

Freedom of Information: Erosion of the Archive?

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The passing of the Promotion of Access to Information Act (PAIA) in South Africa in 2000 ushered in a new era in accessing government records. Members of the public no longer have to wait for 20 years for government records to become archives in order to gain access to them. PAIA gave the public the right of access to all records irrespective of age except for those exempted under the provisions of the Act. This chapter evaluates the impact that Freedom of Information (FOI) legislation in general and PAIA in particular have had on access policies and practices in South Africa, and examines the extent to which this legislation has been used successfully by historians, journalists and other researchers. While the focus is on South Africa, the chapter further examines the lessons that the rest of sub-Saharan Africa could draw from the implementation and use of PAIA.

Introduction

The passing of the Promotion of Access to Information Act (PAIA) in South Africa in 2000 ushered in a new era in accessing government records. No longer do historians, journalists, researchers and citizens in general have to wait for information in records to be repackaged and to be disclosed for them to gain access to it. They also do not have to wait for records to become archival for them to gain direct access to them. Neither is it sufficient for government to deny them access to information or direct access to records without providing reasons on which the denial is predicated.

This article evaluates the impact of the adoption of PAIA on access policies and practices of national archival agencies in South Africa. It argues that in as much as PAIA has liberalised access to official information, it has nonetheless resulted in a series of challenges for these institutions and for archivists. The challenges are fourfold. Firstly, national archival agencies are expected to comply with the requirements of the legislation. That is, as with other institutions covered by the

prescriptions of PAIA, national archival agencies in South Africa are expected to provide access to information held by them when in receipt of a request for it. Hence, archival agencies have to develop access policies that not only target archival records created by other government bodies but also cover access to their current records. Secondly, citizens through PAIA may seek to gain access to records which have been found to possess archival qualities and are already in the custody of the archival agency but have yet to be added to the archival collection. The archival agencies cannot therefore deny access on the grounds that records are yet to be processed because PAIA presumes all government records to be open for access unless exempted. This includes records which are yet to be processed for adding to an archive collection. Thirdly, national archival agencies may experience growth in the volume of records government departments transfer to their custody. Government departments may try to transfer records which have been appraised as having archival value earlier than appropriate in order to avoid processing PAIA access requests. Where archival agencies also provide record centre services, government departments could also release records judged to have archival value early in order to avoid the trouble of recalling them when processing requests for access. Lastly, national archival agencies will have to carry out these access request duties whilst still being expected to provide leadership and mentoring in public sector records management without additional human and financial resources. Although PAIA has brought about renewed opportunities for archives and records management in South Africa, practical use of the legislation continues to expose poor records management practices. This indicates that the important connection between PAIA and records management was not considered when it was enacted.

This article also examines the extent to which historians, journalists, researchers and the general citizenry have used and continue to use PAIA. It suggests that even though the legislation has created the principle of more ready access to official information, citizens still find it difficult to gain direct access. One impediment is the fact that citizens are sometimes asked to state reasons for requesting access. Also, the ultimate provision of access may be adversely effected because the time taken to respond exceeds the period prescribed by PAIA. Lastly, for historians and others to make effective use of PAIA, they rely on catalogues which PAIA mandates organisations to produce. The more precise and informative the catalogues are, the more likely it is that the rights granted by the Act would be invoked.

The piece draws three lessons which sub-Saharan countries can learn from the implementation of PAIA. The first lesson suggests that access to information through both PAIA and national archival laws is an ongoing and evolving process which should improve and enhance good corporate governance. As a result, it seems efficacious that sub-Saharan countries which are yet to adopt access to information legislation should seek to establish the efficacy of public sector records management and of archival services in facilitating access. Even the countries which have already legislated for access to information need to take into consideration the way archives

and records management services operate as they periodically review access practices to determine their effectiveness and responsiveness to requests. The next lesson posits that archivists and records managers in sub-Saharan Africa should strive to gain skills and develop access provision beyond the prescriptions of archival laws. The last lesson suggests that historians and journalists should be more proactive users of PAIA, and should seek to share/disseminate the information they have accessed.

