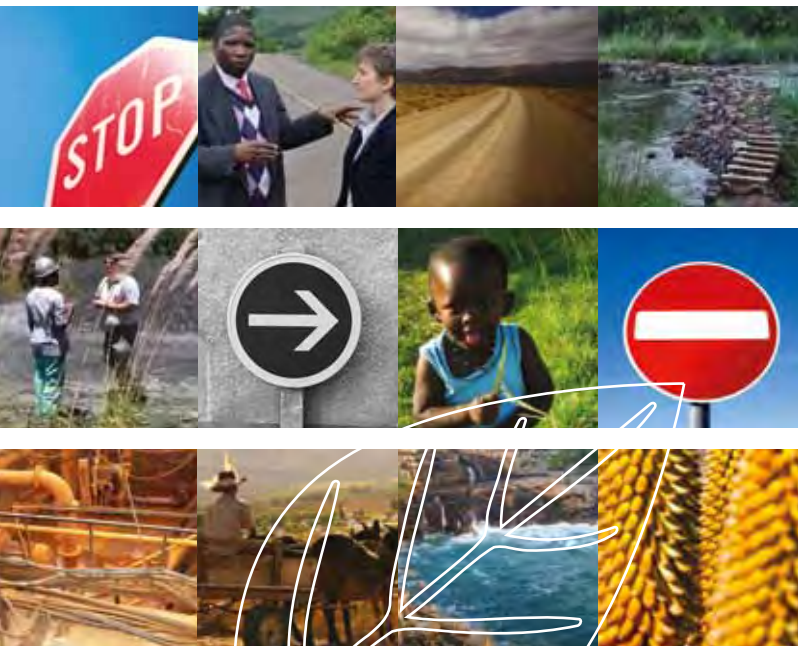


UNLOCK THE DOORS:

HOW GREATER TRANSPARENCY BY PUBLIC AND PRIVATE BODIES CAN IMPROVE THE REALISATION OF ENVIRONMENTAL RIGHTS



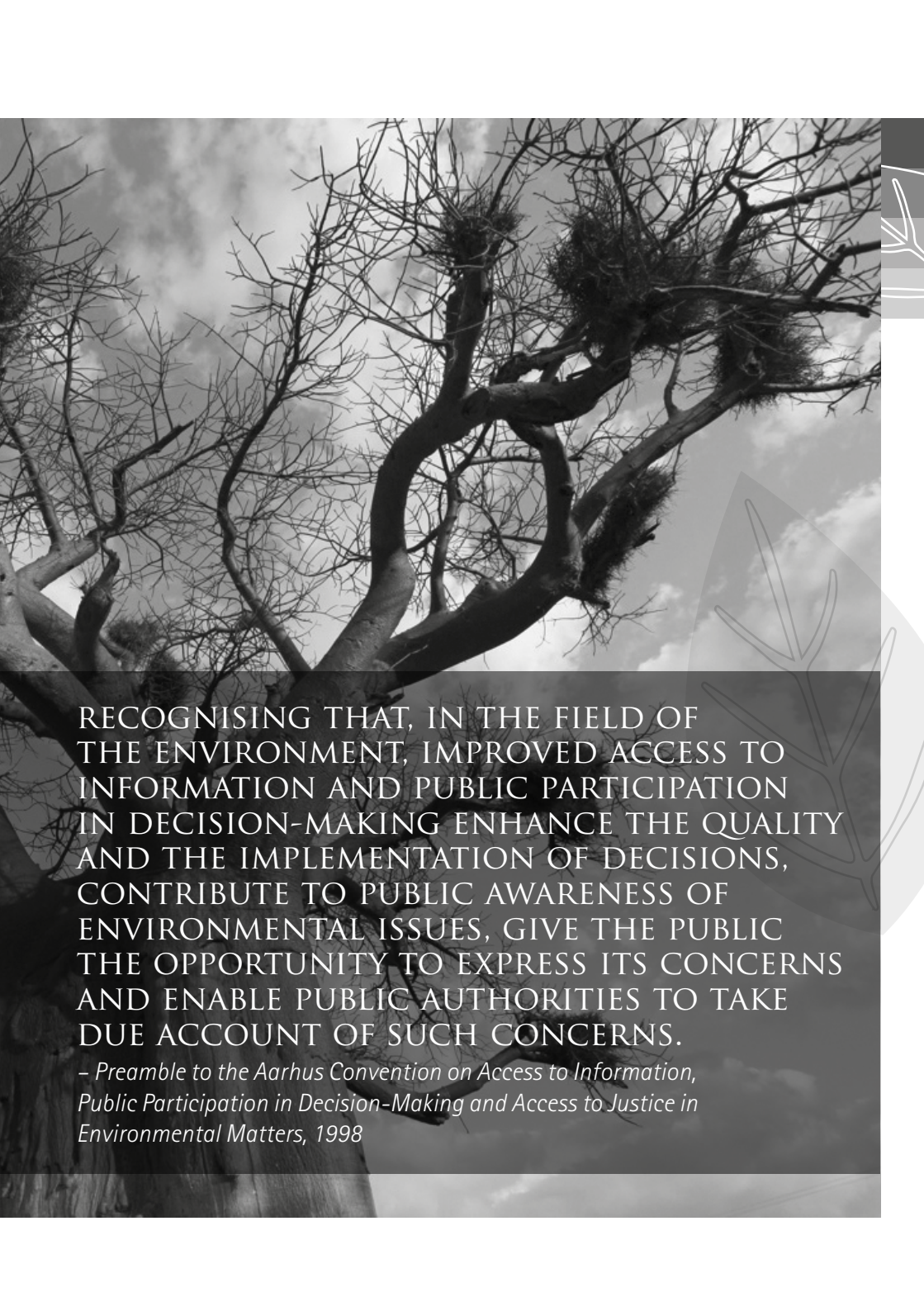
Centre *for*
Environmental Rights

Advancing Environmental Rights in South Africa

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RECOGNISING THAT, IN THE FIELD OF
THE ENVIRONMENT, IMPROVED ACCESS TO
INFORMATION AND PUBLIC PARTICIPATION
IN DECISION-MAKING ENHANCE THE QUALITY
AND THE IMPLEMENTATION OF DECISIONS,
CONTRIBUTE TO PUBLIC AWARENESS OF
ENVIRONMENTAL ISSUES, GIVE THE PUBLIC
THE OPPORTUNITY TO EXPRESS ITS CONCERNS
AND ENABLE PUBLIC AUTHORITIES TO TAKE
DUE ACCOUNT OF SUCH CONCERNS.

*– Preamble to the Aarhus Convention on Access to Information,
Public Participation in Decision-Making and Access to Justice in
Environmental Matters, 1998*



EXECUTIVE SUMMARY

The realisation of the Constitutional right to a healthy environment is dependent on the ability of individuals, communities, civil society organisations, companies and decision-makers to access information about the state of the environment and the impact of human activities.

In July 2010, the Centre for Environmental Rights (CER), with the support of the Open Society Foundation for South Africa, began investigating and assessing the extent to which information about environmental decision-making and impacts was accessible to communities and civil society organisations. While we anticipated some difficulty in obtaining certain types of environmental information, we could not have predicted the astonishing results of this project: with a few notable exceptions, both public and private bodies failed to give access to even the most basic environmental information, in violation of their obligations under the Promotion of Access to Information Act, 2000 (PAIA) and the principles of environmental governance set out in the National Environmental Management Act, 1998 (NEMA).

