

The right of access to environmental information in the public and private sphere

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LLB

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ABSTRACT

Access to information, public participation and access to justice are increasingly on the agenda in the international environmental sphere. In *Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance* (2015 1 SA 515 (SCA) para 71) it was confirmed that the legislature recognised the importance of public interaction and consultation in the field of environmental conservation. One way to involve society in an environmental matter is by ensuring access to relevant environmental information.

The constitutional right of access to information enables society to express its concerns and improve the ability to hold public and private bodies accountable for their actions. The *Promotion of Access to Information Act 2 of 2000* (PAIA) regulates and promotes this constitutional right and the principle of transparency that is also applicable to the environmental context. Although a series of pieces of legislation was recently published that intends to further regulate access to information, it seems that not all legislative developments aim to realise the constitutional right of access to information.

Legislative improvements remain futile if they only remain on paper. Therefore, the right of access to environmental information must be effectively implemented. Although there has been some improvement on the realisation of the right of access to environmental information, there are growing concerns regarding the extent to which this right is being infringed upon by public and private bodies. It seems as if the provisions and application of PAIA and other relevant legislation are misunderstood by public bodies as well as private bodies. It is therefore necessary to determine how the right of access to environmental information in the public and private sphere is currently realised.

Key words: environmental law, administrative law, environmental governance, South Africa, right of access to environmental information

OPSOMMING

Toegang tot inligting, toegang tot geregtigheid en openbare deelname is toenemend op die agenda van die internasionale omgewingsfeer. In *Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance* (2015 1 SA 515 (SCA) para 71) het die hof bevestig dat die wetgewer die belangrikheid van openbare interaksie en konsultasie in die omgewingsfeer erken het. Een wyse om die samelewing in 'n omgewingskwessie te betrek is om toegang tot relevante omgewingsinligting te verseker.

Die grondwetlike reg op toegang tot inligting stel die samelewing daartoe in staat om hul kommer uit te spreek en om openbare en private liggame aanspreeklik vir hul dade te hou. Die *Wet op Bevordering van Toegang tot Inligting 2* van 2000 (WBTI) reguleer en bevorder hierdie grondwetlike reg en die beginsel van deursigtigheid, wat ook van toepassing is in die omgewingsfeer. Alhoewel 'n reeks van wetgewing onlangs gepubliseer is met die voorneme om die reg op toegang tot inligting verder te reguleer, blyk dit dat nie al hierdie wetgewende ontwikkelinge daarop gemik is om die grondwetlike reg op toegang tot inligting te verwesenlik nie.

Wetlike verbeteringe sonder effektiewe toepassing dien geen doel nie. Daarom moet die reg op toegang tot omgewingsinligting effektief geïmplementeer word. Alhoewel daar 'n verbetering in die verwesenliking van die reg op toegang tot inligting in die omgewingsfeer opgemerk is, is daar groeiende kommer oor die mate waartoe hierdie reg geskend word deur openbare en private liggame. Dit wil voorkom asof die bepalings en toepassing van die WBTI en ander toepaslike wetgewing verkeerd verstaan word deur openbare en private liggame. Dit is dus nodig om te bepaal hoe die reg op toegang tot omgewingsinligting in die openbare en private sfeer tans gerealiseer word.

Sleutelwoorde: omgewingsreg, administratiewe reg, omgewingsbestuur, Suid-Afrika, reg op toegang tot omgewingsinligting

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LIST OF ABBREVIATIONS

AMSA	ArcelorMittal South Africa Limited
ANC	African National Congress
BMP	Biodiversity Management Plan
CARA	Conservation of Agricultural Resources Act 43 of 1983
CER	Centre for Environmental Rights
CMA	Catchment Management Agency
CSA	Conservation South Africa
DAFF	Department of Agriculture, Forestry and Fishery
DEA	Department of Environmental Affairs
DME	Department of Minerals and Energy
DMR	Department of Mineral Resources
DOE	Department of Energy
DRDLR	Department of Rural Development and Land Reform
DWAF	Department of Water Affairs and Forestry
DWS	Department of Water and Sanitation
ECA	Environment Conservation Act 73 of 1989
EIA	Environmental Impact Assessment
EIP	Environmental Implementation Plans
EMI	Environmental Management Inspector
EMRI	Environmental Mineral Resources Inspector
EMF	Environmental Management Framework
EMP	Environmental Management Plan
EMPr	Environmental Management Programme
GMOA	Genetically Modified Organisms Act 15 of 1997

GMO	Genetically modified organisms
IAPs	Interested and affected parties
IDP	Integrated Development Plan
MBO	Management by outsiders
MEC	Member of the Executive Council
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
NEMA	National Environmental Management Act 107 of 1998
NEMAQA	National Environmental Management: Air Quality Act 39 of 2004
NEMBA	National Environmental Management: Biodiversity Act 10 of 2004
NEMICMA	National Environmental Management: Integrated Coastal Management Act 24 of 2008
NEMPA	National Environmental Management: Protected Areas Act 57 of 2003
NEMWA	National Environmental Management: Waste Act 59 of 2008
NFA	National Forests Act 84 of 1998
NHRA	National Heritage Resources Act 25 of 1999
NWA	National Water Act 36 of 1998
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
POPI	Protection of Personal Information Act 4 of 2013
SAAELIP	South African Atmospheric Emission Licensing and Inventory Portal
SAAQIS	South African Air Quality Information System
SAHRA	South African Heritage Resources Agency
SAHRC	South African Human Rights Commission

SAHRIS	South African Heritage Resources Information System
SAMRAD	South African Mineral Resources Administration System
SAWIC	South African Waste Information Centre
SCA	Supreme Court of Appeal
SDF	Spatial Development Framework
SEMA	Specific Environmental Management Acts
SoERs	State of the Environment Reports
SPLUMA	Spatial Planning and Land Use Management Act 16 of 2013
SSA	State Security Agency
VEJA	Vaal Environmental Justice Alliance

1 Introduction and problem statement

Access to information, public participation and access to justice are increasingly on the agenda in the international environmental sphere.¹ These ideals are aimed at promoting democracy.² In *Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance*³ (the *AMSA* case) the court confirmed that the legislature recognised the importance of public interaction and consultation in the field of environmental conservation.⁴ For modern society to be able to address current environmental challenges the mobilisation of the intellectual input, goodwill and determination of all interested parties is required.⁵ One key mechanism to involve society in environmental matters is by ensuring sufficient access to relevant environmental information.⁶ In this regard transparency in the public and private sphere⁷ is vital, as the right to know is indispensable in achieving sustainability.⁸

The right of access to information held by private and public bodies is established in section 32 of the *Constitution of the Republic of South Africa, 1996* (the Constitution).⁹ The constitutional right of access to information can be seen as unique and progressive, as an obligation is placed on both public and private bodies to provide access to records¹⁰ in their possession.¹¹ Progressively extending this right to privately held information, the *Promotion of Access to Information Act 2 of 2000* (PAIA) was established to regulate and promote this constitutional right, as well as transparency and accountability within the public and private sphere, in order to realise an open and

¹ Nealer 2005 *Journal of Public Administration* 469.

² Nealer 2005 *Journal of Public Administration* 469.

³ *Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance* 2015 1 SA 515 (SCA) (the *AMSA* case).

⁴ *AMSA* case para 71.

⁵ Nealer 2005 *Journal of Public Administration* 470.

⁶ See 2.2.1.1 below for discussion on the meaning of "environmental information".

⁷ See 2.2.1.2 below for discussion on the meaning of "public sphere" and "private sphere".

⁸ Nealer 2005 *Journal of Public Administration* 470. See 2.1 below.

⁹ Du Plessis "Access to information" 197.

¹⁰ See 2.2.1.1 below for discussion on the meaning of "records".

¹¹ South African Human Rights Commission 2014 *Guide on how to use the Promotion of Access to Information Act 2 of 2000* 6.

participatory South African democracy, in contrast to the secrecy that was at the heart of the *Apartheid* system.¹²

A right of access to information can be applied to obtain information on various issues, including environmental information, which is the particular topic of this mini-dissertation.¹³ There are, furthermore, various ways to obtain environmental information.¹⁴ In this regard a distinction will be made between the active and the passive disclosure of information.¹⁵

PAIA, like all other acts, does not operate in isolation and interconnects with a whole suite of other pieces of legislation.¹⁶ Various pieces of legislation specify procedures regulating requests for information aimed at promoting access to information specifically relevant to the environmental sphere,¹⁷ such as the *National Environmental Management Act* 107 of 1998 (NEMA),¹⁸ the *National Environmental Management: Waste Act* 59 of 2008 (NEMWA),¹⁹ the *National Water Act* 36 of 1998 (NWA)²⁰ and the *Promotion of Administrative Justice Act* 3 of 2000 (PAJA).²¹ By providing public authorities with sufficient access to information, these legal provisions theoretically facilitate improved environmental decision-making, compliance and enforcement by enabling society to act as an effective environmental watchdog and a private environmental enforcer.²²

The *Protection of Personal Information Act* 4 of 2013 (POPI) should also be considered. The POPI provides for the establishment of an Information Regulator that would enable private bodies to appeal against information-related decisions prior to resorting to costly litigation.²³ With regard to PAIA litigation, the Rules Board for Courts of Law proposed

¹² South African Human Rights Commission 2014 *Guide on how to use the Promotion of Access to Information Act 2 of 2000* 6 and Dick 2005 *Mouisaion* 5.

¹³ Du Plessis and Ferreira-Snyman 2002 *Koers* 389. Also see the *AMSA* case para 6.

¹⁴ Du Plessis "Access to information" 198. Also see Nealer 2005 *Journal of Public Administration* 471.

¹⁵ See 2.2.1.3 below for discussion on the meaning of "active disclosure" and "passive disclosure".

¹⁶ PAIA Civil Society Network *Shadow Report 2014* 19.

¹⁷ Du Plessis "Access to information" 198.

¹⁸ Sections 2(4)(k), 24 and 32 of the *National Environmental Management Act* 107 of 1998 (NEMA).

¹⁹ The preamble and sections 2, 72 and 73 of the *National Environmental Management: Waste Act* 59 of 2008 (NEMWA).

²⁰ Sections 2 and 3 of the *National Water Act* 36 of 1998 (NWA).

²¹ Sections 1 and 3 of the *Promotion of Administrative Justice Act* 3 of 2000 (PAJA).

²² Du Plessis "Access to information" 198.

²³ Section 39 of the *Protection of Personal Information Act* 4 of 2013 (POPI).

amendments that would provide the public with more information on the identity and background of presiding officers hearing PAIA matters.²⁴

It seems, however, that not all legislative developments aim to realise the constitutional right of access to information. In 2009, amendments to NEMA removed section 31, which established the right of access to environmental information, and requesters now have to rely on PAIA, which does not expressly deal with a right of access to environmental information.²⁵ The *Protection of State Information Bill*²⁶ seems to be in direct conflict with the right of access to information and the principle of transparency, as this Bill encourages the centralisation and classification of information in accord with a culture of secrecy.²⁷

Although legislation has been enacted to promote transparency and access to information, the implementation of the right of access to information has to be effective, as these improvements remain futile as long as they remain only on paper.²⁸ Even though there has been some improvement in the realisation of this constitutional right in the environmental sphere,²⁹ there are growing concerns regarding the extent to which this right is being infringed upon by public and private bodies.³⁰ According to the *PAIA Civil Society Network's Shadow Report*³¹ various realisation problems currently exist in the public sphere. Some of these problems include the lack of adherence to statutory timeframes,³² the lack of communication between various public bodies and/or the requester,³³ and poor record-keeping.³⁴ Some public bodies also use PAIA to avoid giving feedback to society on environmental governance.³⁵ Private bodies sometimes

²⁴ PAIA Civil Society Network *Shadow Report 2014* 20-21. See 4.4.2.3 below.

²⁵ See 3.1.1.6.1 below.

²⁶ *Protection of State Information Bill*, 2010.

²⁷ PAIA Civil Society Network *Shadow Report 2014* 20. See 4.3.2.4 below.

²⁸ Nealer 2005 *Journal of Public Administration* 473.

²⁹ Centre for Environmental Rights (CER) *Signs of hope?* 1. Also see, for example, the *AMSA* case, where access to environmental information held by a private body was granted. Also see 4.3.3 below for more discussion on the realisation of the right of access to environmental information through litigation.

³⁰ PAIA Civil Society Network *Shadow Report 2014* 22.

³¹ PAIA Civil Society Network *Shadow Report 2014*.

³² See 4.3.2.1 below.

³³ CER *Money talks* 8 and CER *Unlock the doors* 9. Also see 4.3.2.2 below.

³⁴ PAIA Civil Society Network *Shadow Report 2014* 4. Also see CER *Signs of hope?* 2 and 4.3.2.1 below.

³⁵ PAIA Civil Society Network *Shadow Report 2014* 13. Also see CER *Unlock the doors* 19 and CER *Barricading the doors* 1 and 4.3.1 below.

believe that greater transparency constitutes an unacceptable risk to them.³⁶ The Information Regulator has not yet been established as required by the POPI.³⁷ As a result, no internal appeal procedure currently exists to appeal against a refusal by a private body to disclose information.³⁸ The only legal remedy for a requester seeking information from a private body is litigation, which is not within the reach of all members of society due to the high costs associated therewith.³⁹ It seems as if the provisions and application of PAIA and other relevant legislation are misunderstood by public bodies, private bodies and society.

The research question relevant to this study is: How is the right of access to environmental information in the public and private sphere currently realised? The main aim of this study is, therefore, to determine how the right of access to environmental information in the public and private sphere is currently realised. In order to achieve this main aim, the following secondary aims are identified, namely (a) to provide a brief background on the theoretical legal framework pertaining to the nature of the right of access to environmental information; and (b) to provide an in-depth discussion on the existing legislation, recent case law and future legislation, as applicable to both the active and the passive disclosure of environmental information, and (c) to discuss the realisation of these provisions.⁴⁰ In this study the nature of the right of access to environmental information will be briefly discussed as background,⁴¹ followed by a discussion on the realisation of the active⁴² and the passive disclosure⁴³ of environmental information, in order to reach a conclusion and make recommendations in this regard.⁴⁴

This study comprises of a literature study of primary sources such as legislation and case law as well as secondary sources such as electronic sources, textbooks, academic

³⁶ PAIA Civil Society Network *Shadow Report 2014* 2. See 4.3.1 below.

³⁷ PAIA Civil Society Network *Shadow Report 2014* 13. See 4.4.1 below.

³⁸ See 4.4.2.1 below.

³⁹ PAIA Civil Society Network *Shadow Report 2014* 13.

⁴⁰ Although similar studies were conducted in 1998 (Du Plessis *'n Reg op omgewingsinligting*) and 2001 (Ferreira *Die openbare administrasie en die reg op toegang tot inligting*), since then new legislative developments have occurred, judicial precedents have been set and literature and reports have been published that shed new light on the realisation of the right of access to environmental information.

⁴¹ See 2.

⁴² See 3.