Adoption of PAIA in South Africa

PAIA came into force in March 2001 to effectuate sections 32 (1) and (2) of the 1996 Constitution of South Africa. Section 32 (1) stated that: 'Everyone has the right of access to – (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights.'¹ Section 32 (2) went on to declare that: 'National legislation must be enacted to give effect to this right, and may provide reasonable measures to alleviate the administrative and financial burden on the state.'²

It would be wrong to suggest that the enactment of PAIA only fulfils Section 32 of the South African Constitution. Since 1948, access to information has been connected to rights of freedom of expression. In 1948, the United Nations (UN) released the Universal Declaration of Human Rights (UDHR) which stated: 'Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'³ Later, in 1966, the UN also released the International Covenant on Civil and Political Rights (ICCPR) which reiterated the sentiments expressed in the UDHR by stating: 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'⁴ Both treaties expressly pronounce that freedom of expression must include the ability and capacity to 'seek, receive and impart information', a recognition of the need for access to information rights. The ICCPR goes on to further declare that the ability and capacity to gain access to information for purposes of expression should be free, signifying that freedom of expression denotes also freedom of access to information. 'Freedom of expression presupposes something to express. Therefore, access to information is inextricably tied to freedom of expression.'⁵ The ability to exercise one's freedom of expression effectively requires access to information first, allowing the recipient to be ready and willing to impart ideas, opinions or to generally communicate.⁶ In light of this, PAIA also legislates for Section 16 (1) of the Constitution of South Africa which stated that:

Everyone has the right to freedom of expression, which includes

- a. freedom of the press and other media;
- b. freedom to receive or impart information or ideas;

- c. freedom of artistic creativity; and
- d. academic freedom and freedom of scientific research.⁷

The recommendation of Section 32 (2) that South Africa should legislate to enable access to information stems from difficulties encountered in creating a viable access framework based solely on the mandate of constitutional guarantees. Constitutional guarantees on access to information merely express the pledges and desires of government in facilitating access. They may be clear in declaring that it is within the rights of citizens to gain access to state-held information, but they do not define nor elaborate the boundaries of access. For instance, the constitution does not spell out the information which citizens can gain access to; the institutions from which the information may be obtained; how the information is obtainable; who to appeal to when access to information becomes contestable; and further related issues which would turn the guarantee into a right that can be practically exercised. Constitutional guarantees on access to information therefore rely on specific access laws to create and regulate a viable access regime. Through it, citizens can determine the information which they want to access, when they want to access it, and in what form they would prefer the information to be provided. When access laws turn constitutional guarantees into rights which are practical and useable, they do so by clearly identifying the information which citizens can access, the processes by which they do this, the duties of government institutions in facilitating the access, including (but not limited to) measures which will be followed in resolving contentious access issues and disputes.

Access to Records through PAIA

The principle behind PAIA is to enable citizens to gain direct access to official records. Through the law, all public records are presumed open unless access is forbidden in line with a suite of exemptions. Chapter 4 of part 2 of PAIA declares that records falling within the following categories are exempt from access:

- Information relating to the privacy of any third party;
- Some records of the South African Revenue Service;
- Some confidential information from third parties;
- Information on the safety of individuals and protection of property;
- Police dockets needed for bail proceedings;
- Some information relating to law enforcement and legal proceedings;
- Information relating to the defence, security and international relations of the Republic of South Africa;
- Information on the economic interests of the Republic of South Africa;
- Some information on the operation of public bodies.

Where some but not all the information in a record is exempt, the rest can be disclosed when access to it has been requested. Consequently, section 11 of PAIA

offers citizens an unqualified right to access official records. Citizens are neither expected to state reasons nor show any specific interest in order to gain access to official information. All that is required is for government agencies covered by the law to produce and make available manuals which provide sufficient detail to enable citizens to formulate and ultimately gain access to information.

Section 18 lays out the requirements which need to be fulfilled for access to be provided. These include: citizens must indicate the form of access preferred; state whether access should be facilitated in a particular language; and provide an address where the requested information is to be sent. PAIA also requires requests for access to information to be made on a standard form submitted to the respective government department. In exceptional cases, for instance when a requestor is disabled or illiterate, the legislation allows them to make their requests orally. Government departments are obliged by the law to assist requestors to identify and ultimately gain access to the information they require. Even though PAIA appears to be focussed on providing access to official records, its coverage is actually much broader. The law provides access to recorded information rather than just to records, and government agencies in receipt of a request have to provide access to information according to the preferences of the requestor.

PAIA therefore has the capacity to enhance and expand research by historians and others. No longer do historians in South Africa, or those writing about South African history, have to wait 20 years before they can gain direct access to official information. Lord Falconer of Thornton, UK Lord Chancellor, argued that access to information legislation 'means more documents disclosed – providing more sources, sooner, for the contemporary historian to scrutinise'.⁸ This, Scott observed from a US perspective, enables historians to carry out detailed scrutiny of official information inclusive of current administrative records, in the study, writing and teaching of history. He added that accurate, full and complete history cannot be written where access to information is restricted or denied.⁹

Access to Archival Records in South Africa

Access to archival records is literally access to history. Indeed, according to the Archives Council of Wales, 'Archives are the raw material of history.'¹⁰ Archives are records which document past activities and experiences of the relationship between government, private sector, other nation states and citizens. Archives depict how public institutions operated, the challenges they faced and the impact they have on citizens, political parties, non-governmental organisations, the private sector, other nation states, etc. However, archives are not necessarily old records; at times, some attain archival importance the moment they are created.¹¹

Access to archives in South Africa is generally regulated by the National Archives of South Africa Act (NASAA) of 1996, but the PAIA legally overrides other access to information laws including NASAA. In practical terms, PAIA complements and supplements NASAA rather than completely superseding it. When taken together,

both Acts have created a viable, variable and comprehensive access to information framework in South Africa. While NASAA provides a general right of access to archival records, PAIA does the same for all records irrespective of their age, unless specific exemptions apply.