The CER's report *Unlock the doors: How greater transparency by public and private bodies can improve the realisation of environmental rights* is an analysis of 98 PAIA requests and 42 formal requests for information made to 17 public and 35 private bodies. The report also analyses and describes the hundreds of phone calls made and emails sent following up on requests for information, and the matters that eventually ended up in applications to the High Court. This analysis reveals a number of significant problems in accessing environmental information and obstacles to compliance with PAIA by both public and private bodies:

- PAIA has effectively become a tool used by some public bodies to avoid formal and informal feedback to civil society on basic governance, and little thought is given to what information should be publicly and easily available as a matter of course and without any formal requests.
- Officials administering requests for information are unfamiliar with PAIA, and its provisions are poorly used and poorly understood.
- Ignoring PAIA requests and deadlines appears to be the default approach of a number of public and private bodies.
- Internal appeals are not properly considered (and are often ignored) by public bodies and there is no appeal mechanism for private bodies. As a result, even the most basic information is often only accessible by instituting expensive court proceedings.
- With a few exceptions, the approach encountered to giving civil society access to information required for the exercise of their environmental rights can only be described as suspicious and apprehensive.

Both public and private bodies need to give proper consideration to the significant expansion of records made available voluntarily, particularly licences, authorisations and enforceable licence conditions. This will both significantly reduce the administrative burden on these bodies, and will demonstrate a commitment to public accountability and transparency.

In 2012, CER will continue its assessment of civil society access to environmental information, take legal action where required to compel production of records, and continue its engagement with public and private bodies regarding incentives for voluntary disclosure.

TRANSPARENCY AND OPPORTUNITIES FOR EMPOWERMENT

THE CENTRE FOR ENVIRONMENTAL RIGHTS IS A NON-PROFIT LAW CLINIC ESTABLISHED IN OCTOBER 2009 BY EIGHT CIVIL SOCIETY ORGANISATIONS (CSOs) IN SOUTH AFRICA'S ENVIRONMENTAL AND ENVIRONMENTAL JUSTICE SECTOR TO PROVIDE LEGAL AND RELATED SUPPORT TO ENVIRONMENTAL CSOs AND COMMUNITIES. ITS MISSION IS TO ADVANCE ENVIRONMENTAL RIGHTS IN SOUTH AFRICA, AND ITS VISION IS TO FACILITATE CIVIL SOCIETY PARTICIPATION IN ENVIRONMENTAL GOVERNANCE THAT IS STRONGER, MORE STREAMLINED, AND BETTER LEGALLY AND SCIENTIFICALLY EQUIPPED.

Access to information and civil society participation in environmental governance are fundamental precepts of environmental management; they are also an essential component of administratively fair decision-making about the environment, held in public trust for the people of South Africa.

The extent of the failure by those in charge of decisions about environmental impacts to give effect to these principles, as evidenced in this project, astonished even those of us who work in the field. While there are some unexpected exceptions, most public and private bodies that hold environmental information not only fail to facilitate, but actively avoid or delay giving civil society access to information. These failures constitute violations of both PAIA, designed to give effect to Constitutional rights, as well as the environmental management principles in NEMA.

What is clear from this report is that many public bodies are not prioritising their obligations to provide access to information, and that there are inadequate structures, training and incentives in place to achieve compliance with these obligations. Public bodies are also not using tools in PAIA to ease the administrative burden of providing access to information. There is also no enforcement of these obligations through support institutions like the South African Human Rights Commission (SAHRC), placing a significant burden on civil society to exercise remedies through expensive legal action.

Private bodies and parastatals that have more administrative capacity tend to use PAIA to resist disclosure, indicating a belief that greater transparency poses an unacceptable risk to these bodies and their shareholders. In some instances, private bodies appear to be aided by public bodies in concealing basic information like licence conditions from the public.

This culture of avoidance, delay and non-compliance with PAIA is fundamentally and significantly hampering the realisation of environmental rights as guaranteed in s.24 of the Constitution. Moreover, PAIA is increasingly used to exclude civil society from basic feedback on governance and information that should be freely available.

In view of limited government capacity for record-keeping, disclosure and compliance monitoring, coupled with unprecedented pressure on natural resources and vulnerable communities that rely on those resources, this report recommends a far greater consideration of and commitment to voluntary disclosure of information about environmental governance and regulation by public bodies, and increased obligations and incentives for private bodies to disclose basic information about environmental management to the public.



Melissa Fourie
Executive Director

THIS CULTURE OF AVOIDANCE, DELAY AND NON-COMPLIANCE WITH PAIA IS FUNDAMENTALLY AND SIGNIFICANTLY HAMPERING THE REALISATION OF ENVIRONMENTAL RIGHTS AS GUARANTEED IN S.24 OF THE CONSTITUTION. MOREOVER, PAIA IS INCREASINGLY USED TO EXCLUDE CIVIL SOCIETY FROM BASIC FEEDBACK ON GOVERNANCE AND INFORMATION THAT SHOULD BE FREELY AVAILABLE.

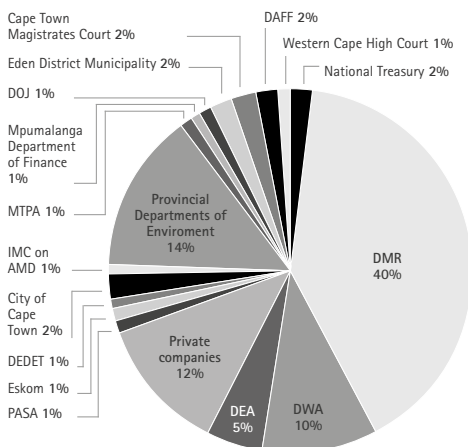
OVERVIEW OF CER'S PROJECT: TRANSPARENCY AND ACCOUNTABILITY IN ENVIRONMENTAL GOVERNANCE

CER's work on access to environmental information has, to a greater degree than we had anticipated, become a cornerstone of our programme work. Without access to basic records held by authorities and private companies, CER's work on supporting communities and CSOs to exercise their environmental rights, as well as national advocacy aimed at promoting environmental rights, simply cannot take place.

In 2010–2011, with the support of the Open Society Foundation of South Africa, CER implemented a project entitled Transparency and Accountability in Environmental Governance. The project included a series of activities aimed at assessing the extent to which civil society can access environmental information from regulators and private entities that would enable them to hold these institutions to account for impacts on the environment.

From July 2010 to early 2012, CER submitted 104 requests for information under PAIA (see figure 1) and 42 formal requests to disclose information voluntarily (not using PAIA) to 17 public and 35 private bodies.

Figure 1: Distribution of PAIA requests submitted by CER from July 2010 to January 2012

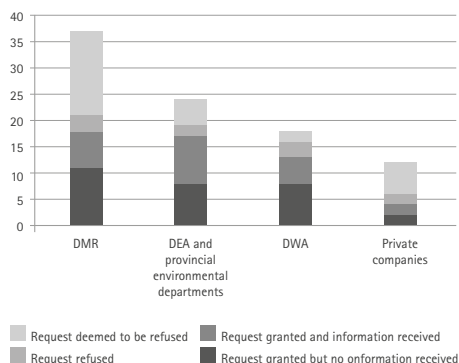


Many of these requests were submitted in support of CER's ongoing case work representing communities and CSOs in exercising their environmental rights (many of which currently relate to the mining sector, which has exceptionally poor standards of access to information). CER also requested key, strategic environmental information to improve civil society understanding of and engagement with environmental decision-making.

During the course of the project, CER submitted 21 internal appeals to challenge refusals and deemed refusals of access to information, and launched two High Court applications under PAIA to compel access to information. CER also reported two officials to the Public Protector for their failure to comply with PAIA.

In the course of submitting over 100 requests for information, CER encountered reluctance, resistance and suspicion from both public and private bodies. We were frequently interrogated about our and our clients' motives, use and need for the information. We were told – by private and public bodies – that key documents like copies of licences were confidential commercial documents not appropriate for public disclosure.

Figure 2: Results of PAIA requests submitted by CER from July 2010 to January 2012



FINDINGS: PUBLIC BODIES AND ACCESS TO INFORMATION ON ENVIRONMENTAL GOVERNANCE

DEPARTMENT OF WATER AFFAIRS

Overview of requests

Over 18 months, CER submitted 11 requests to DWA for copies of water use licences, correspondence and directives in specific cases, as well as public interest documents like organisational organograms and strategy documents. CER's experiences with DWA varied greatly. Overall, our interactions strongly suggest that it has failed to take the necessary steps to comply with PAIA.