⁴³ See 4.

⁴⁴ See 5.

articles and reports relating to the progress made in the implementation of the constitutional right of access to environmental information in the public and private sphere.⁴⁵

The nature of the right of access to environmental information will now be discussed.

⁴⁵ This study follows on previous studies pertaining to the realisation of the right of access to environmental information. This study was concluded in June 2016. Where crucial, the study also refers to new legislation or publications post June 2016 for inclusivity, although it is not part of the formal study.

2 The nature of the right of access to environmental information

Good research practice dictates that the concepts used in the conduct of the research should be explained and framed to provide meaning to the context within which they are used.⁴⁶ Therefore, prior to discussing the existing and future legislation as well as recent case law, as applicable to both the active and the passive disclosure of environmental information, including the efficacy of the realisation of these provisions, it is necessary to first provide a discussion on the nature of the right of access to environmental information in order to provide a common understanding of the concept.⁴⁷ In this section the constitutional foundation and purpose of the right of access to environmental information will first be discussed, followed by a discussion on the scope of the applicability of this right for the purposes of this study with specific reference to the nature of environmental information, the public and the private sphere, and the nature of the disclosure of environmental information.

2.1 The Constitutional foundation and purpose of the right of access to environmental information

Fundamental human rights are protected through a Bill of Rights which is part of a Constitution which is the supreme law in South Africa.⁴⁸ When the Constitution was drafted various organisations and individuals requested that a right of access to information be included in the Constitution to prevent outrages such as *Apartheid* from occurring again, by forcing public and private bodies to act in a transparent and accountable manner and making it impossible to hide behind a veil of secrecy.⁴⁹ The right of access to information is enshrined in section 32 of the Constitution as part of the constitutional Bill of Rights.⁵⁰ Section 32(1) states that "everyone has the right of

⁴⁶ Madue, Tsolo and Ramoabi 2014 *Journal of Public Administration* 877.

⁴⁷ It must be noted that this study is not aimed at providing a comprehensive list of definitions of the concepts used, but rather to provide a foundation for the approach followed in addressing the relevant research question asked in this study, namely "How is the right of access to environmental information in the public and private sphere currently realised?"

⁴⁸ The Bill of Rights mirrors a right-based approach to all administrative conduct in law. Consequently, individuals' rights and freedoms are clearly defined and are no longer considered residual in definition. See Burns and Kidd "Administrative law and implementation of environmental law" 225.

⁴⁹ South African Human Rights Commission (SAHRC) 2014 *Guide on how to use the Promotion of Access to Information Act 2 of 2000* 13. Such a claim to freedom of information is usually based on the view that society is entitled to request access to information in the possession of the State that may have an impact on it. See Currie and De Waal *The Bill of Rights Handbook* 692.

⁵⁰ The State has the duty to "respect, protect, promote and fulfil the rights in the Bill of Rights". See s 7(2) of the Constitution.

access to any information held by the state, and any information that is held by another person and that is required for the exercise or protection of any rights".⁵¹ This right is applicable to private and public bodies alike.⁵²

Section 32 of the Constitution also states that national legislation must be enacted to give effect to the right of access to information.⁵³ In this regard the legislature enacted PAIA, which overrides all other legislation restricting access to information held by a private or public body inconsistent with the provisions and objectives of PAIA.⁵⁴

It must be noted that the right of access to information is not an absolute right and may be restricted in certain circumstances like, for example, the protection of privacy or commercial interests, or efficient, effective and good governance.⁵⁵ These restrictions can be imposed in terms of section 36 of the Constitution or the statutory grounds for refusal as included in PAIA.⁵⁶

⁵¹ Section 32(1) of the Constitution. This right is closely connected to administrative justice. See Kotzé 2004 *Potchefstroom Electronic Law Journal* 71. The importance of this right was confirmed in *Aquafund (Pty) Ltd v Premier of the Western Cape* 1997 7 BCLR 907 (C) para 916E, where the Court held that "If it is accepted that every person is entitled to lawful administrative action, it must follow that in a legal culture of accountability and transparency [such as that] manifested in the constitution, a person must be entitled to such information as is reasonably required by him to determine whether his right to lawful administrative action has been infringed or not. If a person is not able to establish whether his rights have thus been infringed, he will clearly be prejudiced".

⁵² The enforcement of the right of access to information is confirmed against public bodies in s 32(1)(a) of the Constitution (the word "state"), and against private bodies in s 32(2) of the Constitution (the words "another person"). Section 8 of the Constitution provides for the vertical application of the rights as encompassed in the constitutional Bill of Rights by binding organs of state, as well as the horizontal application by binding natural and juristic persons to all provisions of the Bill of Rights. Also see the preamble of PAIA. When the right of access to information was included in the South African Constitution, this was the first time in the world that a right of access to information was extended to private bodies. See SAHRC 2014 *Guide on how to use the Promotion of Access to Information Act 2 of 2000* 13. This was also confirmed in *Davis v Clutchco (Pty) Ltd* 2004 1 SA 75 (C) para 10, when the court held that "in extending the fundamental right of access to information to records held by private bodies, the Constitution and the statute have taken a step unmatched in human rights jurisprudence". Also see 2.2.1.2 below.

⁵³ Section 32(2) of the Constitution. This national legislation may provide for reasonable measures to alleviate the administrative and financial burden on the state. Also see Currie and De Waal *The Bill of Rights Handbook* 693.

⁵⁴ Section 5 of PAIA. See Currie and De Waal *The Bill of Rights Handbook* 695. Also see Ferreira *Die openbare administrasie en die reg op toegang tot inligting* 46-47 for a discussion on the relationship between section 32 of the Constitution and PAIA.

⁵⁵ Du Plessis "Access to information" 198. Also see s 7(3) of the Constitution.

⁵⁶ Section 36(1) of the Constitution states that any constitutional right may be limited in terms of the law of general application, as long as the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". Factors that must be considered when establishing whether such limitation is fair or not include the importance of the purpose for the limitation, the nature of the right, the relation between the limitation and the limitation's purpose,

The right of access to information is vital in the public and private sphere⁵⁷ in the environmental context.⁵⁸ In this regard, reference is made to a right of access to environmental information.⁵⁹ As the basis for this right, section 32 of the Constitution must be read together with section 24 of the Constitution, which states that:

Everyone has the right:

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.⁶⁰

Section 24 establishes a framework for the administration of environmental law by providing the foundation for implementation and governance through administrative functions within the context of environmental law.⁶¹ Although section 24 places a duty on the state to protect the environment through reasonable legislative and other measures,⁶² it is the responsibility of all citizens to ensure the protection of the environment for present and future generations.⁶³ Accordingly it is clear that both the public and the private sphere have a duty to promote the protection of the environment

the nature and extent of the limitation, and the availability of less restricting means to achieve the relevant purpose. Also see s 9 of PAIA, as well as Part 2, chapter 4 and part 3, chapter 4 of PAIA for the statutory grounds of refusal. For discussion pertaining to the use of statutory grounds of refusal in terms of PAIA, see 4 below.

⁵⁷ See 2.2.1.2 below for discussion on the meaning of the public and private sphere.

⁵⁸ Glazewski *Environmental law in South Africa* 5-42. In the international arena calls have been made to provide specifically for a right of access to environmental information. See Glazewski *Environmental law in South Africa* 5-43 and principle 10 of the *Rio Declaration on the Environment and Development* (1992) 31 ILM 874 (Rio Declaration).

⁵⁹ See 2.2.1.1 below for a discussion on the nature of environmental information.

⁶⁰ Section 24 of the Constitution. Section 24 has elements of both a fundamental human right (s 24(a)) and a socio-economic right (s 24(b)). See Kotzé 2004 *Potchefstroom Electronic Law Journal* 60.

⁶¹ Kotzé 2004 *Potchefstroom Electronic Law Journal* 63.

⁶² Section 24(b) of the Constitution. It may be assumed that a relationship exists between the enforcement of the environmental right (or environmental governance) and environmental administration and implementation. In this regard, see Kotzé 2004 *Potchefstroom Electronic Law Journal* 60-62.

⁶³ Du Plessis and Ferreira-Snyman 2002 *Koers* 389. In the past there was strong reliance on so-called "command and control" enforcement measures (measures enforced by the state), where after the reliance shifted to include "management by outsiders" (MBO) measures. MBO can be achieved by collaboration between organs of state, the private sphere and the general public.

by upholding the administration of environmental law through the implementation of, amongst other things, the right of access to environmental information.

The right of access to environmental information deals *inter alia* with public participation in decision-making processes pertaining to specific biospheres.⁶⁴ In order for the public to properly participate in such decision-making processes, access to information is required.⁶⁵ This right does not guarantee the protection of the environment, but can be used as a mechanism to determine detrimental environmental impacts.⁶⁶ This right can be seen as a *drukmittel* rather than a control measure, as it can be used to force public and private bodies to timeously implement preventive measures against pollution.⁶⁷

Although PAIA is broad enough to be used in a wide range of instances, including in the instance of environmental information,⁶⁸ it does not operate in isolation and interconnects with a whole suite of other pieces of legislation.⁶⁹ In this regard various provisions and procedures governing access to environmental information are included in South African environmental legislation.⁷⁰ Consequently, where the provisions and procedures included in environmental legislation are proven to be inappropriate or ineffective to guarantee access to environmental information, reliance can be placed on PAIA, as well as on the relevant constitutional provisions, to obtain such access.⁷¹

The right of access to environmental information is a crucial element of democracy⁷² and various international instruments confirm that this right is essential in achieving

⁶⁴ Du Plessis and Ferreira-Snyman 2002 *Koers* 395. Public participation can be seen as a tool of democracy. Various sections in the Constitution increase the scope of public participation. These sections encourage the participation of the public in local government matters and policy-making and include ss 9, 10, 17, 19(1), 30, 41, 72(1), 118, 152 and 195 of the Constitution. See Nealer 2005 *Journal of Public Administration* 475-477.

⁶⁵ Du Plessis and Ferreira-Snyman 2002 *Koers* 399.

⁶⁶ Du Plessis and Ferreira-Snyman 2002 *Koers* 395.

⁶⁷ Du Plessis and Ferreira-Snyman 2002 *Koers* 395. The right of access to environmental information and public participation are, furthermore, examples of civil-based enforcement measures pertaining to environmental management. See Du Plessis and Ferreira-Snyman 2002 *Koers* 400.

⁶⁸ Roling *Transparency and access to information in South Africa* 13. Also see Ahmed 2014 <https://www.youtube.com/watch?v=t3JVJtFunUA>.

⁶⁹ PAIA Civil Society Network *Shadow Report 2014* 19.

⁷⁰ Du Plessis "Access to information" 198. Also see 3 and 4 below.

⁷¹ Du Plessis "Access to information" 198.

⁷² Nealer 2005 *Journal of Public Administration* 470 and Du Plessis and Ferreira-Snyman 2002 *Koers* 389.

environmental sustainability.⁷³ Cooperative governance is, furthermore, promoted by the provisions of PAIA that establish partnerships between the general public and the public and private sphere by requiring public and private bodies to disclose information related to environmental or safety risks.⁷⁴

One of the aims of PAIA is to promote transparency and accountability⁷⁵ in the public and private sphere by giving effect to the right of access to information.⁷⁶ Good governance also demands accountability and transparency⁷⁷ and, as the realisation of the right of access to environmental information promotes transparency, the realisation of this right can promote good governance.⁷⁸ Transparency is deeply rooted in the South African democracy⁷⁹ and environmental legislation.⁸⁰

⁷³ In the *Report of the World Commission of Environment and Development: our common future* (1987) 43 (the Brundtland report) sustainable development is defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". The importance of access to information to the achievement of environmental sustainability has been confirmed in various international instruments. An example is principle 10 of the Rio Declaration, which states that "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes". Throughout the *United Nations Conference on Environment and Development: Agenda 21* (1992) it is also stated that sustainability can be achieved *inter alia* by the implementation of measures to ensure access to information and/ or transparency. See, for example, *2030 Agenda for Sustainable Development* paras 2.c, 3.7, 9.c, 12.8, 16.10, 70 and the *2030 Agenda for Sustainable Development* paras 2.c, 3.7, 9.c, 12.8, 16.10, 70. Also see United Nations date unknown <https://sustainabledevelopment.un.org/post2015/transformingourworld>.

⁷⁴ Du Plessis and Ferreira-Snyman 2002 *Koers* 401. Also see ss 36(2)(c), 42(5)(c), 46(a)(ii), 68(2) and 70(1) of PAIA. Cooperative governance can also promote the realisation of constitutional principles such as transparency and is required by NEMA. See the preamble and chapter 3 of NEMA.

⁷⁵ Accountability is related to democracy and it has been argued that it is a fundamental requirement for the prevention of the abuse of power and to ensure that power is directed towards achieving effectiveness, efficiency, transparency and responsiveness. It is primarily understood as giving account of something, or publically explaining and justifying public policy. See Madue, Tsolo and Ramoabi 2014 *Journal of Public Administration* 878-879.

⁷⁶ Preamble of PAIA.

⁷⁷ In De la Harpe, Rijken and Roos 2008 *Potchefstroom Electronic Law Journal* 4 it was confirmed that transparency and accountability are two of the principles of good market governance. Also see De la Harpe and Roos 2008 *Potchefstroom Electronic Law Journal* 6, where good governance is defined as respect *inter alia* for transparency and accountability.

⁷⁸ Madue, Tsolo and Ramoabi 2014 *Journal of Public Administration* 878 and Du Plessis and Ferreira-Snyman 2002 *Koers* 399.

⁷⁹ Both the *Constitution of the Republic of South Africa* 200 of 1993 (the Interim Constitution) and the Constitution contain a right of access to information as well as various provisions aimed at the promotion of transparency. See s 23 of the *Constitution of the Republic of South Africa* 200 of 1993 (Interim Constitution) and s 32 of the Constitution. Other provisions promoting transparency include ss 13, 24, 25(3)(b), 67 and 142 of the Interim Constitution and ss 1(d), 33, 41(1)(c), 57(1)(b), 59(1), 70(1)(b), 72(1), 116(1)(b), 118(1), 160(7), 195, 215(1)(b), 216(1)(b) and 217(1)(b) of the

The decision to be transparent is guided by weighing up the advantages and disadvantages stemming from the disclosure of information.⁸¹ It must be noted, however, that the disclosure of information does not necessarily amount to transparency.⁸² In some instances information disclosure can be regarded as an act of pretentious transparency when organisations attempt to mislead by disclosing certain information without achieving the ideals of accountability and transparency.⁸³ Truly transparent organisations share information with stakeholders in such a manner that stakeholders can gain insight into organisational matters.⁸⁴ Today, communication with stakeholders should not be considered as an option but as a natural responsibility that should be managed for optimum effectiveness.⁸⁵

It is now necessary to determine the scope of the applicability of the right of access to environmental information for the purposes of this study.