Morrow and Wotshela, writing about archives in South Africa, observed that citizens need rights to access to archival records because:

such records are the collective memory of government, business, civil society, and individuals, and because a society without adequate archives is like a person who has lost his/her memory. Without them there can be no effective collective action, and activities will take place in a fog of ignorance, limited by the fallibility of individual recollection. In particular, archives can contribute powerfully to forming and maintaining a state whose political and administrative functionaries have the opportunity to be aware of the past and can therefore hope to avoid continually stumbling down the same cul-de-sac.¹²

However Morrow and Wotshela also acknowledged that archival records are incomplete and can be misleading in their presentation of the past.¹³ This same view is shared by Cook and Schwartz, who contended that archival records represent only a 'tiny fraction' of all the records which an organisation has created and held.¹⁴ In principle, archival records are an embodiment of the power of the government, and the archivists who will have selected and preserved the records accentuate this power through the acquisition policies and practices they develop and uphold. Invariably, archival records are 'about maintaining power, about the power of the present to control what is, and will be, known about the past'.¹⁵ Archival records, therefore, do not present a comprehensive account of the past but a selective one in which not all records which a government will have created and used end up as archives. Most of the records, following the appraisal process and prescriptions of acquisition policies, will end up being destroyed. Despite this:

[A]rchives house the most reliable, objective and truthful raw materials (primary sources) of the past. In historical logic, their existence constitutes proof that the information they contain – created to serve contemporary wants, needs and goals and not for the benefit of future generations – is 'objective'. They are, in short, the places where historians cut their teeth and 'lodge their claim to originality'.¹⁶

Archival records may not present a comprehensive account or may be a 'tiny fraction' of the records which were created and used by an organisation, but they are an essential source for the writing and dissemination of history. Booth observed that the limitations of archival records due to being incomplete accounts can be redressed by the adoption of access to information laws like PAIA. Such laws may improve the ability of historians to gain access to official records, but as Booth notes they still fall short of 'total liberalization' of access.¹⁷ What this means is that laws such as PAIA may purport to open up all government records and information irrespective of age but this is subject to clearly laid down exemptions. Access to archives is also not as

liberal as it may be thought. South African archivists have powers to close records for periods beyond the prescribed 20-year threshold of NASAA and may be unable to provide access to records which are yet to be catalogued. According to Booth, the 'politics of the archive extend well beyond controlling access; they include manipulation, concealing, hiding and destroying information'.¹⁸ The adoption of PAIA, therefore, ensures that any denial of access to archival records is in line with the exemptions it prescribes. As is argued later, access to information through PAIA is currently also restricted because of 'manipulation, concealing, hiding and destroying information' by public servants.

Although NASAA creates a functional framework for accessing records, it is restricted to archival records. Through this legislation, citizens are unable to gain access to other records which do not have archival value and will be destroyed in the normal course of business. When these records are destroyed, historians and other citizens are denied access to the information they hold. Even where records are recognised as having archival value, citizens have to wait a long time before they can gain access to them. In other words, under NASAA historians have to wait for 20 years before they can gain access to the records and write and disseminate the history of a certain period. The main problem with such a delay is the fact that some of the information which may have been valuable to their research will have been destroyed in the meantime. The adoption of PAIA has created a framework in which documenting history must not only rely on archival records but can also depend on those still active in the governance processes including records which will not eventually become archives.

Citing Hill,¹⁹ Lee observes that access to archival records is subject to some constraints;²⁰ one of which is that for citizens to gain access to archives, they must travel to where they are held and their access is restricted only to the opening hours of the establishment, although citizens have the option of requesting copies of the records they wish in order to gain access to them at their leisure. Archival institutions also have the option of harnessing the benefits brought about by Information Communication Technologies (ICTs). According to Forde, surrogate archival records which have been digitised can reach more people within and outside a country because they would not otherwise have been able to physically visit the institution holding them.²¹ However, in relation to access laws like PAIA, she observed:

It is doubtful whether the deleterious effect of handling thousands of documents in the pursuit of answering FOI enquiries will ever be quantified, but it will be taking its unheralded toll. However, for political reasons it is already inducing a number of organisations to put information so gleaned directly on the Web, to ensure full public access. Indirectly this has a beneficial preservation effect.²²