Key problems

Failure to appoint Deputy Information Officers

In CER's experience, nearly all requests for information under PAIA are received, processed and decided on by a legal officer based in the Legal Services Unit in DWA's Pretoria office. No Deputy Information Officers have been appointed, as required by PAIA, and the legal officer has expressed the view that she is tasked with processing requests without the mandate or powers to do so effectively.

Lack of training and understanding of PAIA requirements

DWA officials have repeatedly demonstrated a worrying lack of understanding of the general nature and purpose of PAIA and of DWA's obligations under PAIA. This is likely connected to DWA's failure to appoint (and train) Deputy Information Officers.

Refusal to comply with specific provisions of PAIA, and poor document management

The legal officer currently responsible for PAIA requests to DWA refuses to declare under oath that records requested do not exist, as required by s.23(2) of PAIA. On a number of occasions, it has been clear that the official processing the requests simply has no knowledge of what information DWA holds and where these records are

located, which means that no sensible enquiries can be made to locate records. Requests for access to information are usually granted without the decision-maker having had access to the information or verifying that it exists.

While CER has good relationships with DWA officials and we have found them, for the most part, responsive and willing to assist, they are unfamiliar with PAIA's provisions, and reluctant to accept advice.

A glimpse:

Two PAIA requests to the DWA

In August 2010, CER requested various documents relating to an application for a water use licence. After some delay (and threat of an appeal), officials from the regional office sent a file of records that included documents not requested, and came under cover of a letter advising us that the contents were confidential and for the use of CER only. We advised the officials that this instruction was not competent under PAIA, and that we intended to make the information public. The official became agitated and argued that we should have told him why we wanted the information. It was clear from these interactions that he had no knowledge of PAIA prior to receipt of our request.

In December 2011, in response to a request made to the national office of DWA, we were refused the information on the basis that DWA had no obligation to provide records produced by a third party, even if DWA was in possession of the record (and in fact the record was produced for the purpose of submission to DWA). This is not a legitimate ground for refusal under PAIA and again demonstrates an unfamiliarity with the provisions of PAIA.

DEPARTMENT OF ENVIRONMENTAL AFFAIRS

Overview of requests

Compared with the number of requests submitted to other departments, CER has submitted relatively few information requests to DEA – only 8 since July 2010. Generally speaking, DEA makes far more information available voluntarily, or on request without a PAIA application, than other national departments.

Importantly, whereas a PAIA application was necessary every time we wanted to access a copy of a licence or environmental management plan or programme from the DMR, equivalent documents under NEMA are generally accessible without such application.

Most environmental authorisations under NEMA include a requirement that a copy of the authorisation is kept where the activity will be undertaken. Also, the holder of the authorisation must notify all I&APs of a decision taken on an authorisation application, and provide a copy of the authorisation on request. In our experience, environmental assessment practitioners automatically provide a copy of the authorisation with the notice, and provide copies to any requesting parties, including those not registered as I&APs. As a result, CER clients often already had copies of the authorisation and the EIA in their possession, or these were easily obtained without a PAIA request.

Key problems

Delay caused by unnecessary notice to third parties

In respect of almost every request submitted to DEA, a notice was issued to the third party to invite objections to the request. While s.47 of PAIA requires notices to third parties where the record might contain mandatorily protected information pertaining to that third party, this requirement was arguably not met in all cases. Where a third party notice is not required by PAIA, issuing one causes an unnecessary delay in access to information.

Inconsistent and incorrect approach to counting days

DEA officials tasked with receiving and processing PAIA requests only begin counting days when they receive the PAIA request. More particularly, in one instance, the official was on leave and only began counting the 30 days for processing the request on her return. This not only creates unjustified delays, but results in confusion as to when an appeal can be submitted.

Inconsistency and the role of individual officials

The likelihood of a PAIA request being acknowledged and processed within the legislated 30 day timeframe depends wholly on the individual processing the request. While there are highly competent officials who process requests rapidly and respond to correspondence, there are also officials who simply fail to respond timeously or at all.



DEPARTMENT OF MINERAL RESOURCES

Overview of requests

From July 2010 to early 2012, CER submitted 41 PAIA requests to DMR, mostly for information relating to CER's cases and clients. CER also requested strategically important information held by DMR, such as copies of all delegations made by the Minister of Mineral Resources and Regional Managers to make particular decisions under the MPRDA.

DMR's compliance with PAIA was consistently poor, and seemed to deteriorate during the course of the project. Overall, DMR officials demonstrated both an inability and reluctance to comply with PAIA, and appeared to be concerned with protecting the proprietary and financial interests of mining companies far beyond the ambit of PAIA and the MPRDA, to the exclusion of the interests of communities and CSOs.

In addition to failing to process requests for information, DMR makes only a very limited range of information available voluntarily, and limits access to information without any statutory authority for doing so.

A glimpse: A culture of secrecy in DMR

In October 2010, CER submitted two requests for information about, amongst others, certain inter-governmental hearings held in two mining applications in the Western Cape. In both cases, we received standard letters of partial grant in February 2011. After repeated attempts to contact the Western Cape regional office as instructed, a CER legal intern visited the Western Cape office to collect the documents to which access had been granted.


After waiting for over an hour while the matter was discussed, an official, who would only identify himself by his first name, advised her that the documents were of a "sensitive nature" and could not be released – despite the letter of grant from the DMR national office. CER has still not been given the records (although we did find out the official's surname).

Key problems

Outdated PAIA manual

DMR's PAIA manual dates from 2009 and the contact details contained in this manual are outdated; for many months during 2011, DMR's website was under construction, with no contact information available online.

OVERALL, DMR OFFICIALS DEMONSTRATED BOTH AN INABILITY AND RELUCTANCE TO COMPLY WITH PAIA, AND APPEARED TO BE CONCERNED WITH PROTECTING THE PROPRIETARY AND FINANCIAL INTERESTS OF MINING COMPANIES FAR BEYOND THE AMBIT OF PAIA AND THE MPRDA, TO THE EXCLUSION OF THE INTERESTS OF COMMUNITIES AND CSOs.



During the course of the project, DMR advised CER that a new PAIA manual had been drafted and was awaiting approval. While not required by PAIA, it would have been extremely useful for DMR to notify the public of its intention to update the manual and possibly requested input. It is not clear when the new manual will be published.

Inadequate communication from DMR

Of the 41 requests sent to DMR, CER received a response confirming receipt in only 7 instances. For each request, CER has been forced to make repeated enquiries as to the status of the request. We have received no response to telephone messages or emails on over 60 occasions.

Without exception, DMR has failed to respond to any requests for information within the legislated 30 day period. Despite this, DMR has never asked for an extension of the 30 day time period as it is entitled to do in terms of s.26 of PAIA.

No communication between the national and regional offices of the DMR

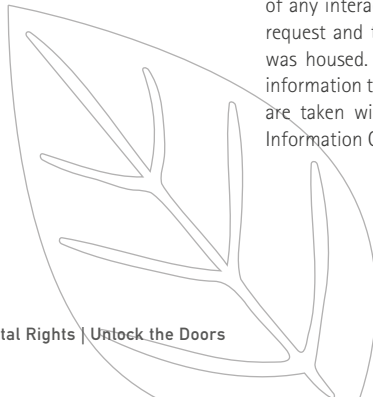
DMR has a national office in Pretoria and 12 regional offices across the country. The Information Officer is the Director-General based in Pretoria, and Deputy Information Officers have been appointed and identified in DMR's PAIA manual – all based in Pretoria. Despite the fact that most records sought about mining operations are located in regional offices, the absence of Deputy Information Officers in the regional offices means that regional offices – where relevant documents are generally held – have no competence to consider and decide PAIA requests.

A glimpse: results of requests for delegations under the MPRDA from DMR's national and regional offices

To test the various paths a PAIA request might take once submitted to DMR, we submitted requests for delegations made at national and regional level to the information officer and deputy information officers in the national office, and to regional managers of the DMR's regional offices.