2.2 The scope of the applicability of the right of access to environmental information

In this section the scope of the applicability of the right of access to environmental information will be determined for the purposes of this study with specific reference to the nature of environmental information, the public and the private sphere, and the nature of the disclosure of environmental information.

2.2.1.1 The nature of environmental information

In the international regime environmental information has been defined as including all information on the state of the environment,⁸⁶ environmental threats and environmental

Constitution. For discussion on the entrenchment of transparency in the Interim Constitution and the Constitution, see Roling *Transparency and access to information in South Africa* 3-9.

⁸⁰ Section 2(4)(k) of NEMA states that "all decisions must be taken in an open and transparent manner, and that access to information must be provided in accordance with the law". For views on the nature of transparency in the public and private sphere respectively, see Adeleke and Word "Who's afraid of transparency?" 32-33.

⁸¹ Ungerer 2013 *South African Business Review* 29. For more detail on the potential advantages and disadvantages of the disclosure of information see Ungerer 2013 *South African Business Review* 29-30.

⁸² Adeleke and Word "Who's afraid of transparency?" 34.

⁸³ Adeleke and Word "Who's afraid of transparency?" 34-35.

⁸⁴ Ungerer 2013 *South African Business Review* 29.

⁸⁵ Ungerer 2013 *South African Business Review* 32.

⁸⁶ Including air, water, fauna, flora, natural sites, land and soil.

protection measures.⁸⁷ For the purposes of this study, environmental information will be interpreted in accordance with this definition.

Although PAIA does not distinguish between general and environmental information,⁸⁸ it does refer to the disclosure of information that will reveal a serious "public safety or environmental risk".⁸⁹ Environmental information that can be requested in terms of PAIA includes all records⁹⁰ in the possession of a public or private body, regardless of when it came into existence.⁹¹ However, certain types of information are excluded from the scope of PAIA.⁹² Consequently, environmental information that falls under one of the excluded categories of information is excluded from the provisions of PAIA.

In this study a distinction will be made between strategic⁹³ and procedural⁹⁴ environmental information. Strategic environmental information relates to the concept

⁸⁷ Glazewski *Environmental law in South Africa* 5-43. Also see *EC Council Directive on Freedom of Access to Information on the Environment (90/313/EEC)* and the *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1999)* 38 ILM 517.

⁸⁸ Kotzé 2004 *Potchefstroom Electronic Law Journal* 72.

⁸⁹ Sections 36(2)(c), 42(5)(c), 46(a)(ii), 68(2) and 70(1) of PAIA.

⁹⁰ A "record" is defined as "any recorded information regardless of form or medium, in the possession or under the control of that public or private body, respectively, and whether or not it was created by that public or private body, respectively". See s 1 of PAIA. The broad definition of a "record" promotes the principle of maximum disclosure. See Roling *Transparency and access to information in South Africa* 13. For further discussion on the meaning of a "record" in terms of PAIA and a distinction between a "record" and "information" see *Enable Employment (Pty) Ltd v Frese* 2015 ZAGPPHC 34 paras 9-10, Roberts 2006 *Politeia* 119-120 and Roling *Transparency and access to information in South Africa* 21-23.

⁹¹ Section 3 of PAIA states that PAIA applies to all records in possession of a public or private body, regardless of when they came into existence. Should an official or an independent contractor in the service of a public or private body be in possession of a specific document, that document is deemed to be in the possession of the relevant public or private body. See s 4 of PAIA.

⁹² For example, information requested for civil or criminal proceedings after the commencement of such proceedings if such disclosure is regulated by another law (s 7(1) of PAIA), information of the Cabinet and its committees that relates to the judicial functions of a court, a Special Tribunal established in terms of the *Special Investigating Units and Special Tribunals Act 74 of 1996*, or information in the possession of an individual member of Parliament or a provincial legislature in that capacity, or relevant to a decision regarding the nomination, appointment or selection of a Judicial Officer or any other person by the Judicial Service Commission (s 12 of PAIA). Furthermore, if the requested environmental information consists of reasons for an administrative decision, PAJA can also be used as s 5 of PAJA states that a person whose rights have been adversely affected by administrative action may, within 90 days after becoming aware thereof, request written reasons for such administrative action. See Du Plessis and Ferreira-Snyman 2002 *Koers* 399. Also see Ferreira *Die openbare administrasie en die reg op toegang tot inligting* 48-49 for a discussion on the distinction between information and reasons.

⁹³ See 3.1 and 4.1.1 below.

⁹⁴ See 3.2 and 4.1.2-4.3 below.

of strategic planning⁹⁵ that was developed when organisations became concerned about the "maintenance of a productive and viable relationship between themselves and the environment". Strategic environmental information can be seen as assisting organisations in the public and private sphere in strategic planning by focussing on long-term environmental goals. For the purposes of this study strategic environmental information includes manuals, policy, legislation, guideline documents, frameworks, strategies, protocols, schemes, plans, programmes and reports.⁹⁶

Procedural environmental information, in this study, is seen as environmental information that must be disclosed as a part of compulsory statutory procedures. These procedures relate to a broad range of statutory functions imposed on both public and private bodies.⁹⁷ The role of these procedures is not only to promote access to environmental information, but to also facilitate improved efforts pertaining to environmental compliance and enforcement.⁹⁸ The latter role is fulfilled by providing private and public enforcers access to a wide range of information required to understand the environmental and regulatory context within which they should execute their duties, to have knowledge of the rights and duties of society where such actions could detrimentally affect the environment, and the obligations and functions of environmental authorities.⁹⁹ In this study various instances where the disclosure of procedural environmental information is required will be referred to, including *inter alia* environmental permitting application procedures and procedural reporting.¹⁰⁰

2.2.1.2 The public and private sphere

As the right of access to information is binding on public and private bodies,¹⁰¹ a distinction will be made throughout this study between the realisation of the right of

⁹⁵ Strategic planning, by its nature, encourages organisations to think strategically about long-term issues. It further provides a structured approach in identifying and evaluating strategic alternatives, allows for organisational resources to be used for maximum benefit and results in improved consistency in the coordination of organisational work efforts. The value of strategic planning is determined by the extent to which it assists key decision makers in thinking and acting strategically. See Cohen 2001 *South African Journal of Business Management* 17-19.

⁹⁶ See 3.1 and 4.1.1 below.

⁹⁷ Du Plessis "Access to information" 204.

⁹⁸ Du Plessis "Access to information" 204.

⁹⁹ Du Plessis "Access to information" 204.

¹⁰⁰ See 3.2 and 4.1.2 below.

¹⁰¹ See 2.1 above.

access to environmental information in the public and the private sphere. When referring to the realisation of this right in the public sphere it must be understood as the realisation of this right by public bodies, within the context of the definition of public bodies as included in PAIA, except when expressly indicated otherwise.¹⁰² The term "public body" is defined as any state department or administration in the local,¹⁰³ provincial or national sphere of government, or any institution or functionary when performing a duty or exercising a power under the Constitution or any provincial constitution,¹⁰⁴ or exercising a public power under any legislation.¹⁰⁵ As the definition of "organ of state" in the Constitution is almost similar to the definition of "public body" in PAIA,¹⁰⁶ for purposes of this study, organs of state fall within the category of public bodies. In this study the realisation of the right of access to environmental information will be investigated by evaluating the extent of the compliance of selected public bodies only. On a national level, these will be the Department of Environmental Affairs (DEA), the Department of Water and Sanitation (DWS), the Department of Mineral Resources (DMR), the Department of Rural Development and Land Reform (DRDLR), the Department of Energy (DOE) and the Department of Agriculture, Forestry and Fisheries (DAFF). On a provincial level, the compliance of all nine provincial departments responsible for environmental matters will be evaluated.¹⁰⁷ As metropolitan

¹⁰² See 4.1. below.

¹⁰³ Section 152(d) of the Constitution confirms that local government has the duty to promote a safe and healthy environment. The Constitution further confirms that the local government sphere is responsible for specific environmental matters such as air quality management, sanitation services, domestic waste management and access to sufficient water and electricity reticulation. See schedule 4, part B and schedule 5, part B of the Constitution. For further discussion on the role of local government in realising the constitutional environmental right, see Du Plessis 2015 *Potchefstroom Electronic Law Journal* 1856-1864, *Le Sueur v eThekweni Municipality* 2013 ZAKZPHC 6 para 37 (discussed in 3.1.1 below), Fuo 2013 *Potchefstroom Electronic Law Journal* 224 and 240, Du Plessis 2010 *Stellenbosch Law Review* 265-297, Du Plessis 2009 *South African Public Law* 56-96 and Du Plessis and Van der Berg 2014 *Stellenbosch Law Review* 580-594, Du Plessis and Kotzé 2014 *Journal of African Law* 145-174 and Petterson and Snijman "Environmental law compliance and enforcement" 291-318.

¹⁰⁴ For example, the President, Parliament, Auditor-General, the Judicial Services Commission, the Human Rights Commission or the Public Protector.

¹⁰⁵ For example, parastatals such as Transnet, the South African Reserve Bank, Telkom, Eskom and tertiary institutions. A parastatal refers to an organisation that is owned by the government. See Cambridge University date unknown <http://dictionary.cambridge.org/dictionary/english/parastatal>.

¹⁰⁶ See s 1 of PAIA and s 239 of the Constitution. Judicial officers are specifically excluded from the definition of "organ of state", but not excluded from the definition of "public body".

¹⁰⁷ Limpopo Department of Economic Development, Environment and Tourism, Western Cape Department of Environmental Affairs and Planning, Gauteng Department of Agriculture and Rural Development, North West Department of Rural, Environment and Agricultural Development, Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs,

municipalities receive a greater number of PAIA requests, the compliance of four of the largest metropolitan municipalities¹⁰⁸ will be investigated.

When referring to the realisation of this right in the private sphere it must, similarly, be understood as the realisation of this right by private bodies, within the context of the definition of private bodies as included in PAIA, except when expressly indicated otherwise.¹⁰⁹ "Private bodies" are defined as a natural person or a partnership which has carried on, or carries on, any trade, profession or business in such capacity, or any existing or former juristic person.¹¹⁰

2.2.1.3 The nature of the disclosure of environmental information

In this study a distinction will be made between the active¹¹¹ and the passive¹¹² disclosure of environmental information. Active disclosure refers to the proactive disclosure of environmental information in terms of statutory obligations, or voluntarily, without being requested to do so.¹¹³ This information is deemed to be in the public domain.¹¹⁴ Passive disclosure, on the other hand, refers to the disclosure of information upon formal request in terms of PAIA or other specified relevant legislation.¹¹⁵ This information is not deemed to be in the public domain.¹¹⁶

After this discussion of the nature of the right of access to environmental information, the realisation of the active disclosure of environmental information will now be discussed.

KwaZulu-Natal Department of Agriculture and Environmental Affairs, Northern Cape Department of Environment and Nature Conservation, Free State Department of Economic, Small Business Development, Tourism and Environmental Affairs and Eastern Cape Department of Economic Development and Environmental Affairs.

¹⁰⁸ The City of Cape Town Metropolitan Municipality, the City of Johannesburg Metropolitan Municipality, eThekweni Municipality and the City of Tshwane Metropolitan Municipality.

¹⁰⁹ See 4.1. below.

¹¹⁰ Section 1 of PAIA.

¹¹¹ See 3 below.

¹¹² See 4 below.

¹¹³ Ntlama 2003 *Stellenbosch Law Review* 275, Tak-Yan *Executive summary of MSc thesis: environmental information disclosure* 1, Ferreira *Die openbare administrasie en die reg op toegang tot inligting* 59 and Du Plessis "Access to information" 198.

¹¹⁴ Du Plessis "Access to information" 198.

¹¹⁵ Nealer 2005 *Journal of Public Administration* 471, Du Plessis "Access to information" 198, Ferreira *Die openbare administrasie en die reg op toegang tot inligting* 56-57 and Tak-Yan *Executive summary of MSc thesis: environmental information disclosure* 1.

¹¹⁶ Du Plessis "Access to information" 198.

3 The realisation of the active disclosure of environmental information

The right of access to environmental information is not always subject to a formal PAIA request.¹¹⁷ Various public and private bodies are compelled to proactively disclose certain information to the public in terms of other legislation.¹¹⁸ In addition, public and private bodies may voluntarily disclose certain information to the public for the sake of transparency, convenience and accountability.¹¹⁹ Du Plessis¹²⁰ is of the view that the ambit of current active disclosure¹²¹ requirements may not be wide enough to include the environmental information required to enable private and public enforcers to fulfil their objectives.¹²² Consequently these enforcers may be compelled to resort to statutory procedures to obtain access to specific environmental information that is not readily available.¹²³ It is therefore necessary to investigate the statutory obligations pertaining to the active disclosure of environmental information and the realisation thereof.

In this section the active disclosure requirements of different types of strategic and procedural environmental information in the public and private sphere will be identified and the realisation thereof will be discussed. In some instances, the lack of an active disclosure requirement pertaining to specific environmental information will also be highlighted.

3.1 The active disclosure of strategic environmental information

PAIA, as well as various other acts that are relevant to environmental information in South Africa, contains specifications related to the mandatory active disclosure of strategic environmental information.¹²⁴ In this section these active disclosure requirements relevant to the public and private sphere will be discussed, including the realisation thereof.

¹¹⁷ SAHRC 2014 *Guide on how to use the Promotion of Access to Information Act 2 of 2000* 25.

¹¹⁸ SAHRC 2014 *Guide on how to use the Promotion of Access to Information Act 2 of 2000* 25.

¹¹⁹ SAHRC 2014 *Guide on how to use the Promotion of Access to Information Act 2 of 2000* 25.

¹²⁰ Du Plessis "Access to information" 204.

¹²¹ See 2.2.1.3 above for discussion on the meaning of "active disclosure".

¹²² Du Plessis "Access to information" 204-205.

¹²³ Du Plessis "Access to information" 205.

¹²⁴ For discussion on the meaning of "strategic environmental information", see 2.2.1.1 above.

3.1.1 *The active disclosure of strategic environmental information in the public sphere*

In this section the most important active disclosure obligations of public bodies in the national, provincial and local sphere of government pertaining to environmental information, as well as the realisation thereof, will be discussed by differentiating between various forms of strategic environmental information. Where the same disclosure obligation is applicable to more than one sphere of government, such an obligation will be discussed under only one of the government spheres.

The active disclosure obligations pertaining to manuals as strategic environmental information will now be discussed.

3.1.1.1 Manuals

Public bodies in the national, provincial and local sphere of government have specific active disclosure obligations related to manuals in terms of PAIA. These obligations will now be discussed.

3.1.1.1.1 The national sphere of government

The national sphere of government is obliged to actively disclose various types of manuals related to the right of access to environmental information. One such example is that PAIA compels the South African Human Rights Commission (SAHRC)¹²⁵ to compile a guide containing information on how to use PAIA to obtain access to information held by public and private bodies.¹²⁶ This guide, also known as the "section 10 guide",¹²⁷ must be made widely available in all official languages.¹²⁸ It must be noted that all functions of the SAHRC, including the publication of the section 10 guide, have recently been transferred to the Information Regulator that is yet to be established in

¹²⁵ In terms of s 184 of the Constitution and s 83 of PAIA the South African Human Rights Commission (SAHRC) is mandated *inter alia* to protect the right of access to information by promoting the implementation of PAIA.