Archival records in South Africa are yet to be digitised. What have been digitised are the finding aids through a system called National Automated Archival Information Retrieval System (NAAIRS). Citizens may be able to identify the records they would wish to gain access to, but eventual access is facilitated through physical visits. Even if

the archival records were automated to enhance access, several issues have to be considered. Electronic media on which archival records will be digitised are fragile. As Forde further remarked, digitisation of archival records needs substantial resources which will cater for the continued need to migrate and emulate records so that they remain accessible over time.²³

The enactment of PAIA has meant that the need to travel to an archival facility to gain direct access to archival records is supplemented by the access provisions of the legislation. What matters here is for historians and other citizens to gain access to the manuals which government agencies have to have produced in compliance with Section 14 of PAIA. Having identified the records they would wish to gain access to, the information is filled into the request for access form and sent to the relevant agency. Depending on the mode of access preferred, information which has been requested is then sent out to the requestor. By virtue of PAIA, direct access to information can be gained without having to travel to the agency which holds it. However, if the information required is subject to NASAA, a visit to the archival institution may be necessary.

Impact of PAIA on Historians

Although regular studies will be necessary to determine the impact of PAIA on historical research since the legislation was enacted in 2000, the experiences of historians and other researchers in the United States, the United Kingdom and Australia may be indicative of what historians in South Africa experience. Historians using PAIA will face paying access fees and waiting a minimum of 30 days for the information. They will also gain access to records which may not be informative for their research. At times, the information which they want access will be redacted. At other times, historians will face attempts, already developing in South Africa, to frustrate and undermine the purposes of PAIA. Historians in South Africa who intend to benefit from PAIA should develop the etiquette of using the legislation, be familiar with the appeals process and be willing to share information to which access has been granted. The most positive thing which PAIA brings about is that historians will be able to gain access to archival records which were previously closed for periods beyond the normal 20 years. PAIA allows for the extended periods to be reviewed in light of the exemptions, and where records are not covered by those exemptions they should be opened up for public access. Even where the exemptions do apply, the law permits for the public interest on the access to be determined. Where it is found that access to the records is within the public interest, they should be opened to the public.

Some feel that access to information laws might not generate the most effective research tools. According to Lee, research relies on information which is available and accessible. Access to information legislation, like PAIA, offer researchers a 'giant mail order archive'.²⁴ Lee is in fact implying that for access to be facilitated, researchers have to make do with the information which government agencies make available

through catalogues. Just as in a mail-ordering system, researchers rely on the catalogues to identify the records or information they wish to access. The more informative the catalogues, the easier it is to identify the records or information required. If, however, the catalogues are not clear and provide little detail of the information held, the harder it is for researchers to gain access. As with mail orders, historians access catalogues which describe the record holdings held by department; however, the information may turn out to be other than that for which they had hoped.

Since PAIA, researchers into the history of South Africa have become more passive participants in the research process; that is, researchers make requests for access and wait for that access to be facilitated. In the archival setup, researchers are active researchers, in that they are mostly physically present at the record holding institution, reading through appropriate administrative histories and identifying relevant records from finding aids. The records are made available immediately, and if they do not meet or serve the research demands they are sent back and others requested. With PAIA, researchers have to wait for the records or information to be found and made available within the prescribed 30 working days. If the records do not satisfy the immediate research need, another request can be made which again legally may take up to 30 days. As evinced by Terrill with reference to Australia, access through access to information laws is time consuming for historians, since it is 'easier by far to read books, articles, and published reports in campus libraries than to negotiate and then access records under FOI'.²⁵

Even though PAIA requires bodies to answer requests for access within 30 days, it provides for an additional 30-day extension. Harris, writing in 2002, observed that at times government bodies in South Africa took more than 30 days to respond to access requests. For instance, in that same year, the South African History Archive (SAHA) submitted 96 requests to 21 bodies and the responses were all made later than the prescribed time frame.²⁶ The Open Democracy Advice Centre (ODAC) noted in 2004 that out of the 140 requests it made, only 13 per cent were facilitated within the 30-day prescribed time frame, while 63 per cent were ignored altogether.²⁷ This is an indication that currently PAIA will not be of as much assistance to historians as they might expect. Historians publish in journals, books and present at conferences. All these modes of disseminating research are time-specific in that they have to meet deadlines for submission to editors. Hence, where requests for access to information take longer than the prescribed timeframe or requests are ignored, historians may become hesitant to use PAIA.