- CER was frequently asked to state its intentions in making the requests, despite this not being required under PAIA and despite the innocuous nature of the requests.
- Of the 9 requests submitted for delegation information, CER eventually received the requested delegations in 4 cases; in 3 cases, our requests were deemed to be refused (despite numerous follow-ups); and 2 requests were refused on the ground that our requests would require a substantial and unreasonable diversion of resources (s.45(b) of PAIA).
- In the Free State, CER received 3 separate decision letters in response to our request for delegations by the Regional Manager. The first decision letter was signed by the Regional Manager and indicated that no delegations had been made. The second decision letter, received a month later, was a standard DMR decision letter granting partial access to the information requested signed by the Deputy Information Officer in Pretoria. The third decision letter, received another month later, was signed by the Acting Regional Manager and enclosed a summary of delegations made by the Minister.

In almost every instance in which access to information was (partially) granted, this was done without evidence of any interaction between the official considering the request and the regional office where the information was housed. The failure to communicate requests for information to the regional offices reveals that decisions are taken without the Information Officer or Deputy Information Officers having had sight of the record.



Despite the standard letter of partial grant stating that CER would be contacted by the regional office, not a single partial grant letter was forwarded by the national office to the regional office holding the information. It was left to the requestor to contact the regional office, forward the request and the proof of payment of the request fee, and to follow up on a regular basis to ensure delivery of the granted information. This is an undue burden to place on requestors.

This break-down in communication between the national and regional offices hampers the delivery of information, even when requests for information are granted. This is clearly reflected in the comparison of numbers of requests granted and information delivered reflected in Figure 2 on page 4.

Inappropriate use of generic partial grant/refusal letter

On all CER's requests for information for which responses have been received, the response has taken the form of either a standard letter granting partial access to information, but excluding prospecting and mine works programmes and information of a confidential, financial nature, or a standard letter of refusal.

The standard partial grant letter does not comply with PAIA, quite clearly indicates that the relevant documents were not considered when the decision was made, and creates a number of practical difficulties in relation to provision of the documents to which access *has* been granted. Since, more often than not, no documents are provided pursuant to this generic partial grant letter, it is impossible for a requestor to assess whether access has, in fact, been granted.

To date, only 3 requests for information have been refused on a ground listed in Chapter 4 of PAIA (the remaining 16 refusals were all deemed refusals). Each of these 3 requests was refused on the basis that delivering the information would constitute an unreasonable diversion of the State's resources (s.45(b)), despite the requests being, for example, for a single copy of a report. The irrelevance of the ground of refusal to the request submitted suggests that the decision-maker has failed to apply his or her mind to the request and is using a standard refusal letter.

Burden on requestors

Obtaining information from DMR through PAIA is a resource and time-intensive process. On 15 separate occasions, CER had to resend requests for information. For the 41 PAIA requests submitted to DMR, CER has recorded making 183 enquiries (and not all enquiries were recorded). That means that, in respect of each request, CER staff phoned or emailed DMR at least 4 times. This does not include the time spent responding to DMR's correspondence. This places a significant and unnecessary burden on requestors.

Power of individuals to hamper access to information

The power of individuals within DMR radically to undermine the right to access to information is very problematic. The majority of the instances where access was granted – but information was never received – were due to the failure of two DMR officials to provide the granted information.

A glimpse: All roads lead to Mr D

In March 2011, CER requested a copy of the EMPR of a mining company that had abandoned a coal mine without doing any rehabilitation.

Mr D is responsible for PAIA requests in one of DMR's busiest regional offices. Mr D failed to respond to any of our emails or telephone calls. Without exception, he has failed to make decisions or transfer any of CER's PAIA requests submitted directly to him or to deliver any information to which access had already been granted by the national office. In fact, Mr D rarely answers his telephone.

After both our request for information and appeal had been ignored, we investigated other avenues to access the information. We contacted officials in both the national and regional offices. Every official indicated that the only way we could access the information was via Mr D.

We phoned Mr D every day for a week. To date, Mr D has not answered or returned these calls and we still do not have the requested information.

CER eventually reported Mr D to the Public Protector.

Failure to deliver documents

DMR has granted CER partial access to information in 14 instances and has delivered the requested information in only 7 instances. In those 7 instances, we received only part of the information requested. In one instance, we were given a new decision letter by a regional official further limiting our rights of access.

The failure to deliver records granted amounts to an effective denial of access to information, without justification in terms of PAIA. It is also procedurally problematic, since granting access to information – but failing to provide it – is not appealable under PAIA, leaving no option but to proceed to court to compel delivery.

A glimpse: Failure to provide records granted

CER submitted PAIA requests to DMR's national office in February 2011 requesting information about mines causing acid mine drainage decant. In March 2011, we received DMR's standard partial grant letter from the information officer. That letter directed us to obtain the documents from the Gauteng regional office. After months of ignored correspondence and phone calls to the Gauteng office, we reported the contact official to the Public Protector. The Public Protector indicated, in late November 2011, that they were investigating the complaint.

In December 2011, we received new decision letters from the regional manager, advising us that all the information requested was refused, except for the environmental management programmes (EMPRs). The letter stated, however, that these were substantial documents that the office lacked the resources to copy. As a result, we could have copies of the documents only if we collected and copied them ourselves. If, however, the documents were damaged or lost in CER's possession, it would be liable for a fine of not less than R500 000. This fine has no basis in PAIA, and is clearly intended to intimidate CER into abandoning its requests.

Failure to consider appeals

In addition to the problem of failing to deliver documents where at least partial access has been granted, CER has not received a single decision in respect of any of the 17 appeals submitted between July 2010 and January 2012. DMR has informed CER that all appeals are considered by DMR's Legal Services before being sent to the information officer for signature.

An unacceptable situation has been allowed to arise in DMR whereby requests for information are ignored, and appeals of these deemed refusals are, in turn, ignored, leaving the requester with no option but to approach the court for the requested information.

DMR plans for improvement

CER has raised a number of these problems with DMR's Chief Director: Legal Services. In October 2011, we were advised that DMR intends publishing an updated PAIA manual which sets out a new procedure for receiving and processing information requests. To limit and manage the high staff turn-over that results in untrained officials processing requests, all requests will be received and processed by Legal Services. Legal Services will liaise with the relevant regional authorities, make a decision on request, and ensure provision of the information to the requestor.

Although this proposal seeks to address the poor and inconsistent responses to requests and communication breakdowns between national and regional offices, it does not address all the problems the DMR faces, highlighted in this report. In addition, and in light of Legal Services' failure to process any of CER's appeals to date, there are grave concerns that capacity constraints will make the new procedure equally ineffective.

At the date of publication of this report, the proposed new manual was still unpublished.

PROVINCIAL AND MUNICIPAL DEPARTMENTS

Overview of requests

Generally speaking, provincial and municipal public bodies performed far better than their national counterparts, and had a better understanding of the tools available to them under PAIA:

- Of the 11 requests submitted to provincial government, CER received the information in 7 instances – a much better success rate than our requests to other public bodies. We have submitted 4 requests to municipalities and have received an answer in 2 instances.
- We received 3 requests for an extension of the 30 day period in which to deal with a request (s.26 of PAIA) from the provincial departments.
- The provincial environment departments have designated information officers whom we were able to identify with relative ease, either through consulting the PAIA manual (where manuals existed) or contacting the respective departments.

However, of the 9 provincial environment departments to which we submitted requests, only 3 had PAIA manuals. Only one of the municipal bodies had a PAIA manual. The SAHRC's Annual Report for 2010/2011 notes that only 29 out of the 282 municipal bodies had produced PAIA manuals, and 41 out of 104 provincial departments had complied with this obligation.