¹²⁶ Section 10(1) of PAIA.

¹²⁷ SAHRC 2014 *Guide on how to use the Promotion of Access to Information Act 2 of 2000* 18.

¹²⁸ Nomthandazo 2003 *Stellenbosch Law Review* 276. Also see SAHRC date unknown <http://www.sahrc.org.za/home/index.php?ipkContentID=97&ipkMenuID=76> and SAHRC 2014 *Guide on how to use the Promotion of Access to Information Act 2 of 2000* 18. The latest version was published in 2014 and provides an oversight on how to use PAIA to advance human rights.

terms of section 39 of the POPI.¹²⁹ Information officers¹³⁰ of public bodies to which PAIA applies are obliged to compile and publish manuals containing specific detail on various matters.¹³¹ These manuals are known as PAIA manuals and have to indicate the types of information that are automatically available and that are not subject to a request in terms of PAIA, as well as the manner of accessing such information.¹³² The practical usefulness and desirability of PAIA manuals have been recognised widely.¹³³

The PAIA manuals of public bodies must be updated, if necessary, at least on an annual basis.¹³⁴ This vague provision may lead to confusion related to when the update of PAIA manuals would be required, as no guidance has been provided related to when it would be necessary to update the PAIA manual of a public body. It may be argued that, if any material changes to the content of the PAIA manual must be made to ensure the correctness thereof, such changes might trigger the necessity for an update of the manual.

Various national government departments responsible for matters directly related to the environment have all recently published PAIA manuals in terms of section 14 of PAIA.¹³⁵

¹²⁹ It must be noted that, despite the transfer of the SAHRC's PAIA mandate to the Information Regulator, the SAHRC's constitutional mandate related to the right of access to information will remain. See SAHRC 2014 the *Promotion of Access to Information Act Annual Report 2013-2014* 26.

¹³⁰ An information officer is defined to mean the departmental head of the public body. Section 1 of PAIA and Wood 2011 *South African Journal of Human Rights* 559.

¹³¹ These manuals must contain detail *inter alia* on its functions and structure, contact details of the information officer of the public body, a description of the SAHRC manual and how to obtain access thereto, sufficient detail on the manner of requesting access to information held by the relevant body, the types of information held by the relevant body and the types of information automatically available, as well as the manner of obtaining access thereto. See s 14 of PAIA.

¹³² DAFF 2015 *Manual prepared in terms of section 14 of the Promotion of Access to Information Act, 2000* 20-21, DEA 2015 *Manual in terms of section 14 of the Promotion of Access to Information Act, 2000* 21, DMR 2014 *PAIA Manual issued in terms of section 14 of the Promotion of Access to Information Act, 2000* 6-11, DOE date unknown *Manual issued in terms of section 14 of the Promotion of Access to Information Act, 2000* 13-14, Department of Rural Development and Land Reform (DRDLR) 2013 *Manual for the Department of Rural Development and Land Reform in terms of section 14 of the Promotion of Access to Information Act, 2000* 27-32 and regs 7 and 10 of GN R792 in GG 40116 of 1 July 2016.

¹³³ PAIA manuals serve to "make society more knowledgeable and office less mysterious". See Wood 2011 *South African Journal of Human Rights* 559. In *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* 2003 3 SA 518 (CPD) para 587F the court acknowledged the importance of PAIA manuals in facilitating a request for access to information by providing specific detail relevant to the manner in which such requests must be made.

¹³⁴ Section 14(2) of PAIA.

¹³⁵ Department of Agriculture, Forestry and Fisheries (DAFF) 2015 *Manual prepared in terms of section 14 of the Promotion of Access to Information Act, 2000*, Department of Mineral Resources (DMR) 2014 *PAIA Manual issued in terms of section 14 of the Promotion of Access to Information Act, 2000*, GN R792 in GG 40116 of 1 July 2016 (Department of Water and Sanitation (DWS)),

However, during this research certain concerns were noted specifically with regard to the PAIA manual published on the website of the DWS.¹³⁶ This manual is not the most recent version of the PAIA manual published in the *Gazette*.¹³⁷ Furthermore, this PAIA manual is outdated as it still refers to the Department of Water Affairs and Forestry and not to the new name of the Department.¹³⁸ It was also noted that the content of the PAIA manuals of some other government departments in the national, provincial and local sphere does not comply with the requirements of PAIA, as they have been published only in English and not in three official languages.¹³⁹

PAIA states that PAIA manuals of public bodies in the national, provincial and local sphere of government should be made available as prescribed.¹⁴⁰ In the Regulations published under PAIA¹⁴¹ detail on the manner of disclosure of public bodies' PAIA manuals has been included.¹⁴² POPI has also recently extended these active disclosure

Department of Energy date unknown *Manual issued in terms of section 14 of the Promotion of Access to Information Act, 2000*, DRDLR 2013 *Manual for the Department of Rural Development and Land Reform in terms of section 14 of the Promotion of Access to Information Act, 2000* and Department of Environmental Affairs (DEA) 2015 *Manual in terms of section 14 of the Promotion of Access to Information Act, 2000*.

¹³⁶ DWS date unknown <https://www.dwa.gov.za/Documents/Default.aspx>.

¹³⁷ GN R792 in GG 40116 of 1 July 2016. Where reference has been made to the *Gazette* in this study, it has to be interpreted as the national *Government Gazette*, unless specified otherwise.

¹³⁸ The new name of this department is the DWS.

¹³⁹ Section 14(1) of PAIA. Also see SAHRC 2012 *The Promotion of Access to Information Act (PAIA) and records management consolidated audit report: 2008-2012* 33. Examples of PAIA manuals published only in English at the time of this study include DMR 2014 *PAIA Manual issued in terms of section 14 of the Promotion of Access to Information Act, 2000*, DEA 2015 *Manual in terms of section 14 of the Promotion of Access to Information Act, 2000*, GG 36699 of 26 July 2013 (Limpopo Department of Economic Development, Environment and Tourism), GN 2397 in PG 326 of 27 July 2015 (Gauteng Department of Agriculture and Rural Development), GG 39544 of 24 December 2015 (North West Department of Rural, Environment and Agricultural Development), Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs 2015 *Promotion of Access to Information Manual compiled in terms of section 14 of the Promotion of Access to Information Act (Act 2 of 2000)*, GG 37731 of 12 June 2014 (KwaZulu-Natal Department of Agriculture and Environmental Affairs), City of Tshwane Metropolitan Municipality date unknown *Section 14 manual* and eThekweni Municipality date unknown *Section 14 manual (compiled in compliance with section 14 of chapter 2 of part 2 of the Promotion of Access to Information Act, Act no 2 of 2000 (PAIA))*.

¹⁴⁰ Section 14(3) of PAIA.

¹⁴¹ GN R187 in GG 23119 of 15 February 2002, as amended by GN R1244 in GG 25411 of 22 September 2003.

¹⁴² Regulation 4 of GN R187 in GG 23119 of 15 February 2002 states that "Immediately after the manual has been compiled in terms of section 14(1) or updated in terms of section 14(2) of the Act, the information officer of a public body must make available a copy of the manual in at least the three official languages in which the manual is compiled as required by section 14 of the Act, to the Human Rights Commission; and the head of office of every office of that public body; and make available the manual on the web site, if any, of the public body; and the information officer of a public body may publish the manual in three official languages in the *Gazette*."

obligations to PAIA.¹⁴³ Public bodies are required to make their PAIA manuals easily accessible to the public.¹⁴⁴ Although there has been an improvement in the availability of the PAIA manuals of government departments, challenges were experienced during this study in obtaining access to the most recent versions of some of the PAIA manuals. Although PAIA manuals have been published by various government departments on their websites, some of these manuals are undated and therefore it cannot be ascertained whether the content of these manuals is outdated or whether the specific version of the manual found is the most recent version.¹⁴⁵ It was also found that, although the abovementioned national government departments' PAIA manuals are accessible via internet search engines, they are not always easily accessible on the departments' official websites.¹⁴⁶ As the source of a document found via an internet search engine cannot always be easily determined, uncertainty exists on the authenticity and currency of the PAIA manuals found via these internet search engines. This challenge is also applicable to obtaining access to the PAIA manuals of public bodies in the provincial sphere of government.¹⁴⁷

It was further noted that in practice the PAIA manuals of national, provincial and local government departments are usually published either on the government department's official website, the Department of Justice and Constitutional Development's website, or in the national or provincial *Gazette*.¹⁴⁸ These different ways of publishing of PAIA manuals may constitute a challenge to the accessibility of the most recent versions of them.¹⁴⁹ A further challenge pertaining to the availability and currency of PAIA manuals

¹⁴³ The Schedule of POPI amends s 14(3) of PAIA by requiring that PAIA manuals of public bodies must be published on the website of the public body and be available at the head office of the department for public inspection.

¹⁴⁴ SAHRC 2014 *Guide on how to use the Promotion of Access to Information Act 2 of 2000* 21.

¹⁴⁵ Examples of undated PAIA manuals include the DOE date unknown *Manual issued in terms of section 14 of the Promotion of Access to Information Act, 2000*, the City of Tshwane Metropolitan Municipality date unknown *Section 14 manual* and eThekweni Municipality date unknown *Section 14 manual (compiled in compliance with section 14 of chapter 2 of part 2 of the Promotion of Access to Information Act, Act no 2 of 2000 (PAIA))*.

¹⁴⁶ An example is the PAIA manual of the DOE, which was not easily accessible directly from the DOE's official website. See DOE date unknown <http://www.energy.gov.za/home.html>.

¹⁴⁷ An example is the PAIA manual of the Limpopo Department of Economic Development, Environment and Tourism, which was not easily accessible directly from the department's official website. See Limpopo Department of Economic Development, Environment and Tourism date unknown <http://www.ledet.gov.za>.

¹⁴⁸ Department of Justice date unknown <http://www.justice.gov.za/paia/paia.htm>. An example is the PAIA manual of the Limpopo Department of Economic Development, Environment and Tourism.

¹⁴⁹ CER *Barricading the doors* 3.

is that since the commencement of section 14 of PAIA¹⁵⁰ some government departments responsible for environmental matters have been divided,¹⁵¹ consequently amending the scope of responsibility of these departments.¹⁵² As a result, every time a "new" government department is established, these "new" departments must start from scratch in ensuring compliance with section 14 of PAIA by publishing a new PAIA manual. This may complicate the compliance of the affected government departments.

3.1.1.1.2 The provincial sphere of government

Like public bodies in the national sphere,¹⁵³ public bodies in the provincial sphere of government to which PAIA applies are also obliged to compile and publish PAIA manuals.¹⁵⁴ In terms of the Centre for Environmental Rights' (CER) report on the value of transparency in the realisation of environmental rights¹⁵⁵ it was found, at the time of the compilation of their report in 2012, that only three provincial government departments responsible for environmental matters had published PAIA manuals.¹⁵⁶ However, since then more public bodies in the provincial sphere of government responsible for environmental matters have published PAIA manuals.¹⁵⁷ Although there has been improvement relating to the availability of PAIA manuals, challenges similar to those experienced in relation to the PAIA manuals of national bodies were experienced in the provincial sphere related to the availability of the most recent version of PAIA

¹⁵⁰ 2 February 2000.

¹⁵¹ For example, the then Department of Water Affairs and Forestry (DWAF) was divided into the DWS and the DAFF. Another example is the then Department of Minerals and Energy (DME), which was divided into the DMR and the DOE.

¹⁵² For example, forestry previously fell under the responsibility of the then DWAF, which was divided into the DWS and the DAFF. Currently, forestry is the responsibility of the DAFF. Yet again, energy previously fell under the responsibility of the DME, which was divided between the DMR and DOE.

¹⁵³ See 3.1.1.1.1 above.

¹⁵⁴ Section 14 of PAIA.

¹⁵⁵ CER *Unlock the doors*.

¹⁵⁶ CER *Unlock the doors* 11.

¹⁵⁷ See, for example, the published PAIA manuals of the Western Cape Department of Environmental Affairs and Planning (Western Cape Department of Environmental Affairs and Planning 2013 <https://www.westerncape.gov.za/text/2013/March/paia-manual-environmental-affairs-and-development-planning-eng.pdf>), the Limpopo Department of Economic Development, Environment and Tourism (GG 39085 of 13 August 2015), the Gauteng Department of Agriculture and Rural Development (GN 2397 in PG 326 of 27 July 2015), the North West Department of Rural, Environment and Agricultural Development (GG 39544 of 24 December 2015), the Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs (Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs 2015 *Promotion of Access to Information Manual compiled in terms of section 14 of the Promotion of Access to Information Act (Act 2 of 2000)*), and the KwaZulu-Natal Department of Agriculture and Environmental Affairs (GG 37731 of 12 June 2014).

manuals.¹⁵⁸ It was also noted that the content of the PAIA manuals of some provincial government departments does not comply with all the provisions of PAIA.¹⁵⁹

3.1.1.1.3 The local sphere of government

Like public bodies in the national and provincial sphere,¹⁶⁰ public bodies in the local sphere of government to which PAIA applies are obliged to compile and publish PAIA manuals.¹⁶¹ In 2011 it was noted that only 29 out of 282 municipal bodies or, stated otherwise, only 10% of municipal bodies have produced and published PAIA manuals.¹⁶² In 2012 it was noted that 12% of municipalities have compliant PAIA manuals.¹⁶³ The City of Tshwane, City of Johannesburg, City of Cape Town and eThekweni metropolitan municipalities, however, all have PAIA manuals available on their websites.¹⁶⁴ Although there has been improvement relating to the availability of PAIA manuals in this sphere, challenges similar to those experienced in relation to the PAIA manuals of national and provincial bodies were experienced in the local sphere related to the availability of the most recent version of PAIA manuals.¹⁶⁵ Furthermore, the content of PAIA manuals of some local government departments does not comply with all the provisions of PAIA.¹⁶⁶

Another form of strategic environmental information is policy and legislation, of which the active disclosure requirements will now be discussed.

3.1.1.2 Policy and legislation

Public bodies in the national, provincial and local sphere of government have specific active disclosure obligations related to policy and legislation. These obligations will now be discussed.

¹⁵⁸ See 3.1.1.1.1 above.

¹⁵⁹ See 3.1.1.1.1 above.

¹⁶⁰ See 3.1.1.1.1 and 3.1.1.1.2 above.

¹⁶¹ Section 14(1)(d) of PAIA.

¹⁶² CER *Unlock the doors* 11.

¹⁶³ CER *Barricading the doors* 3.