These issues are further compounded by the likelihood that access to the records which have been identified may provide incomplete information. The reason this becomes a problem for historians is that PAIA mandates that access to a record cannot be denied on the presumption that part of the information it captures is exempt. The law allows a department holding the record and in receipt of an access request for it to redact or 'black-out' the sections which specifically fall under exemption clauses. Blacking-out information may render the record meaningless or

less informative to historical research. A question that arises, however, is whether the blacking-out process follows any established criteria or is subject to personal whim. Undeniably, the exemptions and the blacking-out of information have the effect of hindering research and discouraging historians. Making reference to Garfinkel,²⁸ Hakim²⁹ and Hill,³⁰ Lee argues that:

It is difficult to judge how representative material produced through the freedom of information processes might be. Nor can one ever be sure about how far steps have been taken to ensure that certain kinds of information did not enter the written record in the first place. It goes without saying that the increased availability of documentary data does not obviate their careful use; what is recorded by bureaucracies, and how – once recorded – materials are sorted, organized or inventoried, reflects organizational priorities, practices and interests.³¹

When historians request access to information through PAIA, they do so without knowing whether the records or information they gain access to will become comprehensive sources for their research. It is difficult for them to know beforehand if the information they will end up with is sufficient for the research at hand. Although PAIA provides historians with an alternative source of information, it does not guarantee that the information to which they gain access will always support all their research designs.

Even though access to information through PAIA must be granted within 30 days, there are many instances when access is denied or becomes contentious. This stems from the exemption provisions and the fact that decisions to deny access may be appealed against. In South Africa, it appears that access is unavoidably contentious because of the weak resolution mechanisms available. Initially, an internal appeal against denied access is made and the decision on its outcome should be communicated to the requestor within 30 days. When the internal appeals process does not yield conclusive results, the requestor or the agency from which information was requested can appeal to the High Court for adjudication.

Clearly, courts are not accessible to all citizens because of the costs involved. Taking a matter to adjudication in a court is not cheap, and most citizens do not have the resources to approach the courts. Even those that do would want the matter to be dealt with expeditiously, and this may not always be the case. Cases taken to courts undergo various stages. The case is initially registered and a magistrate or a judge must be assigned before it can begin. Deliberations on issues brought before courts sometimes take days or even months before judgement can be passed. Even when a judgement has been made, the opposing party may appeal against the verdict, resulting in further delays. Siphon Khumalo reporting in *The Mercury* quotes Dr Leon Wessels: 'If they refuse you information, they just have to tell you why it is not being given to you. But there are no appeal mechanisms and one has to go to court to challenge officials to reveal or give information.'³² This chronicles some of problems which historians intending to use PAIA have to face. It is currently not known whether many historians intending to use PAIA can wait 30 days or the time required

to contend denied access in courts. Even where this does happen, it is not a guarantee that access will be immediate, since compliance to court orders is in itself another lengthy process.

In view of all this, historians may at the moment be rather hesitant users of PAIA. Commenting from the Australian perspective, Terrill posited that the hesitation could be a result of a resistance by the history profession to access to information laws. He argued that '[h]istorians appear to have a lingering conception that documents should not be sought before they are available in archives – despite the fact that FOI is legislatively created and administratively accepted'.³³ Terrill seems to overlook the fact that history with its reliance on archives as sources of information is an established tradition, while access laws are just being accepted globally. The emergence of access to information laws as a viable research tool will take time to make a meaningful impact on the writing, dissemination and teaching of history. As more and more countries around the world adopt access to information laws, historians will no doubt end up regarding them as complementary to research into archival records and valuable to history-writing. With time, any hesitancy will fall away.

Access to information through PAIA is not free, unlike access in some archival institutions. PAIA mandates that requestors pay 35 rand³⁴ before the processing of a request. Harris noted that in 2002 SAHA was charged 5,000 rand for access to 30 files.³⁵ Paying of fees, although it was expected to 'alleviate ... financial burden on the state' has the potential to cut down use of PAIA by historians.³⁶ Examples abound which show that fees could hinder potential access to current records and information. For instance, Ireland in 2003 revised in order to increase its access to information fee structure and the result has been a sharp decline in access requests. The Information Commissioner of Ireland, Emily O'Reilly, giving an address at the Deputy Information Officer's Forum in Johannesburg, South Africa, highlighted the drop in access requests from 7,936 in 2002 to 3,228 in 2005. Among journalists, the figures fell from 2,103 in 2002 to 963 in 2005.³⁷ The figures indicate the effects of access fees amongst all researchers, including historians.

In South Africa, the failure by many government departments to provide access to information within the prescribed 30-day period has had a direct influence on the high access fees charged. The delays, which may be linked to searching for the required records and/or to making copies of them, could be a contributing factor to the high charges. It is doubtful that many historians will have access to funds that would enable them pay thousands of rand in access fees. The established historian having a contract with a publishing house may be able to afford this, but novice historians are unlikely to be able to raise such large sums of money. The high access fees charged could lead historians to prefer access to archival records or to conduct oral history research rather than to rely on access through PAIA. However, there may be strategies for dealing with this. Historians could plan research initiatives through their professional associations or the history teaching institutions could collaborate to work on certain agreed research agendas. By coming together in such partnerships, they would be able to pool their financial resources and could make effective use of the law.