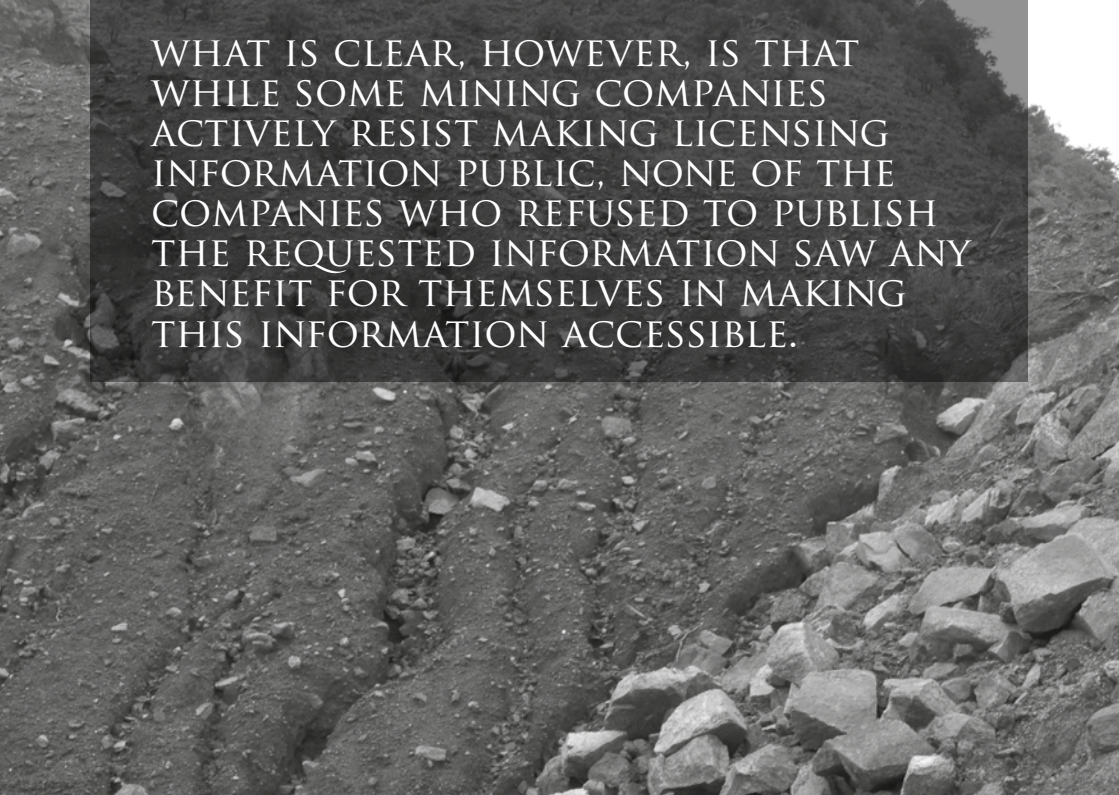
GENERALLY SPEAKING,
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PARASTATALS AND OTHER PUBLIC BODIES

Although we submitted only one request to each of the Petroleum Agency of South Africa (PASA) and Eskom, our experiences with these parastatals highlight an interesting problem in relation to PAIA implementation. Both PASA and Eskom denied access to requested information on the ground of s.44 of PAIA, which permits regulators to deny access to opinions, advice or reports used for the formulation of policy.

In both the applications submitted to PASA and Eskom, CER requested information of an uncontroversial nature, the disclosure of which would be of beneficial to the public. Therefore, the decision of these bodies to refuse the information appears to be a merely technical application of PAIA. The decision-makers considered whether such information could be denied (as opposed to whether it should be released) and withheld it without clear reasons.



WHAT IS CLEAR, HOWEVER, IS THAT WHILE SOME MINING COMPANIES ACTIVELY RESIST MAKING LICENSING INFORMATION PUBLIC, NONE OF THE COMPANIES WHO REFUSED TO PUBLISH THE REQUESTED INFORMATION SAW ANY BENEFIT FOR THEMSELVES IN MAKING THIS INFORMATION ACCESSIBLE.

FINDINGS: PRIVATE BODIES AND ACCESS TO INFORMATION ON ENVIRONMENTAL MANAGEMENT

FORMAL REQUESTS FOR VOLUNTARY DISCLOSURE

During 2011, in collaboration with the Open Democracy Advice Centre, CER sent formal requests (not relying on PAIA) to 30 of the largest mining companies in South Africa, most of which are listed on at least the Johannesburg Securities Exchange, requesting them to make all their environmental licences available on their websites. Of the 30 companies, two agreed to do so, Sentula Limited and Exxaro Resources Limited. While this is a commendable commitment, to date only Sentula Limited has actually published any of its environmental authorisations on its website.

Of the remaining companies, 18 failed to respond to the request, despite follow-up correspondence, and the remaining 10 refused to publish the information.

Some of the reasons provided by those who refused our request included:

- concerns about the administrative, financial and logistical burden of uploading records on websites;
- the potential harm to commercial interests and competitiveness;
- that the information should be obtained from regulators;
- that the information pertaining to existing prospecting and mining rights is confidential; and
- that the information is released to shareholders and other parties in a "controlled fashion" to limit misinterpretation or abuse.

Copies of correspondence from mining companies, and a list of mining companies who failed to respond to requests, can be downloaded at www.cer.org.za.

The overall picture is one of a mining industry unwilling to make available – freely, voluntarily and publicly – the basic rules of environmental management applicable to their operations. While some companies raised cost

concerns, the costs of uploading documents on a website should be negligible to companies of this size; it is also not clear why this would be affordable for two companies and not others. Giving electronic access to licences should actually reduce costs for companies who will, in most cases, no longer have to make photocopies for requestors.

What is clear, however, is that while some mining companies actively resist making licensing information public, none of the companies who refused to publish the requested information saw any benefit for themselves in making this information accessible. This suggests a belief that secrecy serves the interests of mining companies better than transparency.

This attitude must also be understood in the context of poor compliance with and enforcement of environmental laws. In the absence of regular compliance monitoring by authorities, access to information makes it easier for civil society to detect existing and ongoing violations of regulations. This creates a clear incentive for private bodies to avoid disclosure of those requirements to the public.

The outcomes of this project suggest a need for greater engagement with the mining sector around transparency and accountability through access to information.



PAIA REQUESTS TO PRIVATE BODIES

CER has submitted 11 PAIA requests to private companies since July 2010. In 6 instances, we have received no decision; 3 requests have been refused; in 2 instances, the information has been granted and provided.

The information requested included copies of mining licences, EMPRs and financial provision information, social and labour plans, copies of water use licences, copies of environmental authorisations, reports, and application forms.

Key problems

Failure to respond to requests, and no appeal

In about 60% of the requests to private companies, no decision was made on requests, resulting in a deemed refusal under PAIA. The lack of an internal appeal mechanism applicable to private companies means that refusals (including deemed refusals through lack of response) can only be challenged in court. This option is simply beyond the means of many individuals and CSOs. In effect, private bodies are able to create their own exit strategy from their PAIA obligations by ignoring requests.

Referral back to public bodies

In response to PAIA requests, private bodies often referred us back to the relevant public body, despite the private body quite clearly being in possession of the records. In a number of instances, private bodies indicated that they thought it inappropriate that their PAIA obligations

should be similar to that of the State, when the State also held copies of those records.

In relation to mining matters, CER and its clients were repeatedly advised that DMR regional offices had instructed the mining company in question *not* to release the information, and that we should approach DMR with the request instead. At a national level, the DMR has been explicit that advising mining companies to withhold information is against its policies. This is another example of poor practices by the regions and a failure in communication between DMR national and regional offices.

On the other hand, we have found repeated attempts by national departments to avoid legitimate PAIA requests for access to documents prepared by private bodies and submitted to and held by national departments, by referring requestors to the private bodies. In one instance, a DWA official advised CER that it was "*like asking [her] for documents that belonged to Kentucky Fried Chicken – those documents should be requested from Kentucky Fried Chicken!*" And so requestors are sent from pillar to post, in violation of PAIA.

Mining information is private information

Both mining companies and DMR took the view that information about mining operations is confidential, simply by virtue of it relating to the operations of a mine. This notion of confidentiality is frequently extended to mining licences and EMPRs.