¹⁶⁴ The following manuals could be found online: City of Cape Town Metropolitan Municipality 2013 *Section 14 manual (in terms of the Promotion of Access to Information Act 2 of 2000)*, City of Johannesburg Metropolitan Municipality 2014 *Manual in terms of the Promotion of Access to Information Act (Act no 2 of 2000)*, City of Tshwane Metropolitan Municipality date unknown *Section 14 manual* and eThekweni Municipality date unknown *Section 14 manual (compiled in compliance with section 14 of chapter 2 of part 2 of the Promotion of Access to Information Act, Act no 2 of 2000 (PAIA))*.

¹⁶⁵ See 3.1.1.1.1 above.

¹⁶⁶ See 3.1.1.1.1 above.

3.1.1.2.1 The national sphere of government

Where decisions are taken related to the use of public power and to the formulation of policy in a democracy, it is necessary to ensure transparency in the conduct of the state - consequently society should have access to relevant records.¹⁶⁷ In terms of the Constitution society has the right to have access to all promulgated national legislation,¹⁶⁸ including legislation relevant to environmental management.¹⁶⁹ The Constitution requires all national bills that are signed into Acts of Parliament,¹⁷⁰ as well as draft legislation,¹⁷¹ to be published. Various environmental acts mandate national authorities to issue regulations and norms and standards in terms of these acts¹⁷² and some of them need to be published for comment prior to finalisation.¹⁷³

With regard to administrative justice PAJA states that the Minister must publish a code of good administrative conduct which provides information and practical guidelines aimed at the promotion of sufficient administration.¹⁷⁴ Such a code of good administrative conduct was published in 2006 on the Department of Justice's website.¹⁷⁵ This document contains information on informing society of the decisions made and the

¹⁶⁷ Nomthandazo 2003 *Stellenbosch Law Review* 275.

¹⁶⁸ Inclusive of regulations, proclamations and other instruments of subsidiary legislation. See s 101 of the Constitution.

¹⁶⁹ Section 101 of the Constitution. All acts, draft bills, bills, notices, green papers and white papers are publically available on the South African government's official website. See South African Government date unknown <http://www.gov.za/document/latest>. Furthermore, the content of all published government gazettes is also publically available on the official website of Government Printing Works. See Government Printing Works date unknown <http://www.gpwonline.co.za/Gazettes/Pages/Published-Gazettes.aspx>.

¹⁷⁰ Section 81 of the Constitution. In addition, a Bill amending the Constitution must be published in the *Gazette* before such a Bill is introduced. See s 174(5)(a) of the Constitution.

¹⁷¹ Draft national legislation that may affect municipal functions must be published for public comment prior to being introduced to Parliament. See s 154(2) of the Constitution.

¹⁷² Examples of mandates of the national sphere of government to issue regulations include s 71 of the *Water Services Act* 108 of 1997, s 54 of the *National Forests Act* 84 of 1998, s 32 of the *Environment Conservation Act* 73 of 1989 (ECA), ss 44-45 of NEMA, s 55(3) of NEMAQA, s 16(4) of NEMWA, ss 26, 69 and 90 of NWA, s 25(1A) of NEMICMA, ss 83 and 85 of NEMICMA, s 97 of the *National Environmental Management: Biodiversity Act* 10 of 2004 (NEMBA), s 107 of the *Mineral and Petroleum Resources Development Act* 28 of 2002 (MPRDA), s 26 of the *National Heritage Resources Act* 25 of 1999 (NHRA), s 36 of the *National Nuclear Regulator Act* 47 of 1999 and ss 37 and 120 of the *Local Government: Municipal Systems Act* 32 of 2000. Examples of mandates to issue norms and standards include s 9 of NEMBA, ss 7-8 of NEMWA, s 11 of the *National Environmental Management: Protected Areas Act* 57 of 2003 (NEMPA), s 45(2) of the *National Environmental Management: Integrated Coastal Management Act* 24 of 2008 (NEMICMA), s 7 of NEMAQA and s 13 of NHRA.

¹⁷³ For example, s 47(1) of NEMA and s 97(3) read with ss 99-100 of NEMBA.

¹⁷⁴ Section 10(5A) of the PAJA.

¹⁷⁵ Department of Justice 2006 http://www.justice.gov.za/paja/docs/unit/PAJA_Code_draft_v2_2006.pdf.

consultation procedures to be followed, thereby promoting the right of access to information. General policy documents such as the *National Development Plan - 2030*¹⁷⁶ are also aimed at the implementation of measures to promote access to information and accountability.¹⁷⁷ It is submitted that the abovementioned policy documents realise the Constitutional values and principles that should govern public administration.¹⁷⁸

Mandates for national departments to publish policy have been incorporated into environmental legislation, such as the mandate to publish a policy within which the Waste Management Bureau must perform,¹⁷⁹ the mandate to publish national policy relevant to heritage resources management for general information¹⁸⁰ as well as statements of general policy on the management of heritage resources.¹⁸¹

3.1.1.2.2 The provincial sphere of government

As with the national sphere of government,¹⁸² society also has the right to have access to all promulgated provincial legislation.¹⁸³ Provincial bills assented to and signed by the Premier must be published,¹⁸⁴ as well as draft provincial legislation that may affect

¹⁷⁶ *Executive summary: National Development Plan – 2030 – Our future, make it work* (2012).

¹⁷⁷ The National Development Plan presents a long-term strategy to increase employment and broaden opportunities *inter alia* through providing access to information. The importance of accountability is also confirmed throughout the National Development Plan. See *Executive summary: National Development Plan – 2030 – Our future, make it work* (2012) 18, 24, 27, 35, 40, 42, 44, 45, 47 and 65.

¹⁷⁸ Section 195 of the Constitution.

¹⁷⁹ Section 34B of NEMWA. The Waste Management Bureau's duties include *inter alia* implementing the pay-out of incentives and funds derived from waste management charges and promoting best practises with regard to waste management.

¹⁸⁰ Section 6(1) of the *National Heritage Resources Act* 25 of 1999 (NHRA). Note that, in terms of s 6(3) of the NHRA, a draft policy must have been made available for public comment prior to the publication of the final policy. Also see SAHRA date unknown <http://www.sahra.org.za/sahris/about/legislation>. The following documentation has been published on SAHRA's website: a draft discussion document entitled *Towards a policy framework for the protection, conservation, management and promotion of heritage objects* (2004) and a document entitled *South African Heritage Resources Information System Policy* (2013). Also see Department of Arts and Culture 2009 *National Policy on South African Living Heritage* where the *National Policy on South African Living Heritage* was published by the Department of Arts and Culture in 2009.

¹⁸¹ Section 47(3) of NHRA. An example of such a policy is the *Draft Policy on the protection, management and conservation of heritage objects* (2005), published in GN 500 in GG 27424 of 30 March 2005. Note that a draft policy must have been made available for public comment prior to the publication of the final policy.

¹⁸² See 3.1.1.2.1 above.

¹⁸³ Including regulations, proclamations and other instruments of subsidiary legislation. See s 140 of the Constitution.

¹⁸⁴ Section 123 of the Constitution.

municipal functions.¹⁸⁵ With reference to specifically environmental matters, the legislative competence of the provincial sphere of government is confirmed in the Constitution.¹⁸⁶ Various environmental acts also mandate provincial authorities to issue regulations in terms of the specific act.¹⁸⁷ For any conflict that might arise between national and provincial legislation falling within a functional area listed in Schedule 4 of the Constitution, specific guidance has been provided for resolving the conflict.¹⁸⁸

Mandates for provincial departments to publish policy have also been incorporated into environmental legislation, such as the mandate to publish a provincial policy related to heritage resource management for general information¹⁸⁹ and the mandate to publish statements of general policy on the management of heritage resources.¹⁹⁰

3.1.1.2.3 The local sphere of government

Society has a constitutional right to have access to all municipal by-laws.¹⁹¹ Prior to their being passed into law by the Municipal Council, such by-laws must have been published for public comment.¹⁹² With regard to the authority of the local sphere of government to enact by-laws relevant to the environment, two recent cases are of importance. In *Le Sueur v eThekweni Municipality*¹⁹³ the court had to decide whether or not the eThekweni Municipality acted *ultra vires* when it introduced amendments to the eThekweni Town Planning Schemes.¹⁹⁴ The applicant argued that the Municipality did not have the authority to legislate in the environmental sphere as, in terms of schedule 4 of the

¹⁸⁵ Such draft legislation must be published for public comment prior to being introduced to Parliament. See s 154(2) of the Constitution.

¹⁸⁶ The environment has been listed as a functional area of concurrent national and provincial competence in terms of schedule 4, part A of the Constitution.

¹⁸⁷ Examples of mandates of the provincial sphere of government to issue regulations include s 32 of the ECA, ss 24(5)-(6) and 47 of NEMA, s 55(3) of NEMAQA, s 16(4) of NEMWA, ss 25(1A) and 84 of the NEMICMA, s 26 of NHRA and s 87 of NEMPA.

¹⁸⁸ National legislation would prevail over provincial legislation if all relevant conditions are met as included in s 146 of the Constitution. Also see ss 147-150 of the Constitution relating to conflict between national legislation and a provision of a provincial constitution, conflicts that cannot be resolved, the status of legislation that does not prevail and interpretation of conflicts.

¹⁸⁹ Section 6(2) of the NHRA. Note that, in terms of s 6(3) of the NHRA, a draft policy must have been made available for public comment prior to the publication of the final policy.

¹⁹⁰ Section 47(3) of NHRA. Note that, in terms of s 47 of the NHRA, a draft policy must have made available for public comment prior to the publication of the final policy.

¹⁹¹ Section 162 of the Constitution. Also see s 13 of the *Local Government: Municipal Systems Act* 32 of 2000. Also see Du Plessis *Environmental Law and Local Government* and 2.2.1.2 above.

¹⁹² Section 160(4) of the Constitution.

¹⁹³ *Le Sueur v eThekweni Municipality* 2013 ZAKZPHC 6 (the *Le Sueur* case).

¹⁹⁴ *Le Sueur* case paras 2 and 16.

Constitution, the environment has been identified as a functional area over which the national and provincial sphere of government have exclusive legislative competence.¹⁹⁵ The court held that, as the Constitution confirms that the three spheres of government are interrelated and must adhere to the principles of cooperative government, it is clear that it was not the intention of the legislature to allocate legislative authority to the three spheres of government in distinct, water-tight compartments.¹⁹⁶ Therefore, the court confirmed that the local sphere of government is entitled to regulate environmental matters.¹⁹⁷ In *Nel v Hessequa Local Municipality*¹⁹⁸ the court relied on the judgement of the *Le Sueur* case and confirmed that municipalities have the authority to enact by-laws related to the environment.¹⁹⁹ It is therefore clear that the local sphere of government does have the authority to legislate in the environmental sphere. By-laws related to various aspects of the environment in specific municipal areas have already been published.²⁰⁰

In addition to the above, specific policy documents, such as the *Back to basics* Government Programme, require local government to implement specific measures to promote access to information.²⁰¹ As part of this programme, municipalities must

¹⁹⁵ *Le Sueur* case para 16. Also see schedule 4 of the Constitution.

¹⁹⁶ *Le Sueur* case para 20. Also see s 40(1) of the Constitution.

¹⁹⁷ *Le Sueur* case para 37. Also see Petterson and Snijman "Environmental law compliance and enforcement" 291.

¹⁹⁸ *Nel v Hessequa Local Municipality* (WCC) (unreported) case number 12576/2013 of 14 December 2015 (*Hessequa* case).

¹⁹⁹ *Hessequa* case para 16.

²⁰⁰ Examples of By-laws published include the *Solid Waste By-laws* of City of Tshwane Metropolitan Municipality, (LAN 1091 in *Gauteng Provincial Gazette* 209 of 25 May 2005), the *Air Pollution Control By-laws* (LAN 624 in *Gauteng Provincial Gazette* 96 of 25 May 2011), *Waste Management By-laws* (LAN 1012 in *Gauteng Provincial Gazette* 216 of 30 July 2013) and the *Water Services By-laws* (LAN 835 in *Gauteng Provincial Gazette* 179 of 21 May 2004) of the City of Johannesburg Metropolitan Municipality, *Refuse Removal By-laws* (MN 47 in *KwaZulu-Natal Provincial Gazette* 6133 of 17 October 2002) and *Sewage Disposal By-laws* (MN 27 in *KwaZulu-Natal Provincial Gazette* 5356 of 13 May 1999) of the eThekweni Metropolitan Municipality, *Air Quality Management By-laws* (*Western Cape Provincial Gazette* 6772 of 30 July 2010), *Dumping and Littering By-laws* (*Western Cape Provincial Gazette* 5894 of 21 June 2002) and *Water By-laws* (*Western Cape Provincial Gazette* 6847 of 18 February 2011) of the City of Cape Town Metropolitan Municipality.

²⁰¹ South African Government date unknown <http://spcollection.cogta.gov.za/sites/cogtapub/Pages/background.aspx>. One of the five pillars of the *Back to basics* Government Programme is to promote good governance, accountability and transparency. The *Back to basics* Government Programme is based on the *White Paper on Local Government* 1998 and the *Local Government: Municipal Structures Act* 117 of 1998 that provide that district municipalities should fulfil specific developmental mandates. In pursuit of these mandates, the Government confirms that participatory governance has been extended to more citizens than ever before.

develop and implement effective and affordable communication systems to ensure proper engagement with their communities.²⁰²

Another form of strategic environmental information is guideline documents of which the active disclosure obligations will now be discussed.

3.1.1.3 Strategic environmental guideline documents

Public bodies in the national, provincial and local sphere of government have specific active disclosure obligations related to various strategic environmental guideline documents. These obligations will now be discussed.

3.1.1.3.1 The national sphere of government

Although not obliged, the Minister of Environmental Affairs has the mandate to publish guidelines relevant to the implementation, administration and institutional arrangements pertaining to various environmental matters.²⁰³ This Minister must also publish guidelines relevant to the procedure to be followed by a provincial or municipal authority when compiling an environmental outlook report.²⁰⁴ Various guidelines have been published in this regard.²⁰⁵

In terms of planning law the Minister of Rural Development and Land Reform also has the mandate to issue guidelines to guide municipalities in fulfilling their responsibilities

²⁰² South African Government date unknown <http://www.gov.za/about-government/government-programmes/back-basics>.

²⁰³ Section 24J of NEMA. Guidelines that have been published include, for example, the *Companion guideline for implementation: environmental management assessment regulations* (GN 805 in GG 35769 of 10 October 2012), the *Guideline for implementation: environmental management framework (EMF)* (GN 806 in GG 35769 of 10 October 2012) (for discussion related to the requirement to publish an EMF see 3.1.1.4.1 below), the *Guideline for implementation: public participation in the environmental impact assessment (EIA) process* (GN 807 in GG 35769 of 10 October 2012), the *EIA guideline for aquaculture in South Africa*, the *Guideline for implementation: need and desirability* (GN 891 in GG 38108 of 20 October 2014) and the *EIA Guideline for renewable energy projects* (GN 989 in GG 39297 of 16 October 2015).

²⁰⁴ Section 16A(4) of NEMA. For more discussion on the requirement to publish environmental outlook reports and the purpose thereof see 3.1.1.6.1 below.