Major users of PAIA such as SAHA also offer historians alternative access measures. According to that institution's Freedom of Information Programme, it 'aims to utilise PAIA to extend the boundaries of freedom of information and amass an archive of released materials for public use'.³⁸ SAHA's approach to open up these records to the public in this way addresses a concern which Terrill has also raised. He has been concerned that requests made under access to information laws often involve unconnected individuals and it is unlikely that the information they gain access to will be available to the general citizenry in the same way as archival records are. This, he feels, 'misses the important point that FOI offers the opportunity to view records beyond the small percentage selected for permanent archival preservation'.³⁹ In its work, SAHA has assisted many unconnected individuals in gaining access to information through PAIA and, with their permission, the information is made available for access either through its webpage or through physical visits.

The efforts by SAHA would have even greater effect if historians and others using PAIA could either donate records to SAHA once they had used them or allow the institution to make surrogate copies. The concern raised by Terrill can also be addressed by historians publishing beyond professional journals and conferences. Journals and conferences are generally accessible to only a few people who are from the same profession or are interested in the findings being disseminated. This excludes the majority of citizens who may benefit from the information as well. One option would be to publish more widely through avenues more accessible to most citizens, hence facilitating an access common to all.

Clearly PAIA can enable historians to write the history of South Africa as it unfolds. It can enable historians to gain access to records they would have not had access to before the law was passed in 2000. PAIA has also ensured that the 20-year rule of waiting for records to be appraised and selected for archival preservation is replaced by a 30-day waiting period. If properly complied with, this enables access to all records irrespective of age or qualification for permanent preservation. Clearly, PAIA has increased potential access to archival material, since all records are presumed open unless a specific exemption applies. What the legislation does is challenge historians to be active users of the access to information regime, and afterwards they should seek to share broadly the records with which they have come into contact. Historians should seek to educate themselves about the law and could campaign for access fee reductions or complete fee 'holidays' in order to enhance their access to records for the better and more informed writing and dissemination of history. Alternatively, historians could work with establishments like SAHA to gain access to government information and to further promote access to records resulting from its access to information programme.

Impact of PAIA on Archival Processes and Practices

The adoption of PAIA might affect governance processes and the archival record. It is possible that the right to direct access to records could lead to empty archives. That

is, PAIA has created an access regime through which direct access is not restricted to archival records but extended to all records held by organisations covered by the Act. As a result, direct access to records held by individual departments might prevent the identification and acquisition of archival records. There is also the possibility that the conduct of public affairs will become oral rather than being captured in records, also risking empty archives. However, the adoption of PAIA is much more positive than these concerns suggest. The law is likely to develop adherence to good records management practices in South Africa which will ensure that appropriate records of governance are created and preserved. It will ensure that government departments adhere to the prescriptions of retention schedules and either transfer records to the archival institutions early or on time. The law should lead to: the creation of more informative archives; archival records being processed much more quickly; the earlier opening of archival records; the liberalisation of acquisition policies; acquisition and access policies which are citizen-centric; and more rigorous and informative access catalogues which will cater for variable access needs of all citizens. Through PAIA, archives will continue to acquire and open records for public access.

The Development of Good Records Management Practices

The crucial, if not the most important, development that will arise from PAIA is the development and adherence to good records management practices across the South Africa public service. PAIA, unlike the United Kingdom FOI law, has been enacted with the presumption that good records management practices already exist in South Africa. Pickover and Harris have found the opposite to be true. They observe that insofar as PAIA mandates government departments to provide information about the records they hold to facilitate ease of access, some information provided through section 14 manuals has been found to be inadequate. These authors have also posited that the difficulties which departments face in facilitating access results from the failures in making routine decisions on records retention. Consequently, PAIA has been adopted into a poor records management environment which hinders practical direct access to the records and information held by departments.⁴⁰ Although this has become an impediment to access, it nonetheless presents opportunities for the betterment of public sector records management practice.

Section 14 of PAIA prescribes that the manuals which departments generate should provide 'sufficient detail to facilitate a request for access to a record of the body, a description of the subjects on which the body holds records and the categories of records held on each subject'.⁴¹ This implies that departments should have in place a system which enables them to categorise records according to functions and their related activities. The practice behind this is influenced by the fact that when citizens make requests for access to information, they do so seeking to understand the outcomes of organisational or administrative activities. Categorising records according to functions and related activities makes it possible to identify and present the information held. Although Pickover and Harris have found the inadequacy of

the manuals an impediment to improved access, the difficulties faced by departments in compiling and using them presents a further case for implementing a good records management system.