DMR also seems to be receptive to the notion peddled by mining companies that EMPRs, in particular, contain proprietary information because of the consulting fees incurred by the mining company in preparing them. However, this same argument is rarely proffered in the context of an EMP under NEMA – a similar document prepared by the same consulting firms, but with licence conditions making its disclosure compulsory.

A glimpse: Commisiekraal Coal (Pty) Ltd

In response to a request for copies of EMPs approved by the DMR, Commisiekraal Coal (Pty) Ltd stated the following: *"We have been advised from a legal perspective that the [EMP] is a privileged document approved by [DMR]... We are not at liberty to make the decision whether such document may be disclosed to any person, since the prospecting right holders are in a contractual relationship with the Minister of Mineral Resources and as such, we are not entitled to decide unilaterally whether the [EMP] may be disclosed at all."*

This view was adopted although the company was required by statute to have consulted the requestors, as landowners and I&APs, on the very documents that were being withheld on the basis of privilege.

Responding to requests for information by threatening legal action

In at least two instances, private bodies responded to requests for information from CSOs by threatening legal action.

A glimpse: Threat of legal action in response to requests for information

The Bronkhorst and Wilge River Conservancy Association (BWRCA) requested copies of permits and licences under the MPRDA, NEMA and NWA from Malachite Mining Services (Pty) Ltd. Malachite referred the BWRCA to *"the applicable State Department"*. The BWRCA wrote again, highlighting sections of NEMA and PAIA setting out their right to the information. Malachite responded, warning that it was *"obtaining a legal opinion on the content of [BWRCA's] letter"*. Anxious they were about to be sued, the BWRCA approached CER for assistance. (The legal proceedings are described below.)

The Greater Pongola River Catchment Protection Association (GPRCPA) requested copies of prospecting rights and EMPs issued to a group of companies near the headwaters of the Pongola River. The companies refused access and advised that the GPRCPA should approach the DMR for access. The GPRCPA issued a statement to I&APs, raising concerns about the refusal to provide information. In response, the companies sent GPRCPA a letter advising them that their conduct was unlawful and instructing them to refrain from making *"any similar speculative comments"*.



PROMOTING ACCESS TO INFORMATION THROUGH THE COURTS

CER has launched two applications in the High Court to compel delivery of documents requested under PAIA.

Copies of all the pleadings are available at www.cer.org.za

CASE 1: BWRCA v Malachite Mining Services (Pty) Ltd

The BWRCA requested copies of licences held by Malachite. Malachite failed to respond to the PAIA request. CER sent a letter of demand, giving Malachite a further chance to provide the information, but again received no response. In the absence of a right to appeal, CER instituted proceedings in the High Court for an order that the deemed refusal be overturned and the information be provided to the BWRCA. After filing a notice of intention to oppose the application, Malachite eventually agreed to provide copies of the documents they held and to pay BWRCA's costs.

CASE 2: CER v DMR

CER submitted three requests to DMR for information relating to financial provision for rehabilitation under s.42 of the MPRDA and the exercise of the Minister's powers to order an independent audit of a company's financial provision. When no response was received within the statutory timeframe – a deemed refusal – we submitted appeals. The appeals, too, were ignored and deemed to have been refused. DMR failed to respond to a letter of demand and CER instituted proceedings in the High Court for an order that the deemed refusal be overturned and the information provided. The DMR eventually filed a notice of intention to oppose in January 2012, but did not file answering papers within the required period. The case is ongoing.

The importance of the case: This case highlights the need for an appeal mechanism for PAIA applications to private companies – ideally to an Information Commissioner – to force the company to comply without having to incur unnecessary legal costs.

The importance of the case: To date, CER has not succeeded in obtaining a single piece of information relating to financial provisions for rehabilitation through PAIA, and we have been told by both mining companies and the DMR that this is confidential financial information. This is information that goes to the heart of the ability of a mining company to rehabilitate, and, accordingly, to the right to a healthy environment.

This case also turns on one of our biggest procedural challenges – the failure to process requests, followed by the failure to process appeals. There is a need for clear precedent that public bodies' non-compliance with PAIA is unacceptable.



THE ROLE OF SUPPORTING INSTITUTIONS: THE SAHRC AND THE PUBLIC PROTECTOR

In its project, CER explored the roles of the state institutions established under the Constitution to support constitutional democracy, namely the SAHRC and the Public Protector to support communities and CSOs seeking access to information about environmental management and governance.

While each of these institutions plays an important role in the administration and implementation of PAIA, neither is ideally placed or resourced to protect and promote the right to information rigorously and to hold departments and individuals to account for failing to comply with PAIA. Also, neither has the necessary powers to hold private bodies to account. This again highlights the need for an appropriately-resourced Information Commissioner to ensure greater compliance.

The SAHRC

In terms of s.32 of PAIA, public bodies must submit an annual report to the SAHRC. Through these reports, the SAHRC has gathered valuable information on compliance with PAIA. Its findings paint a bleak picture of the state of compliance by key departments holding environmental information, and the SAHRC lacks the necessary powers to compel better compliance. In the SAHRC's 2010/2011 Annual Report, DWA was listed amongst 25 (of 42) national departments that had failed to submit reports to it in terms of s.32 of PAIA – some 60% of national departments.

Nevertheless, the SAHRC plays an important role, unearthing and investigating non-compliance and providing essential support to those requesting information from public bodies.

We analysed SAHRC data in respect of each of the DMR, DEA and DWA for the years 2006-2011.

Department of Mineral Resources

DMR failed to submit a s.32 report to the SAHRC for all but one of the years reviewed by CER, namely the financial year 2010/11. For that year, the DMR reported that it had received 607 requests for information, 14 of which it had granted in full and 593 (97%) of which it had refused in full. DMR reported only 4 appeals (despite refusing 593 requests), only one of which was successful.

Although CER's experience creates some suspicion about the reliability of these figures, the very high number of reported requests highlights how little information DMR makes available voluntarily – necessitating many more PAIA requests. The high percentage of refusals indicates a significant lack of transparency.

Department of Water Affairs

DWA has failed to submit a report to the SAHRC since the 2005/6 financial year. As a result, the SAHRC has no current information about the implementation of PAIA by DWA. In the 2005/6 financial year, DWA reported receiving 107 requests for information, and granting every request in full.

Department of Environmental Affairs

Of the 3 departments, DEA has been the most consistent in submitting reports over the past 5 years (although there are information gaps in 2 years). DEA's figures reflect a significant decrease in the number of requests between the years 2007 and 2010, at least some of which may be ascribed to a far greater voluntary disclosure programme, as well as conditions in licences issued by the DEA requiring the licence-holder to disclose that document. The DEA appears to be granting access to information in a smaller percentage of the requests received each year – a worrying trend.

Table 1: PAIA requests received and granted by DEA in 2006–2010 as reported to SAHRC

	2006	2007	2008	2009	2010
Number of requests for access received in terms of s.32(a)	82	100	—	—	30
Number of requests for access granted in full in terms of s.32(b)	71	53	—	—	15
	86,6%	53%			50%

The Public Protector

In its 2010/11 Annual Report, the SAHRC noted that DEA was one of only three departments that had granted access to information in the public interest in terms of s.46 of PAIA, which requires that information must be disclosed where it would reveal evidence of a substantial contravention of the law or an imminent and serious public safety or environmental risk.

Earlier in this report, we highlighted the ability of individual officials radically to hamper access to information under PAIA. CER has submitted two complaints to the Public Protector about officials – both employed by DMR – and we are aware that one of the matters is under investigation.

While this is undoubtedly an important role, the poor conduct of individuals must be considered in light of the overall capacity and willingness of a public body to comply with PAIA, and the Public Protector is not well-placed to undertake such an investigation. In addition, reporting individuals to the Public Protector carries the high risk of irredeemably damaging any relationship the requestor has with the official, making access to information from that official much more difficult.

CONCLUSIONS ABOUT THE CURRENT STATUS AND IMPLEMENTATION OF PAIA

Using PAIA as a shield from interaction and feedback

In both the private and public sector, we have encountered repeated instances of bodies using PAIA to resist and slow down access to information.