²⁰⁵ Examples include the *South African school guide for producing a state of the environment report* (see DEA 2002 *South African school guide for producing a state of the environment report*), the *State of the environment reporting guidelines for municipalities* (see DEA 2005 *State of the environment reporting guidelines for municipalities*) and the *Provincial and local government state of the environment training manual* (Department of Environmental Affairs 2002 *Provincial and local government state of the environment training manual*). All these manuals have been published at Department of Environmental Affairs 2009 <http://soer.deat.gov.za>.

under the *Spatial Planning and Land Use Management Act* 16 of 2013 (SPLUMA) and such guidelines must be published in the *Provincial Gazette*.²⁰⁶ Environmental legislation also contains mandates for the public sphere to publish various types of guideline documents.²⁰⁷ Examples include the authority to publish national norms and standards pertaining to various waste management matters,²⁰⁸ biodiversity management,²⁰⁹ national ambient air quality standards specifying permissible amounts of specific substances in ambient air,²¹⁰ the management and development of protected areas in terms of the *National Environmental Management: Protected Areas Act* 57 of 2003 (NEMPA),²¹¹ and emissions from point, non-point and mobile sources pertaining to specific substances.²¹² The management authorities²¹³ of a national park, nature reserve, marine protected area or a world heritage site in terms of NEMPA also have a duty to publish their internal rules in the *Gazette*.²¹⁴

With reference to water services the *Water Services Act* 108 of 1997 mandates the Minister of Water and Sanitation to prescribe compulsory national standards for water quality, tariffs and use.²¹⁵ The Minister of Mineral Resources had to develop a Code of Good Practice for the Minerals Industry, as well as a Broad-based Socio-economic

²⁰⁶ Reg 36(6) of GN R239 in GG 38594 of 23 March 2015.

²⁰⁷ Such as national norms and standards, rules, codes of good practice and charters.

²⁰⁸ Section 7 of NEMWA. Examples of such waste management norms and standards that have been published include *National domestic waste collection standards* (GN 21 in GG 33935 of 21 January 2011), *National norms and standards for the assessment of waste for landfill disposal* (GN R635 in GG 36784 of 23 August 2013), *National norms and standards for disposal of waste to landfill* (GN R636 in GG 36784 of 23 August 2013), *National standards for the extraction, flaring and recovery of landfill gas* (GN 924 in GG 37086 of 29 November 2013), *National standards for the scrapping or recovery of motor vehicles* (GN 925 in GG 37087 of 29 November 2013), *National norms and standards for the storage of waste* (GN 926 in GG 37088 of 29 November 2013) and *National norms and standards for the remediation of contaminated land and soil quality in the Republic of South Africa* (GN 331 in GG 37603 of 2 May 2014).

²⁰⁹ Section 9 of NEMBA. Examples of norms and standards published in terms of NEMBA include *Norms and standards for biodiversity management plans [BMPs] for species* (GN R214 in GG 31968 of 2 March 2009), *Norms and Standards for the marking of rhinoceros and rhinoceros horn, and for the hunting of rhinoceros for trophy hunting purposes* (GN 304 in GG 35248 of 10 April 2012) and *Norms and standards for BMPs for ecosystems* (GN 83 in GG 37302 of 7 February 2014).

²¹⁰ Section 9 of NEMAQA. Examples of such standards that have been published include *National ambient air quality standards* (GN R1210 in GG 32816 of 24 December 2009) and *National ambient air quality standards for particular matter with aerodynamic diameter less than 2.5 micron metres (PM 2.5)* (GN 486 in GG 35463 of 29 June 2012).

²¹¹ Section 11 of the *National Environmental Management: Protected Areas Act* 57 of 2003 (NEMPA).

²¹² Section 9 of NEMAQA.

²¹³ In terms of s 1 of NEMPA such a management authority can either be an organ of state or any other person or institution authorised to manage a protected area.

²¹⁴ Section 52 of NEMPA. Where the management authority is a provincial or local public body, this disclosure requirement will similarly be applicable to these bodies.

²¹⁵ Sections 9-10 of the *Water Services Act* 108 of 1997.

Empowerment Charter within five years of the effective date of the *Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA)*.²¹⁶ Although there is no explicit active disclosure requirement in the MPRDA, the Code and Charter have been published in the *Gazette*.²¹⁷

3.1.1.3.2 The provincial sphere of government

Provincial authorities are also mandated by environmental legislation to publish guideline documents. As with the Minister's option to publish national ambient air quality standards,²¹⁸ the MEC of a province can establish, in the *Gazette*, provincial ambient air quality standards specifying permissible amounts of specific substances in ambient air, as well as provincial standards for emissions from point, non-point and mobile sources in the province or in a geographical area within the province pertaining to specific substances.²¹⁹ Provincial norms and standards pertaining to various waste management matters may also be published in the *Gazette* by the MEC of a province.²²⁰

3.1.1.3.3 The local sphere of government

The local sphere of government is also authorised to publish guideline documents. In terms of air quality management, for example, local authorities have the option, like the option of the Minister and a MEC of a province to establish national and provincial standards for emissions, respectively,²²¹ to establish, in terms of any by-law, local standards for emissions from point, non-point and mobile sources in the municipal area pertaining to specific substances.²²²

²¹⁶ Section 100 of the MPRDA.

²¹⁷ GN 446 in GG 32167 of 29 April 2009 and GN 838 in GG 33573 of 20 September 2010. Note that a reviewed draft Broad-based Socio-economic Empowerment Charter was published for comments in GN 450 in GG 39933 of 15 April 2016.

²¹⁸ See 3.1.1.3.1 above.

²¹⁹ Section 10 of NEMAQA. An example of published provincial ambient air quality standards is the ambient air quality standards for Gauteng (Gauteng Department of Agriculture and Rural Development 2009 *Gauteng Province Air Quality Management Plan – Final Report 11*).

²²⁰ Section 8 of NEMWA. An example of published norms and standards pertaining to various waste management aspects is the waste collection standards for Gauteng (Gauteng Department of Agriculture and Rural Development 2010 *General Waste Collection Standards for Gauteng (Incorporating Cleaning Standards)*).

²²¹ See 3.1.1.3.2 above.

²²² Section 11 of NEMAQA.

The active disclosure requirements of environmental frameworks, strategies, protocols and schemes will now be discussed.

3.1.1.4 Environmental frameworks, strategies, protocols and schemes

Public bodies in the national, provincial and local sphere of government have specific active disclosure obligations related to various environmental frameworks, strategies, protocols and schemes. These obligations will now be discussed.

3.1.1.4.1 The national sphere of government

Environmental legislation contains various active disclosure obligations pertaining to environmental frameworks; environmental strategies; environmental protocols and environmental schemes. Examples include the notification in the *Gazette* of the adoption of an Environmental Management Framework (EMF)²²³ and the manner in which the EMF can be accessed for public inspection,²²⁴ the requirement to publish a National Biodiversity Framework²²⁵ and the requirement to publish a national framework for achieving the objective of the *National Environmental Management: Air Quality Act* 39 of 2004 (NEMAQA).²²⁶ In terms of planning law, the Minister of Rural Development and Land Reform is obliged to develop a Spatial Development Framework (SDF)²²⁷ that

²²³ An Environmental Management Framework (EMF) is a document that specifies environmental attributes of specific geographical areas including the sensitivity, interrelationship, extent and significance of such attributes that must be taken into account by a decision-making authority. See s 24(3) of NEMA. EMF Regulations have been published in GN R547 in GG 33306 of 18 June 2010.

²²⁴ Reg 5(4) of GN R547 in GG 33306 of 18 June 2010. It is important that EMFs be publically accessible as it is a legal requirement that EMFs be taken into consideration during EIA processes. A basic assessment report must contain a description of the legislative and policy context of the proposed development, "including how the proposed activity complies with and responds to the legislation and policy context, plans, guidelines, tools frameworks, and instruments". Furthermore, a scoping report must contain a description of the legislative and policy context of the proposed development, "including an identification of all legislation, policies, plans, guidelines, spatial tools, municipal development planning frameworks and instruments that are applicable to [the] activity and are to be considered in the assessment process". See appendices 1 and 2 of GN R982 in GG 38282 of 4 December 2014.

²²⁵ Section 38 of NEMBA. To date only a draft National Biodiversity Framework for South Africa has been published for comment in GN 801 in GG 30027 of 29 June 2007.

²²⁶ Section 7 of the *National Environmental Management: Air Quality Act* 39 of 2004 (NEMAQA). The National Framework for Air Quality Management in the Republic of South Africa was first published in 2007 (GN 1138 in GG 30284 of 11 September 2007) and subsequently amended in 2012 (GN R919 in GG 37078 of 29 November 2013).

²²⁷ Such a SDF must take cognisance of all environmental management instruments that have been adopted by a relevant environmental management authority and must provide accessible and clear information to the public and private sectors. See s 12(1)(g) of the *Spatial Planning and Land Use Management Act* 16 of 2013 (SPLUMA).

must be published in the *Gazette* and the media subsequent to being subjected to a public consultation process.²²⁸ Furthermore, this Minister has the mandate to publish a regional SDF in the *Gazette* subsequent to following a public consultation process.²²⁹

With regard to environmental strategies the Minister of Environmental Affairs had to publish a national waste management strategy in the *Gazette* within two years of the effective date of the NEMWA, which was published in 2012.²³⁰ A pricing strategy for waste management charges must also be published in the *Gazette*.²³¹ In terms of the NWA a National Water Resource Strategy had to be established by notice in the *Gazette*²³² and the Minister of Water and Sanitation may publish a pricing strategy for water use charges in the *Gazette* in concurrence with the Minister of Finance.²³³ All Catchment Management Agencies (CMAs)²³⁴ established in terms of the NWA must establish, by notice in the *Gazette*, CMA strategies for the conservation of water resources within their water management areas.²³⁵ A further example is that the Minister of Mineral Resources, in consultation with the Minister of Environmental Affairs, also has the mandate to publish, by notice in the *Gazette*, strategies to facilitate the closure of interconnected mines.²³⁶

The active disclosure requirements of environmental protocols and schemes pertain for example to national estuarine management protocols and coastal planning schemes. Estuaries in South Africa must be managed in accordance with a national estuarine management protocol that had to be published in the *Gazette* within four years of the commencement of the *National Environmental Management: Integrated Coastal*

²²⁸ Section 13(1) of SPLUMA.

²²⁹ Section 18 of SPLUMA.

²³⁰ Section 6 of *National Environmental Management: Waste Act* 59 of 2008 (NEMWA). The latest version of the National Waste Management Strategy was published in 2012 (GN R344 in GG 35306 of 4 May 2012).

²³¹ Section 13A(1) of NEMWA. A proposed National Pricing Strategy for Waste Management Charges was published in 2015 (GN 84 in GG 38438 of 2 February 2015).

²³² Section 5(1) of the *National Water Act* 36 of 1998 (NWA). The first edition of the NWRS was published in September 2004 (DWS date unknown <https://www.dwa.gov.za/nwrs/NWRS2004.aspx>) and the second edition was published in June 2013 (DWS date unknown <https://www.dwa.gov.za/nwrs/NWRS2013.aspx>).

²³³ Section 56 of NWA.

²³⁴ Note that, where no Catchment Management Agency (CMA) has been established, the DWS fulfils the role of a CMA. See s 72(1) of NWA.

²³⁵ Section 8 of NWA.

²³⁶ Section 43(10) of MPRDA.

*Management Act 24 of 2008 (NEMICMA).*²³⁷ Such a protocol was published in 2013.²³⁸ Coastal planning schemes may be established by the Minister of Environmental Affairs by notice in the *Gazette*, after consultation with the MEC of the province and any other authority responsible for the management of the relevant area of coastal public property or a coastal zone straddling more than one province to which the scheme applies.²³⁹

3.1.1.4.2 The provincial sphere of government

The provincial sphere of government, like the national sphere of government, has the obligation to actively disclose various framework, strategy and scheme documents to the public. Once an EMF has been adopted by the MEC of a province, notice thereof must be given in the official *Gazette* of the relevant province, including information about the manner in which the EMF can be accessed for public inspection.²⁴⁰ In terms of water legislation all CMAs established in terms of NWA must establish, by notice in the *Gazette*, CMA strategies for the conservation of water resources within their water management areas.²⁴¹ The MEC has the mandate to establish coastal planning schemes by notice in the *Gazette*, after consultation with the Minister of Environmental Affairs and any other authority responsible for the management of the relevant area within a coastal zone within the province that is not coastal public property or a coastal zone straddling more than one province.²⁴²

In terms of planning law, the provincial sphere of government must develop a provincial SDF²⁴³ that must be published in the *Provincial Gazette* and the media, subsequent to it being subjected to a public consultation process.²⁴⁴

²³⁷ Section 33 of the *National Environmental Management: Integrated Coastal Management Act 24 of 2008 (NEMICMA)*.

²³⁸ GN 341 in GG 36432 of 10 May 2013. The National Estuarine Management Protocol contains information *inter alia* on standards for estuarine management and requirements on estuarine management plans.

²³⁹ Section 56(2)-(3) of NEMICMA.

²⁴⁰ Reg 5(4) of GN R547 in GG 33306 of 18 June 2010.

²⁴¹ Section 8 of NWA.

²⁴² Section 56(2)-(3) of NEMICMA.

²⁴³ Such a SDF must provide accessible and clear information to the public and private sectors and take cognisance of all environmental management instruments that have been adopted by a relevant environmental management authority. See ss 12(1)(g) and (m) of SPLUMA.

²⁴⁴ Section 15 of SPLUMA.

3.1.1.4.3 The local sphere of government

The local sphere of government has similar obligations related to the active disclosure of environmental frameworks and schemes in terms of planning law. Each municipality must, as part of its Integrated Development Plan (IDP),²⁴⁵ develop a municipal SDF²⁴⁶ that must be published in the *Provincial Gazette*.²⁴⁷ Furthermore, prior to a land use scheme being approved and adopted by a municipality it must have been subjected to a public participation process.²⁴⁸ In terms of environmental law, the local sphere of government also has active disclosure duties similar to those of the national and provincial sphere of government pertaining *inter alia* to CMA strategies for the conservation of water resources within its water management area²⁴⁹ and coastal planning schemes.²⁵⁰

Another form of strategic environmental information is environmental plans and programmes, of which the active disclosure requirements will now be discussed.

3.1.1.5 Strategic environmental plans and programmes

Public bodies in the national, provincial and local sphere of government have specific active disclosure obligations related to various environmental plans and programmes. These obligations will now be discussed.

3.1.1.5.1 The national sphere of government

Certain environmental plans and programmes have to be disclosed actively by the national sphere of government. NEMA was amended in 2014²⁵¹ to require certain

²⁴⁵ Sections 12(1)(m) and 20(2) of SPLUMA require that municipal SDFs must be prepared as part of a municipality's IDP. For further discussion on IDPs see 3.1.1.5.3 below.