PAIA may not be a records law which prescribes records management standards and practices. It does, however, carry a strong obligation towards them. Departments are expected to know the records and information they hold; they are expected to know how their records and information are arranged, as well as their availability for access. Good records management assures that records are created and that the information in them can be accessed. PAIA can then be taken as an information policy which relies on laws like NASAA to make available records and information for access. As mentioned earlier, PAIA does not replace NASAA but complements it. The Information Act of the Northern Territory in Australia⁴² demonstrates this. In this law, FOI, privacy, archives and records management are all combined. Effectively, the law recognises that access to information, whether through FOI or privacy laws, relies on the creation and availability of records. The law also observes that for archives to exist, records should have been created in the first place. If records were not created, there will be no need for FOI or privacy legislation or for archival institutions. It is the records which provide the information subject to the access rights, hence the need to properly and adequately manage them.

PAIA cannot be based on the goodwill and willingness of executive bodies and public servants to provide citizens with access to records and information. There is need for auxiliary precautions which will ensure that public servants adhere to the spirit of the law. For instance, the Canadian Information Commissioner, John Reid, recommended to the Gomery Commission that 'there should be mandatory record-keeping in government, and that the obligation to create a "paper trail" should be something more than a matter of policy. It should be an explicit part of the law.'⁴³ The recommendations continued to state that a law such as PAIA:

should be amended to include an obligation on the part of every officer and employee of a government institution to create records that document decisions and recommendations, and that it should be an offence to fail to create those records.⁴⁴

Further, there should be record-keeping legislation:

which would require public servants and persons acting on behalf of the Government to collect, create, receive and capture information in a way that documents decisions and decision-making processes leading to the disbursement of public funds. This would make it possible to reconstruct the evolution of spending policies and programs, support the continuity of government and its decision-making, and allow for independent audit and review. Such record-keeping legislation should state clearly that deliberate destruction of documentation and failure to comply with record-keeping obligations are grounds for dismissal. The reason for the creation of legal obligations to maintain and not to destroy government records, in addition to similar rules in the access to information

regime, is that the rationale for mandatory recordkeeping does more than facilitate public access to information: it ensures good government and accountability.⁴⁵

The Canadian Access to Information Review Task Force has recommended that the following will improve the commitment of public servants to furthering the aims of FOI legislation:

- Job descriptions of public servants should encompass responsibilities binding them to provide access to information according to the prescriptions of the FOI law. The job descriptions should also mandate them to share in the responsibilities of managing public sector records. It is through this engagement that public servants are more likely to promote access to information and uphold observance to good records management principles;
- The performance agreements for managers in public organisations should mandate them to create and oversee the performance of access to information systems in their institutions. The agreements should also present a reminder that good records management underlies efficient provision of access to information;
- Regular meetings to review the performance of individual government departments should also review their capacities to adequately manage records and to provide access to information;
- When government introduces new public programmes, records management and access to information should be built into them;
- Good records management and access to information should be part of the corporate governance plans of government departments.⁴⁶

Since, as this article shows, access to information is dependent on good records management, the effects of these processes on one another should be part of the objectives the institutions should seek to achieve.

Lessons Drawn

The PAIA and its impact on access to records, including archives, presents several lessons which other African countries contemplating FOI legislation will need to consider. The core lesson is that FOI laws do not replace archival legislation. National Archival laws will remain in force but their effectiveness will be complemented by FOI legislation. FOI laws will allow access to all records including those that will eventually reside in archive repositories, while archival legislation will continue to regulate acquisition and access to archives. However, archival agencies will have to ensure that the access conditions they impose on archival records are in line with those of the FOI regime.

The other lesson is that countries have to recognise that access to information, whether through FOI, privacy laws or the National Archives Act, is mainly access to records. It is the records which document the information which is the subject of all

these laws. Therefore, it is important that records management be given due prominence. It is through good records management practices that adequate information on functions and activities will be created and maintained for timeframes commensurate with the activities performed. The same process will ensure that access to information is possible and timely, including identification of archival records and their transfer to an archival repository.

It follows from this that African countries and others contemplating passing FOI legislation should research the reasons why the Northern Territory of Australia enacted an information law composed of FOI, privacy, archives and records management. Could it be that the four issues together are central to access to information or is that records management drives the other three? These are the issues which need to be explored if Africa is able to enact and have in place effective access to information regimes. Once enacted, African countries will need to carry out periodic access to information reviews under both FOI and archival laws. Undertaking such reviews would assess the quality of access in line with good records management which is essential for effectively searching and retrieving information.

Lastly, oversight institutions in the form of Information Commissioners should be central to enacting of FOI laws in Africa. Currently, South Africa does not have an Information Commissioner office, but its role is performed by the Human Rights Commission. This arrangement, however, has meant that the Human Rights Commission focuses on all human right issues rather than focussing specifically on FOI. FOI has to compete with other human rights, and competing priorities may impact negatively on the promotion of access to information.