Although PAIA was promulgated to give effect to the Constitutional right to access to information, it has been effectively interpreted to create two categories of information: one, information listed in the departmental PAIA manuals as being automatically available; and two, information subject to a request for information under PAIA. The view commonly held is that all information that does not fall in the first category falls into the second: both public and private bodies frequently indicate that they will not release information without a PAIA request, even when there is no legal basis on which to withhold the information.

This approach builds a barrier between public servants, private companies and civil society, which in no way aids better environmental governance and management.

A glimpse: All engagement with DMR filtered through PAIA

In June 2011, on behalf of a community, CER lodged a complaint with DMR about the illegal operations of a mining company. As a result, officials conducted an inspection and issued instructions to the company. CER wrote to DMR asking about the outcome of the inspection. DMR refused to answer enquiries, instructing CER to submit a PAIA request for the information (despite the fact that the information requested was not in the form of a record).

In October 2011, CER requested a meeting with DMR (and a number of other government departments) to introduce and provide information about a series of community workshops on environmental rights in Limpopo. The day before the scheduled meeting, a DMR official in the Limpopo regional office advised there was no need to meet with DMR because they would not answer any of CER's questions; irrespective of what we asked, DMR would ask CER to submit a PAIA request.



THIS APPROACH
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BETWEEN PUBLIC
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CIVIL SOCIETY,
WHICH IN NO
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GOVERNANCE AND
MANAGEMENT.

The communication burden

As the number of PAIA requests submitted by CER to private and public bodies increased, it became apparent that obtaining information about requests for information was in itself a monumental task. As a result, CER has maintained a detailed database of every conversation, telephone call and email sent in respect of PAIA requests. This communication log (available at www.cer.org.za) is testament to the significant burden on requestors and the extent to which accessing information is hampered by PAIA.

In addition to poor communication, the attitudes of unhelpful and sometimes antagonistic state and company employees – which may also be the result of a lack of prioritisation and resources for compliance with PAIA – cannot but discourage requestors from submitting and following up on PAIA requests.

Making better use of the legislation

Certain important provisions of PAIA were never, in CER's experience, put to use. In part, the failure to use these provisions is related to a lack of training and awareness of the PAIA provisions.

- **"Blacking out" confidential information:** DMR routinely refuses prospecting and mine works programmes on the basis that they contain information of a confidential commercial nature, the disclosure of which would be likely to cause harm to the commercial or financial interest of a party or would be reasonably expected to prejudice the private body in commercial competition. In their interactions with CER none of the requestees made use of s.28 of PAIA, which requires disclosure of all parts of the record that do not contain confidential information and can be reasonably severed from the confidential information.
- **Extensions:** Very few bodies made use of the extension provisions in s.26 or s.57 of PAIA that allow an information officer an additional 30 days to process a request.
- **Public interest override:** Whereas DEA used the public interest "override" in s.46 or s.70 of PAIA 4 times in 2010 (reported in the SAHRC 2010/2011 Annual Report), the "override" has never been used

by either DMR or DWA, and was never used in respect of any request by CER to private or public bodies.

While the legislation has not been adequately used by public bodies in implementing PAIA, the offences provision in s.90 has also not been sufficiently utilised by either the SAHRC or civil society in enforcing the obligation of public bodies to publish PAIA manuals.

Need for law reform

Certain provisions in PAIA have proved difficult to use, or generate confusion in the processing of PAIA requests. Some would benefit from minor amendment and some require significant change. Proposed amendments should address:

- Clarity on the counting of days
- Greater specificity on the grounds of refusal to limit abuse of discretion
- A lower threshold for mandatory disclosure of environmental risk
- Specific provision for access to information for the purpose of public participation in environmental and other decision-making process, subject to the Promotion of Administrative Justice Act, 2000
- Provision for urgent access to information, where circumstances require
- Provision for a remedy where access is granted, but records are not provided
- Provision for an appeal to an Information Commissioner, particularly in the case of private bodies
- Enforcement mechanisms for failing to submit reports to the SAHRC (for example compelling departments to pay all PAIA revenue to the SAHRC)


Benefits of promoting voluntary disclosure by public and private bodies

Because of the way in which PAIA has been implemented and understood by public and private bodies, access to information is no longer the default position out of which small and discrete areas of confidential information are carved. This not only creates a heavy burden on both the State and those who seek information, but also hampers the ability of civil society to assist the

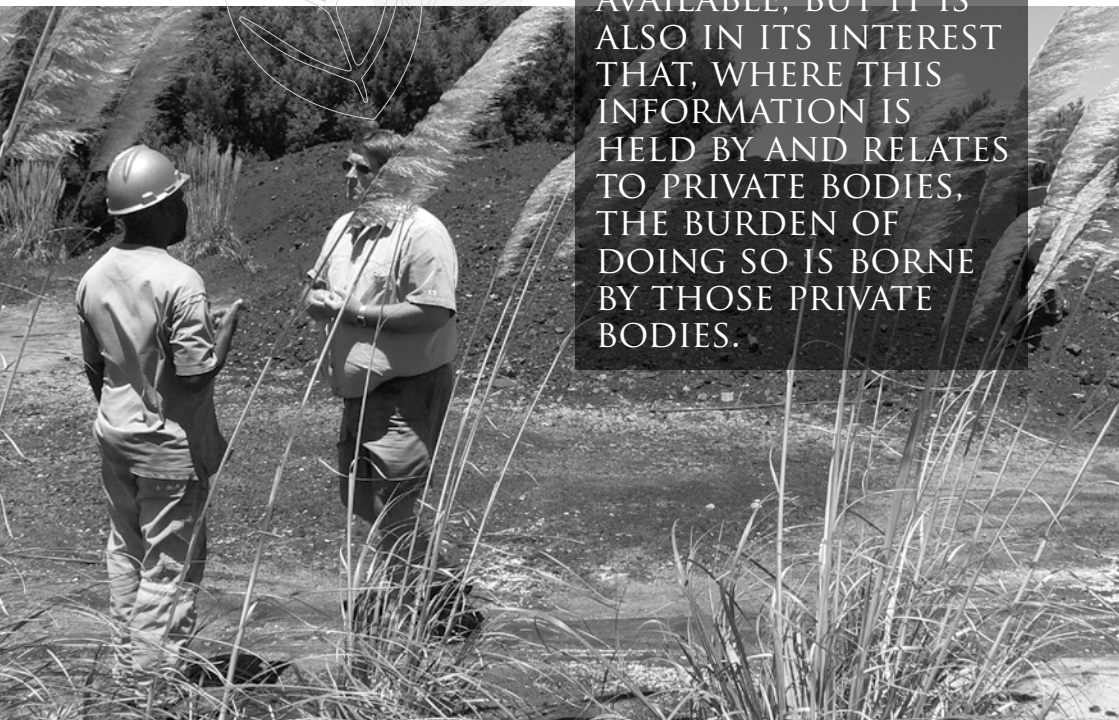
State in monitoring compliance and enforcing environmental laws. It is in the State's interests not only to make information widely, publicly and voluntarily available, but it is also in its interest that, where this information is held by and relates to private bodies, the burden of doing so is borne by those private bodies.

Making information available voluntarily would not only significantly decrease the number of PAIA requests submitted by civil society, but has the potential to increase public trust in and co-operation with decisions about resource use and extraction. Readily available information allows for better public monitoring of compliance, better environmental protection and increased realisation of environmental rights.

It must also be clarified that voluntary disclosure should, as far as reasonably possible, mean access to information without having to make any request – under PAIA or otherwise. In other words, this is information that should be available on private and public body websites, posted on billboards, and be available for inspection at the offices of the bodies and at the site where an activity takes place. Of the information already voluntarily available, the CER's analysis indicates that only parts of it are available on the websites of the DMR, DEA and DWA. Links are often broken, and where information is on the website, it is very difficult to locate.