²⁴⁶ Such a SDF must provide accessible and clear information to the public and private sectors and take cognisance of all environmental management instruments that have been adopted by a relevant environmental management authority. See ss 12(1)(g) and (m) of SPLUMA.

²⁴⁷ Section 20 of SPLUMA.

²⁴⁸ Section 24(1) of SPLUMA.

²⁴⁹ Section 8 of NWA.

²⁵⁰ Coastal planning schemes may be established by the municipality by notice in the *Gazette*, after consultation with the MEC and any other authority responsible for the management of the relevant area within the jurisdiction of a municipality that is not coastal public property or a coastal zone straddling more than one province. See ss 56(2)-(3) of NEMICMA.

²⁵¹ GN 152 in GG 37401 of 28 February 2014.

government departments to prepare Environmental Implementation Plans (EIPs)²⁵² and Environmental Management Plans (EMPs),²⁵³ respectively.²⁵⁴ These EMPs must be approved, published in the *Gazette* and also reviewed and republished every five years.²⁵⁵ Records of all EMPs and EIPs compiled in terms of NEMA must be kept in good order by the Director-General of the DEA and must, furthermore, be readily available for public inspection.²⁵⁶

In terms of NEMAQA, subsequent to a consultative process having been followed, a priority area air quality management plan compiled by a national air quality officer must be approved and published in the *Gazette* within 90 days of such approval.²⁵⁷ NEMWA requires that approved industry waste management plans compiled by organs of state must be published in the *Gazette*.²⁵⁸ Furthermore, bioregional plans related to the management of biodiversity in a determined bioregional area²⁵⁹ and approved biodiversity management plans (BMPs) must be published in the *Gazette*.²⁶⁰ Water services development plans and summaries thereof must also be published by water services authorities and a copy thereof must be made available for public scrutiny.²⁶¹ In terms of coastal management, a summary of an adopted national coastal management

²⁵² Schedule 1 of NEMA. These departments include the DEA, DWS, DRDLR, DAFF, Department of Human Settlements, Department of Trade and Industry, Department of Transport, Department of Tourism, Department of Defence, Department of Public Enterprises and Department of Public Works.
²⁵³ Schedule 2 of NEMA. These departments include the DEA, DWS, DMR, DOE, DRDLR, Department of Health and Department of Labour.

²⁵⁴ Sections 11(1)-(2) of NEMA. The purpose of this amendment was to harmonise the environmental plans, policies, programmes and decisions of various government departments, to minimise the duplication of procedures and functions of such government departments and to promote consistency in the exercising of their functions that may affect the environment. See s 12 of NEMA.

²⁵⁵ Sections 11(2) and 15(5) of NEMA. Examples of EMPs that have been published include the EMP of DEA, which has been consolidated with its Environmental Impact Plan (EIP) (GN 530 in GG 39998 of 19 May 2015), the EMP of the Department of Health (GN 2 in GG 39730 of 25 February 2016), the EMP of the Department of Labour (GN 1025 in GG 32667 of 30 October 2009), the EMP of the DMR (GN 798 in GG 3188 of 16 July 2008) and the EMP of the DRDLR (GN 1817 in GG 25834 of 19 December 2003).

²⁵⁶ Section 16(5) of NEMA.

²⁵⁷ Section 19(5) of NEMAQA.

²⁵⁸ Section 32(7) of NEMWA.

²⁵⁹ Section 40 of NEMBA.

²⁶⁰ Section 43 of NEMBA. Examples of published BMPs include, for example, *BMP for the black rhinoceros* (GN 49 in GG 36096 of 25 January 2013), *BMP for the bearded vulture* (GN 350 in GG 37620 of 8 May 2014), *BMP for sharks* (GN 258 in GG 38607 of 25 March 2015), *BMP for the African lion* (GN 1190 in GG 39468 of 2 December 2015) and *BMP for the white rhinoceros* (GN 1191 in GG 39469 of 3 December 2015).

²⁶¹ Sections 12-18 of the *Water Services Act* 108 of 1997.

programme must be published and the programme or extracts thereof must be made available for public inspection.²⁶²

Certain shortcomings pertaining to the active disclosure requirements of certain plans have been identified. For example, there are no active disclosure requirements pertaining to Estuarine Management Plans.²⁶³ Furthermore, Community Forestry Agreements that are entered into between the Minister of Agriculture, Forestry and Fishery and communities need not be actively disclosed.²⁶⁴ These agreements contain information on the management of the forest with specific reference *inter alia* to licensed activities which the community may carry out.²⁶⁵ It can therefore be argued that such agreements should be actively disclosed to ensure that all members of the relevant community have sufficient knowledge of the management measures to be implemented and are able to implement them in line with the agreement. The same argument can be used to motivate active disclosure requirements pertaining to Heritage Agreements. Heritage Agreements can be entered into between SAHRA and any other person relevant to the conservation of a specific heritage resource.²⁶⁶ It can be argued that active disclosure of these agreements would enable all relevant parties, including the general public, to implement the provisions of these agreements to contribute to the conservation of the relevant heritage resource.

3.1.1.5.2 The provincial sphere of government

Like the requirement to actively disclose priority area air quality management plans compiled by national air quality officers, an approved priority area air quality management plan compiled by a provincial air quality officer must be published in the *Gazette*, subsequent to a consultative process having been followed.²⁶⁷ The MEC of a province has the mandate to publish in the *Gazette* bioregional plans with the concurrence of the Minister of Environmental Affairs.²⁶⁸ Furthermore, as with the requirement to actively disclose a summary of a national coastal management

²⁶² Section 44(3) of NEMICMA.

²⁶³ Reg 5 of GN 341 in GG 36432 of 10 May 2013.

²⁶⁴ Sections 30-32 of the *National Forests Act* 84 of 1998 (NFA).

²⁶⁵ Section 31(1) of NFA.

²⁶⁶ Section 42(1) of NHRA.

²⁶⁷ Section 19(5) of NEMAQA.

²⁶⁸ Section 40(3) of NEMBA.

programme, a summary of an adopted provincial coastal management programme must be published and the programme or extracts thereof must be made available for public inspection.²⁶⁹

3.1.1.5.3 The local sphere of government

In the local sphere a summary of a municipal coastal management programme prepared and adopted by a coastal municipality must similarly be published, and this programme or extracts thereof must be made available for public inspection.²⁷⁰ Planning law requires every municipal council to adopt an IDP²⁷¹ which includes a municipal SDF.²⁷² Subsequent to the adoption of the IDP the municipality must inform the public of such adoption and of where copies of or extracts from the IDP may be accessed for public inspection.²⁷³ A summary of the IDP must also be publicised.²⁷⁴

Other strategic environmental information is contained in environmental reports, of which the active disclosure requirements will now be discussed.

3.1.1.6 Strategic environmental reports

Public bodies in the national, provincial and local sphere of government have specific active disclosure obligations related to various environmental reports. These obligations will now be discussed.

3.1.1.6.1 The national sphere of government

Section 31(1) of NEMA, which was repealed by section 14 of the *National Environment Laws Amendment Act*,²⁷⁵ stated that every citizen had a right to have access to information related to the state of the environment including threats to the environment.²⁷⁶ In 1992 the United Nations Conference called upon national

²⁶⁹ Section 45(3) of NEMICMA.

²⁷⁰ Section 48(3) of NEMICMA.

²⁷¹ Section 25(1) of the *Local Government: Municipal Systems Act* 32 of 2000.

²⁷² See 3.1.1.4.3 above. Such a SDF must take cognisance of all environmental management instruments adopted by a relevant environmental management authority.

²⁷³ Section 25(4)(a) of the *Local Government: Municipal Systems Act* 32 of 2000.

²⁷⁴ Section 25(4)(b) of the *Local Government: Municipal Systems Act* 32 of 2000.

²⁷⁵ *National Environment Laws Amendment Act* 14 of 2009.

²⁷⁶ For discussion pertaining to the repealed right of access to information in terms of NEMA see Du Plessis "Access to information" 208-209.

governments to produce state of the environment reports (SoERs) on a regular basis.²⁷⁷ In response thereto the South African government published its first national SoER in 1999²⁷⁸ and the most recent national SoER was published in 2012.²⁷⁹ SoERs were also published at various sectoral, regional, provincial²⁸⁰ and local²⁸¹ levels in South Africa, thus indicating that environmental concerns have infiltrated all spheres of governance.²⁸² The DEA also established a website to facilitate access to national, provincial and municipal SoERs.²⁸³ It must be noted that this website seems to be outdated, as not all published national, provincial and local SoERs are reflected on it.²⁸⁴

NEMA was again amended in 2013²⁸⁵ and now places the Minister of Environmental Affairs under the obligation to publish a national environment outlook report within four years of the commencement of the operation of this amendment Act, in other words, by 2017, and four-yearly thereafter.²⁸⁶ Such a national environment outlook report is yet to be published.

In addition to the above, every organ of state required to prepare an EMP or EIP must report annually on the implementation thereof.²⁸⁷ Records of these annual reports must be kept in good order and must be readily available for public inspection.²⁸⁸ In terms of

²⁷⁷ DEA 2012 *2012 South African Environmental Outlook 3*.

²⁷⁸ DEA 2012 *2012 South African Environmental Outlook 3*.

²⁷⁹ DEA 2012 *2012 South African Environmental Outlook*. The purpose of these state of the environment reports (SoERs) is to provide an overview of the current state of the South African environment, the pressures experienced and South Africa's responses to these pressures. They also provide a forecast of the future state of the environment based on current trends and suggest interventions that should be implemented. They are aimed at providing reliable scientific information that will assist in driving the South African environmental agenda. See DEA 2006 *South Africa Environment Outlook: a report on the state of the environment: executive summary and key findings v*.

²⁸⁰ For examples of provincial state of the environment reports that were published see 3.1.1.6.2 below.

²⁸¹ For examples of municipal state of the environment reports that were published see 3.1.1.6.3 below.

²⁸² DEA 2012 *2012 South African Environmental Outlook 3*.

²⁸³ <http://soer.deat.gov.za>.

²⁸⁴ Department of Environmental Affairs 2009 <http://soer.deat.gov.za/documents.html?d=5>. Examples of environmental outlook reports not reflected on this website include the 2012 national environmental outlook report (DEA 2012 *South African Environmental Outlook*), the Western Cape's 2013 state of the environment outlook report (Western Cape Province: Department of Environmental Affairs and Development Planning 2013 *State of the environment outlook report for the Western Cape*) and the City of Cape Town's *2012 State of the environment report*.

²⁸⁵ *National Environmental Management Laws Second Amendment Act 30 of 2013*.

²⁸⁶ Section 16A(1) of NEMA.

²⁸⁷ Section 16(1)(b) of NEMA.

²⁸⁸ Section 16(5) of NEMA.

water legislation, a Water Management Institution²⁸⁹ in the national, provincial or local sphere of government must prepare and publish an annual report containing *inter alia* financial information,²⁹⁰ of which copies must be made available for inspection and purchase by the public.²⁹¹ Water services committees and water boards must also issue annual reports pertaining to their activities, which reports must be made publically available.²⁹²

It must be noted that there is no active disclosure requirement pertaining to Atmospheric Impact Reports that were submitted to an air quality officer as a result of a suspicion that a contravention of NEMAQA has taken place.²⁹³ As this type of report may contain proof of an infringement of the public's constitutional environmental right, it is submitted that the active disclosure of these types of reports would empower the public to protect its constitutional environmental right by easily obtaining access to this information.

There are also reporting requirements pertaining to the international environmental sphere. One such example is that the Minister of Environmental Affairs must annually report to Parliament on the Department's participation in international meetings related to international environmental initiatives, instruments and existing mechanisms for the implementation thereof.²⁹⁴

3.1.1.6.2 The provincial sphere of government

Some provincial government departments have published provincial SoERs in response to the call of the United Nations Conference, as discussed above.²⁹⁵ The amendment to

²⁸⁹ A Water Management Institution is defined in s 1 of NWA as a "a catchment management agency, a water user association, a body responsible for international water management or any person who fulfils the functions of a water management institution" in terms of NWA.

²⁹⁰ Section 33 of schedule 3 of NWA.

²⁹¹ Section 33 of schedule 3 of NWA.

²⁹² Sections 44, 59 and 62 of the *Water Services Act* 108 of 1997.

²⁹³ Section 30 of NEMAQA.

²⁹⁴ Section 26(1) of NEMA. Also see Du Plessis "Access to information" 199-200.

²⁹⁵ Examples of provincial SoERs that were published include the *State of the environment outlook report for the Western Cape* (Western Cape Province: Department of Environmental Affairs and Development Planning 2013 *State of the environment outlook report for the Western Cape*), the *North West environmental outlook* (North West Province: Department of Rural, Environment and Agricultural development 2013 *North West Environmental Outlook*) and *Gauteng state of the environment report* (Gauteng Department of Agriculture and Rural Development 2011 *Gauteng state of the environment report - 2011.*) Also see DEA 2009 <http://soer.deat.gov.za/documents.html?d=5>.

NEMA in 2013²⁹⁶ similarly imposed a duty on a MEC to whom environmental responsibilities have been assigned to publish a provincial environment outlook report within four years of the commencement of operation of the amendment Act, and four-yearly thereafter.²⁹⁷

3.1.1.6.3 The local sphere of government

Some municipalities have also voluntarily published municipal SoERs in response to the call of the United Nations Conference, as discussed above.²⁹⁸ The 2013 amendment to NEMA²⁹⁹ gave metropolitan and district municipalities the option to publish a municipal environmental outlook report within four years of the commencement of the operation of this amendment Act, and four-yearly thereafter.³⁰⁰

It is now necessary to discuss the active disclosure requirements pertaining to other types of strategic environmental information not mentioned above.

3.1.1.7 Other strategic disclosure requirements

Public bodies in the national, provincial and local sphere of government have specific active disclosure obligations related to various other types of strategic environmental information. These obligations will now be discussed.

3.1.1.7.1 The national sphere of government

Various active disclosure requirements pertaining to other types of strategic environmental information exist. Descriptions of the categories of records automatically available and the manner in which such records can be obtained, as submitted by public bodies, must be published in the *Gazette* at least on an annual basis.³⁰¹ In practice such descriptions are usually published either on the government department's official website, in the *Gazette* or on the Department of Justice and Constitutional

²⁹⁶ *National Environmental Management Laws Second Amendment Act 30 of 2013.*

²⁹⁷ Section 16A(2) of NEMA.

²⁹⁸ Examples of municipal SoERs that have been published include the SoERs of the City of Cape Town Metropolitan Municipality (City of Cape Town Metropolitan Municipality 2012 *2012 State of the environment report*) and the City of Johannesburg Metropolitan Municipality (City of Johannesburg Metropolitan Municipality 2008 *State of the environment report 2008*).

²⁹⁹ *National Environmental Management Laws Second Amendment Act 30 of 2013.*

³⁰⁰ Section 16A(3) of NEMA.

³⁰¹ Section 15 of PAIA.

