders in the Open Democracy Charter process ought to address is a question along the following lines: Given the continued state reliance upon and rolling out of this judicial enforcement model, how can stakeholders interested to effectively implement the right of access to information most effectively complement and supplement such enforcement?

---

[28] Roberts 4.

[29] Roberts 19-22.

[30] M Dimba 'Access to Information as a Tool for Socio-Economic Justice' (unpublished paper presented in Atlanta, Georgia, USA, 26-29 February 2008).

[31] Dimba 6-7 (citing S Jagwanth 'The Right to Information as a Leverage Right' in Calland and Tilley (eds) *The Right to Know, the Right to Live* (ODAC, 2002). As Richard Calland has pointed out, international access to information advocates have now moved beyond this exclusively instrumental understanding of the value of the right of access to information. R Calland 'Illuminating the Politics and the Practice of Access to Information in South Africa' in K Allan (ed) *Paper Wars: Access to Information in South Africa* 8.

[32] See Calland 'Illuminating the Politics and the Practice of Access to Information in South Africa' 9-13 (making the point that attention to politics in implementation has recently risen to prominence on the international agenda of access to information advocates).

[33] As pointed out by Glenn Penfold, another reason working in tandem with the high costs of High Court litigation to dampen enforcement actions may be the uncertainty relating to the meaning of a large number of PAIA's provisions. AS he points out, 'the last thing a requester wants to do is spend the money, alienate the party on the other side, and risk losing!'. This uncertainty is exacerbated by the broad nature of several of the grounds of refusal as well as narrow breadth of the public interest override. It is therefore often difficult to advise with confidence that a court considering the matter will grant access.