IT IS IN THE STATE'S INTERESTS NOT ONLY TO MAKE INFORMATION WIDELY, PUBLICLY AND VOLUNTARILY AVAILABLE, BUT IT IS ALSO IN ITS INTEREST THAT, WHERE THIS INFORMATION IS HELD BY AND RELATES TO PRIVATE BODIES, THE BURDEN OF DOING SO IS BORNE BY THOSE PRIVATE BODIES.



RECOMMENDATIONS FOR IMPROVEMENT

On the basis of information collated and experience gained through this project, CER makes the following recommendations. These practical recommendations are designed to ease the flow of information to civil society, as is required by the Constitution, PAIA and environmental legislation; to reduce the administrative burden on public and private bodies; and to improve civil society trust in decision-making about environmental governance and management.

1 Voluntary disclosure:

- Public bodies need to give proper consideration to (and ask for public input on) the significant expansion of records made available voluntarily through s.15 declarations, and through third parties like licence-holders or industry associations. Making disclosure of licences by licence-holders an enforceable licence condition – as is the case with environmental authorisations under NEMA – will significantly reduce the administrative burden on departments like DMR and DWA. It would also eliminate referrals of requests to private bodies back to public bodies, and attempts to avoid disclosure by citing an instruction from a public body not to disclose.
- Private bodies must give proper consideration to the significant expansion of records made available voluntarily, particularly licences. Not only will this reduce the administrative burden on those companies, but demonstrate a commitment to transparency and accountability to the public.

2 Human resources: Public bodies' obligations under PAIA need to be built into their staff organogram and specific obligations included in appointed officials' performance contracts. Generally speaking, we believe that busy departments like DMR and DWA need to appoint at least one dedicated, qualified deputy information officer at a sufficiently senior level, and one full-time PAIA administration officer. Where significant records are held in regional offices, that model must be replicated in the regions. Legal training for these officials is essential.

3 Standard procedures: Proper internal standard operating procedures must be put in place within public bodies (including their regional offices) to comply with PAIA requirements. It is strongly recommended that information officers share best practice and ongoing training with each other to ensure improved performance and consistency amongst different departments (something one would already have expected from DEA and DWA that report to the same Minister).

4 Mitigating staff turnover: Staff appointments, training programmes and internal standard operating procedures must consider the high staff turnover, and ensure back-ups when key staff vacate their positions.

5 More support from SAHRC for public bodies: The SAHRC's available electronic resources are geared towards private bodies and requestors, while the real need for hands-on support and training lies with public bodies, particularly national departments.

In 2012, CER will continue its assessment of civil society access to environmental information, take legal action where required to compel production of records, and continue its engagement with public and private bodies regarding incentives for voluntary disclosure.



ANNEXURES AVAILABLE ON WWW.CER.ORG.ZA

- DMR's standard letters of partial grant and standard refusal
- PAIA manuals of the DWA, the DEA and the DMR
- A register of all PAIA applications
- A communications log for all requests under PAIA
- Pleadings in legal proceedings on access to information
- Media articles

ABBREVIATIONS AND ACRONYMS

CER	Centre for Environmental Rights
CSO	civil society organisations
DEA	Department of Environmental Affairs
DMR	Department of Mineral Resource
DWA	Department of Water Affairs
EIA	environmental impact assessment
EMP	environmental management plan
EMPR	environmental management programme
I&APs	interested and affected parties
MPRDA	Mineral and Petroleum Resources Development Act, 2002
NEMA	National Environmental Management Act, 1998
NWA	National Water Act, 1998
ODAC	Open Democracy Advice Centre
OSF	Open Society Foundation for South Africa
PAIA	Promotion of Access to Information Act, 2000
PASA	Petroleum Agency of South Africa
SAHRC	South African Human Rights Commission

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CONTACT DETAILS

CENTRE FOR ENVIRONMENTAL RIGHTS NPC

8A Sussex Road, Observatory, 7925

Cape Town, South Africa

Tel 021 447 1647

Fax 086 730 9098

Email info@cer.org.za

www.cer.org.za

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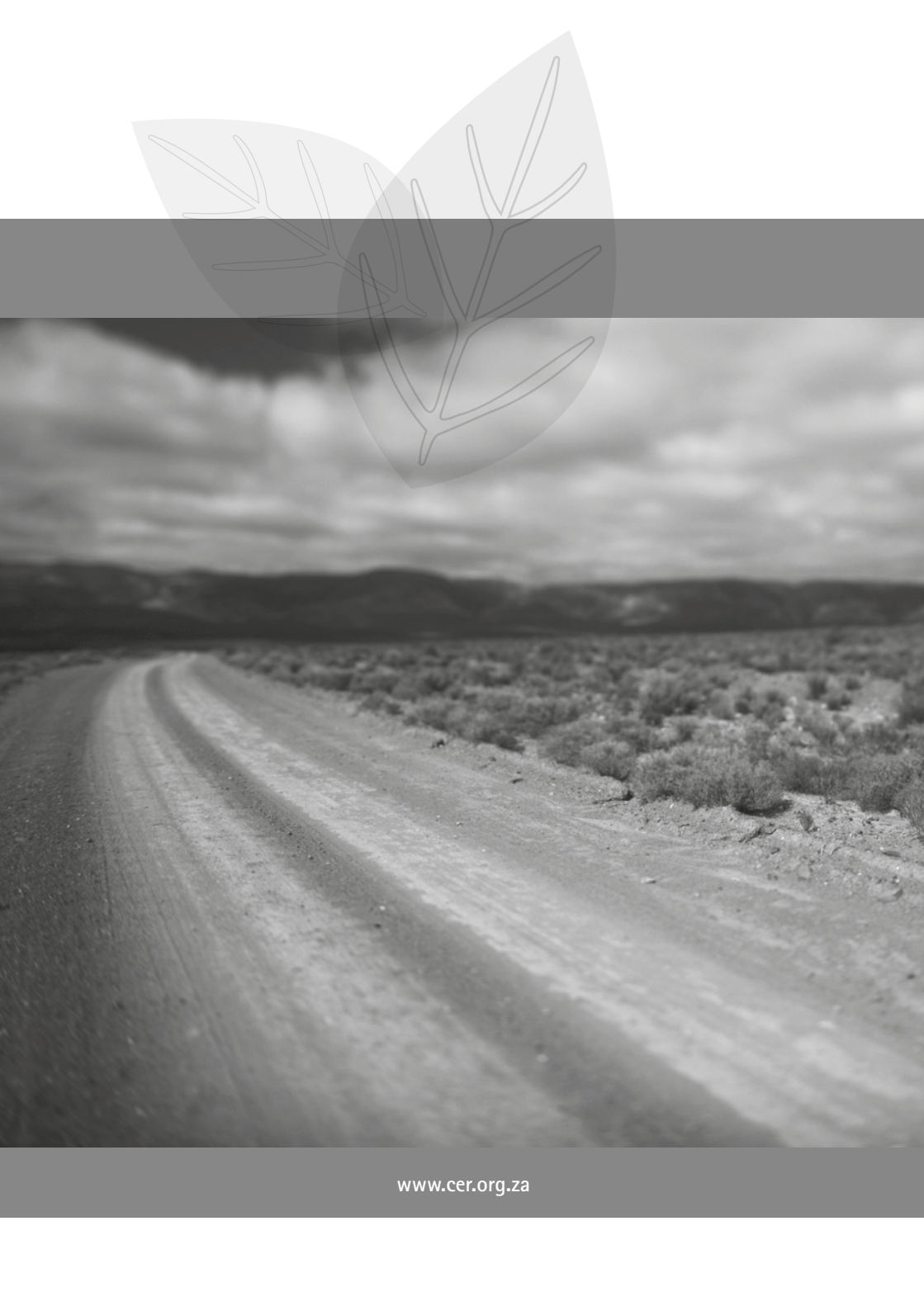
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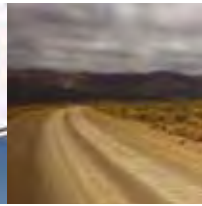
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