

Ms. Kish Candasamay
Acting Head: PAIA
South African Human Rights Commission

11 March 2016

Dear Ms. Candasamay

Thank you for the opportunity to address the Commission as it prepares a report to the Minister in accordance with section 83 of the Promotion of Access to Information Act.

The Public Service Accountability Monitor (PSAM) is a self-funded institute within the School of Journalism and Media Studies at Rhodes University. The PSAM is a founder member of the PAIA CSN and has been utilizing PAIA's provisions routinely since its enactment and has litigated to promote the correct interpretation of its enabling provisions.

We have had the opportunity to consider the Centre for Environmental Rights (CER) submission prepared by Christine Reddell. The PSAM is in respectful agreement with sentiments and recommendations contained within the CER's submission. As regards their observations and recommendations made at paragraphs 9.4 and 9.5 regarding environmental authorizations, approvals, permits and licenses, based on our experiences we would like to further suggest that information relating to the enforcement of environmental law should also be more readily accessible to the public. In this regard:

1. While it is acknowledged that the release of certain case-by-case sensitive records would not always be in the interests of enforcement action, the blanket "sealing off" of information relating to interventions and follow-up action, not only violates stakeholders' rights of access to info, but in fact tends to hamper enforcement. Often enforcers are dependent on stakeholders for obtaining knowledge of violations, and stakeholders need to be up to speed with the status of interventions in order to monitor and gauge their effectiveness, be alert to follow-up incidents, and have incentives to maintain vigilance.
2. It should be noted that the sealing off phenomenon often prevails even where administrative rather than criminal enforcement action is pursued, with the term "sub judice" often being advanced as the reason for a lack of transparency.
3. Enforcement action often relates to holders' non-compliance with terms and conditions of authorisations, permits etc as discussed in para. 9.4 of the CER submission, and it is a contradiction in terms if these documents are publicly available, yet the public cannot readily obtain info related to enforcement of their T's & C's.

4. Experience is that sealing off may be used to cover over the absence of effective intervention, or any intervention at all for that matter, which may itself be the result of a range of factors, from incompetence or laziness at the level of the individual official, to embarrassment at, or a perceived need to hide, sheer organisational incapacity due to work overload and/or short-staffing.
5. The crucial point though is that without systemic transparency, enforcement activities occur behind a veil which shields inadequacies while maintaining the *status quo*, since there is a paucity of compelling information available to the public to put forward in advocating for systemic improvement.

Turning now towards the severability provisions of PAIA, the PSAM wishes to make the following observations and recommendations:

6. Far too many record holders appear unaware or circumvent the peremptory severability provisions, namely section 28 (public bodies) and section 59 (the private bodies) of the Act and in so doing frustrate access to records that would otherwise be capable of being released once protected information is redacted. We would urge the Commission to ensure that future outreach and training on PAIA better emphasize the obligations imposed upon record holders by sections 28 and 59. We have and continue to interact with PAIA users who have little or no means to litigate where they are met with a refusal by the Information Officer and/or relevant authority. Greater adherence to the severability clauses would really promote the objectives of PAIA while respecting the need to withhold portions of records that should remain protected from disclosure.

In an effort to support improved adherence to these severability clauses, we would like to recommend that sections 25(3), 56(3) and 77(5) be amended to specifically require the information officer, private body and relevant authority to provide written assurance when notifying the requester/appellant that they have considered section 28/59 (whichever is applicable) before arriving at a decision to refuse or only partially release records sought. It appears increasingly appropriate to explore disciplinary and criminal action (in accordance with section 90 of PAIA) against record holders where a record is eventually released (say through an internal appeal or litigation) and the subsequently established facts support a conclusion that the severability clause was circumvented.

Yours sincerely

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per:

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