Conclusion

Dismissing oral testimony as an alternative to the disclosure of records, the Gomery Commission contended that records which capture 'errors ... should be exposed to public scrutiny and comment, and the public servants responsible for errors committed in good faith should not be penalized because they made a decision that did not achieve the anticipated results ... public servants should not fear embarrassment in the event that their advice to their superiors may be disclosed'.⁴⁷ A UK respondent interviewed for a PhD Thesis by the present author observed that 'most organisations, looking at what went on in Canada, United States and Australia, found that there are no benefits to this [resorting to oral testimony rather than creating and maintaining records] and will probably not take that approach but inevitably people will be thinking of the consequences of FOI and will take appropriate steps to make sure they do not expose themselves any more than is necessary'.⁴⁸ Records of public proceedings will continue to be created and referred to for accountability and other aspects of governance.

Records which fit the acquisition strategy and policies of South Africa Archives will continue to be selected and made available for public access. What PAIA has done is

subject archival records to access conditions prescribed by that legislation. The same records can be accessed earlier in their life. One needs to be aware that records which will be accessed in the creators' offices under the auspices of PAIA may not necessarily be later selected for archival purposes. The fact that a file would have been accessed under PAIA does not justify its selection for the archives. The archival conventions, practices and policies which South Africa as a country and the nine individual provinces practice are the ones which will continue to guide acquisition and preservation of archives. The advantage to the historian is they can gain early access to any record, but they are subject to the delays imposed by the access prescriptions of PAIA.

Notes

- [1] South Africa Government, *Constitution*.
- [2] *Ibid.*
- [3] United Nations, *Yearbook*, 176.
- [4] United Nations, *International Covenant*, Article 19.
- [5] Martin and Feldman, "Access to Information."
- [6] Although the UN had passed these resolutions, South Africa was at the time an apartheid state, and freedom of expression was curtailed for the majority of the population. Citizens could only freely express themselves after the 1994 elections which ushered in a new political dispensation.
- [7] South Africa Government, *Constitution*.
- [8] Falconer, "Freedom of Information."
- [9] Scott, "The Freedom of Information Act," 73–85.
- [10] Archives Council of Wales, "A National Archives and Records Policy," 7–16.
- [11] *Ibid.*, 1.
- [12] Morrow and Wotshela, "The State of Archives," 313–35.
- [13] *Ibid.*, 315–6.
- [14] Cook and Schwartz, "Archives, Records, and Power," 1–19.
- [15] *Ibid.*, 3.
- [16] Booth, "Sites of Truth," 91–109.
- [17] *Ibid.*, 96.
- [18] *Ibid.*, 97.
- [19] Hill, *Archival Strategies*.
- [20] Lee, "Research Uses," 370–91.
- [21] Forde, "Access and Preservation," 193–200.
- [22] *Ibid.*, 197–8.
- [23] *Ibid.*, 198.
- [24] Lee, "The UK Freedom of Information Act," 1–18. See also Lee, "Research Uses," 370–91.
- [25] Terrill, "A Bit Fast Money," 231–42.
- [26] Harris, *Using the Promotion*.
- [27] The Open Democracy Advice Centre, *South Africa Summary Country Report*.
- [28] Garfinkel, *Studies in Ethnomethodology*.
- [29] Hakim, "Research Based on Administrative Records," 489–519.
- [30] Hill, *Archival Strategies*.
- [31] Lee, "The UK Freedom of Information Act," 7.
- [32] Khumalo, *The Mercury*.

- [33] Terrill, "A Bit Fast Money," 234.
- [34] Regulations emanating from section 22 of PAIA has exempted access fees on married persons whose combined income is less than R 27, 192; individuals seeking access to their own personal records; maintenance officers carrying out enquiries pursuant to the Maintenance Act, 1998.
- [35] Harris, *Using the Promotion of Access to Information Act*.
- [36] Terrill, "A Bit Fast Money," 235.
- [37] Ireland Government, *Freedom of Information in a Democracy*.
- [38] South Africa History Archive, *Guidebook*.
- [39] Terrill, "A Bit Fast Money," 235. See also Terrill, "Individualism and Freedom," 30–32.
- [40] Pickover and Harris, "Freedom of Information in South Africa."
- [41] South Africa Government, *Promotion of Access to Information Act*.
- [42] Northern Territory of Australia, *Information Act*.
- [43] Canada Government, *Commission of Inquiry*.
- [44] *Ibid.*
- [45] *Ibid.*
- [46] Canada Government, *Access to Information*, 161.
- [47] Canada Government, *Commission of Inquiry*, 179.
- [48] Sebina, Personal Interview.

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