Development's website.³⁰² An evaluation of the online availability of these descriptions confirmed that, although some of these departments are compliant with section 15 of PAIA,³⁰³ not all government departments are. The DEA last published such a description in 2011³⁰⁴ and the DRDLR last published such a description in its 2013 PAIA manual.³⁰⁵ It must be noted that the division of the responsibility for environmental matters among various government departments, together with subsequent amendments to the scope of responsibility of these departments, also constitutes a challenge to anyone wishing to ascertain the availability and currency of these departments' descriptions in terms of section 15.³⁰⁶

The Director-General of the government department responsible for government information services and communication must ensure the publication of the contact details of the information officers of all public bodies in all telephone directories issued for public use.³⁰⁷ During this study it was found that the contact details of the Information Officers of the DEA, DOE, DWS, DAFF, DMR³⁰⁸ and the DRDLR have been uploaded onto the website of the Department of Government Communication and Information Systems.³⁰⁹

Various active disclosure obligations pertaining to other types of strategic environmental information have been included in environmental legislation. An officer, who is tasked to provide information to the public pertaining to appropriate dispute resolution

³⁰² PAIA Civil Society Network *Shadow Report 2013* 11. Also see Department of Justice date unknown <http://www.justice.gov.za/paia/paia.htm>.

³⁰³ The Department of Mineral Resources published its description in terms of section 15 of PAIA in 2015 in GN 813 in GG 39172 of 4 September 2015. The latest description of the DWS is included in its PAIA Manual published in terms of s 14 of PAIA in reg 10 of GN R792 in GG 40116 of 1 July 2016 and the Department of Agriculture, Forestry and Fishery's latest description is included in its PAIA Manual in Department of Agriculture, Forestry and Fishery 2015 *Manual prepared in terms of section 14 of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000)* 19.

³⁰⁴ GN R320 in GG 34198 of 15 April 2011.

³⁰⁵ DRDLR 2013 *Manual for the Department of Rural Development and Land Reform in terms of section 14 of the Promotion of Access to Information Act, 2000* 27.

³⁰⁶ See 3.1.1.1.1 above.

³⁰⁷ Section 16 of PAIA.

³⁰⁸ Although only the Director-General of the DMR's contact details have been uploaded, it can be argued that, as an information officer is defined in s 1 of PAIA as the Director-General of the department, the entry is sufficient.

³⁰⁹ Department of Government Communication and Information Systems date unknown <http://www.gcis.gov.za/content/resourcecentre/contactdirectory>.

mechanisms must be designated by the DEA.³¹⁰ With regard to water management the Minister of Water and Sanitation must determine, by notice in the *Gazette*, a class in line with the established classification system, and resource quality objectives for every significant water resource in South Africa.³¹¹ A Water Management Institution has the duty to make information related to floods or droughts that have occurred or are likely to occur, risks posed to dams and other information related to water resources that should be known, publically available in an appropriate manner, and an early warning system may be established.³¹² Furthermore, in terms of the *Water Services Act*³¹³ a water services authority must publically disclose its intention to enter into or renew an agreement with a service provider or a joint venture with an entity other than a public sphere water services institution.³¹⁴ Water services providers' conditions related for example to tariff structures, technical conditions and the promotion of water conservation must also be publically disclosed.³¹⁵

Various publically accessible information systems must be established in terms of environmental legislation, such as a national waste information system,³¹⁶ a national

³¹⁰ Section 22(2)(c) of NEMA. For more information on the use of dispute resolution mechanisms in environmental disputes see Couzens and Dent 2006 *Potchefstroom Electronic Law Journal* 1-50.

³¹¹ Section 13 of the NWA. Examples of classes and resource quality objectives that have been established include classes and resource quality objectives of water resources for the Olifants catchment (GN 466 in GG 39943 of 22 April 2016), the Olifants-doorn catchment (GN 467 in GG 39943 of 22 April 2016) and the Upper, Middle and Lower Vaal catchments (GN 468 in GG 39943 of 22 April 2016, GN 469 in GG 39943 of 22 April 2016, GN 470 in GG 39943 of 22 April 2016). All resource quality objectives and classes determined are binding on all public and private bodies performing a duty under the NWA and may relate to the Reserve, the water level, the instream flow, the quality and characteristics of the water resource and the instream and riparian habitat, the presence and concentration of certain substances in the water, the characteristics and distribution of aquatic biota, the regulation or prohibition of instream or land-based activities which can affect the quantity or quality of the water resource and any other characteristic of the particular water resource. See Pienaar 2008 *Water wheel* 25 and Kidd *Environmental Law* 75.

³¹² Section 145 of NWA. This requirement forms part of the establishment of national monitoring and information systems which are, clearly, prerequisites for the effective administration of the NWA. See Kidd *Environmental Law* 81.

³¹³ *Water Services Act* 108 of 1997.

³¹⁴ Section 19(3) of the *Water Services Act* 108 of 1997. A water services authority is defined to include any municipality, including a rural or district council as defined in the *Local Government Transition Act* 209 of 1993, that is responsible for ensuring access to water services. See s 1 of the *Water Services Act* 108 of 1997.

³¹⁵ Section 4(2) of the *Water Services Act* 108 of 1997. A water service provider is defined to mean any person providing water services to consumers or to another water services institution, but does not include a water services intermediary as defined in the *Water Services Act* 108 of 1997. See s 1 of the *Water Services Act* 108 of 1997.

³¹⁶ The purpose is to provide information on waste management in South Africa to organs of state and the public, subject to the provisions of PAIA. See ss 60-61 and 64 of NEMWA. This system was developed in 2005 and is publically accessible online. See DEA date unknown

information system containing information related to the management of water resources,³¹⁷ and a national information system on water services.³¹⁸ With regard to heritage resource management, the South African Heritage Resources Agency (SAHRA) has an online information system named the South African Heritage Resources Information System (SAHRIS), which enables the public to view and comment on developments pertaining to heritage resources in their area. In other words, this database facilitates public participation in the permitting process pertaining to heritage resources.³¹⁹ Declared heritage sites, a list of permit applications and various layered maps can be accessed on SAHRIS.³²⁰ SAHRA must also compile financial statements indicating its income and expenditure, as well as its assets and liabilities, which must be made available for public inspection.³²¹ SAHRA must also compile a register of declared heritage objects of which a summary must be made available to the public.³²² SAHRA further has the duty to submit a list of the burial grounds and graves of individuals connected to the liberation struggle or who died as a result of the actions of the state security forces, which burial grounds and graves the SAHRA believes should be

<http://sawic.environment.gov.za/>. Regulations pertaining to this system were published in 2012. See GN R625 in GG 35583 of 13 August 2012.

³¹⁷ Section 139 of NWA. The purpose of this information system is to provide the public with information *inter alia* on the status of water resources. See s 140 of NWA. The National Integrated Water Information System was launched in 2015 and is publically accessible online. See South African Government News Agency 2015 <http://www.sanews.gov.za/south-africa/line-water-information-system-launched>. Also see DWS date unknown http://niwis.dwa.gov.za/DashboardEngine.aspx?DashboardID=niwis%5CHome%5CHome&breadcru mbs=menu_home.

³¹⁸ Sections 67(1), (3) and (4) of the *Water Services Act* 108 of 1997. The public is entitled to reasonable access to information contained in this national information system and the Minister of Water and Sanitation must ensure that the information contained therein is in an accessible format.

³¹⁹ SAHRA 2013 *The South African Heritage Resources Information System, commonly known as SAHRIS* 1.

³²⁰ The development of this database is in line with the power of a heritage resources authority in terms of s 25(2) of NHRA, which is that a heritage resources authority may publish, or make publically available, any information pertaining to the national estate.

³²¹ Section 21(12) of NHRA. In SAHRA's 2013 and 2015 Annual Reports, sections on financial information have been included that contain a financial overview of SAHRA, as well as statements of its financial position, financial performance, changes in net assets and cash flow, and a comparison of budgeted and actual amounts. This report is publically accessible. See SAHRA 2013 *SAHRA Annual Report 2013* 68-87 and SAHRA 2015 *SAHRA Annual Report 2015* 75-91.

³²² Section 32(7)-(8) of NHRA. On SAHRA's website it is indicated that such a list is available for perusal at SAHRA's head office. See SAHRA date unknown <http://www.sahra.org.za/sahris/about/heritage-objects>.

protected.³²³ The approved list must be published by the Minister of Arts and Culture.³²⁴ SAHRA must also regularly publish a summary of the inventory of the national estate.³²⁵

In terms of biodiversity management, the Minister of Environmental Affairs has the mandate to publically disclose any information related to South Africa's international biodiversity obligations.³²⁶ There is also an active disclosure requirement in terms of directives issued by designated Executive Officers in terms of the *Conservation of Agricultural Resources Act* 43 of 1983 (CARA).³²⁷

There are, however, certain shortcomings pertaining to the active disclosure requirements. For example, there is no active disclosure requirement pertaining to the national action list that must be developed by the Minister of Environmental Affairs to provide a mechanism for screening waste and other material in terms of the NEMICMA.³²⁸ The NEMICMA states, however, that the Minister of Environmental Affairs must make publically available, progressively, sufficient information related to the management and protection of the coastal zone so that the public can make an informed decision on whether or not the State is fulfilling its duties in terms of section 3 of NEMICMA.³²⁹ It can be argued that the active disclosure of the national action list would empower the public to make an informed decision on whether or not the State is fulfilling its duties in terms of section 3 of NEMICMA. A further shortcoming identified is that, although the Registrar of Deeds must be notified of any land declared as a

³²³ Section 36(7)(a) of NHRA. In 2002 it was reported that SAHRA had appointed various individuals to collect the names of dead activists in terms of this section and, at the time of writing, a total of 6320 names had been included on the database. See Mail and Guardian 2002 <http://mg.co.za/article/2002-01-01-jobless-hired-to-collect-names-of-dead-activists>. For discussion on the importance of graves and burial sites as heritage resources, see SAHRA date unknown <http://www.sahra.org.za/sahris/about/burial-grounds-graves>.

³²⁴ Section 36(7)(b) of NHRA. Although a separate list of burial grounds and graves of individuals connected to the liberation struggle or who died as a result of the actions of state security forces could not be found, a publically accessible list of all declared and graded burial grounds and graves was found on SAHRA's website. See SAHRA date unknown <http://www.sahra.org.za/sahris/sitesfinder>.

³²⁵ Section 39(7) of NHRA. The national estate is defined to include all heritage resources in South Africa of cultural significance or other value for present and future generations. See s 3 of NHRA. The national inventory has been integrated into SAHRIS. See SAHRA 2013 *The South African Heritage Resources Information System, commonly known as SAHRIS* 1.

³²⁶ Section 59(e) of NEMBA.

³²⁷ Section 7(3) of the *Conservation of Agricultural Resources Act* 43 of 1983.

³²⁸ Section 73 of NEMICMA.

³²⁹ Section 93 of NEMICMA.

remediation site,³³⁰ Contaminated Land Registers to be kept by the Minister of Environmental Affairs need not themselves be actively disclosed.³³¹ It is submitted that these registers should be actively disclosed as they should contain valuable information *inter alia* on the locality, ownership and nature of contaminated land,³³² which could provide guidance to a person or company wishing to engage in development in a specific area that may include contaminated land. The active disclosure of Contaminated Land Registers would promote the public's knowledge on the presence and locality of contaminated areas and empower people to determine whether their constitutional right to an environment not harmful to health or well-being is being infringed upon.

3.1.1.7.2 The provincial sphere of government

Section 15(2) of PAIA is equally applicable to descriptions submitted by the provincial sphere of government.³³³ An evaluation of the online availability of these descriptions which are required to be published by provincial government departments confirmed that, although most provincial government departments are compliant with section 15,³³⁴ some government departments are not. An example is the KwaZulu-Natal Department of Agriculture and Environmental Affairs, which last published such a description in 2014 as part of its PAIA manual.³³⁵

During the performance of this study it was found that the contact details of the Information Officers of all provincial Government Departments have been uploaded

³³⁰ Section 40(2) of NEMWA.

³³¹ Section 41 of NEMWA.

³³² Section 41(1) of NEMWA.

³³³ See 3.1.1.7.1 above.

³³⁴ See, for example, the latest descriptions in terms of section 15 of PAIA of the Limpopo Department of Economic Development, Environment and Tourism (GN 875 in GG 39232 of 25 September 2015), the Gauteng Department of Agriculture and Rural Development (GN 608 in GG 39475 of 4 December 2015), the North West Department of Rural, Environment and Agricultural (Reg 8.2 of GG 39544 of 24 December 2015), the Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs (Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs 2015 *Promotion of Access to Information Manual compiled in terms of section 14 of the Promotion of Access to Information Act (Act 2 of 2000)* 11-12), the Northern Cape Department of Environment and Nature Conservation (GN 872 in GG 39232 of 25 September 2015) and the Free State Department of Economic, Small Business Development, Tourism and Environmental Affairs (GN 878 in GG 39232 of 25 September 2015).

³³⁵ Reg 3.1 of GG 37731 of 12 June 2014.

onto the website of the Department of Government Communication and Information Systems.³³⁶

There are also various requirements in terms of environmental legislation to establish and maintain environmental information systems on a provincial level, such as a provincial waste information system that must "include the information required by the national information system",³³⁷ and a list of heritage resources considered to be protection worthy, including any amendment or addition to such a list.³³⁸

3.1.1.7.3 The local sphere of government

Section 15(2) of PAIA is equally applicable to descriptions in terms of section 15 of PAIA submitted by the local sphere of government.³³⁹ The last dates of publication of such descriptions of the City of Cape Town Metropolitan Municipality and the City of Johannesburg Metropolitan Municipality are 2010³⁴⁰ and 2014³⁴¹ respectively. Although descriptions could be found in the PAIA manuals of the City of Tshwane Metropolitan Municipality and eThekweni Metropolitan Municipality, the dates of publication of these manuals are unknown.³⁴² No other subsequent published descriptions could be found at the date of this research.³⁴³

It was also found that the Information Officers' contact details of the City of Johannesburg Metropolitan Municipality, the City of Tshwane Metropolitan Municipality, eThekweni Metropolitan Municipality and the City of Cape Town Metropolitan

³³⁶ Department of Government Communication and Information Systems date unknown <http://www.gcis.gov.za/content/resourcecentre/contactdirectory>. Although the head of the North West and Western Cape departments' contact details have been uploaded, no additional contact details of the Information Officers of these departments have been specified. It can be argued, however, that, as an information officer is defined as the head of the department, it is sufficient if the head's contact details have been uploaded to the website.

³³⁷ Section 62 of NEMWA. An example of an established provincial waste information system is the Gauteng Waste Information System, which is publically accessible online. See Gauteng Department of Agriculture and Rural Development date unknown <http://www.gwis.gpg.gov.za/>.

³³⁸ Sections 30(1)-(2) of NHRA.

³³⁹ See 3.1.1.7.1 above.

³⁴⁰ GN 325 in GG 33127 of 23 April 2010.

³⁴¹ City of Johannesburg Metropolitan Municipality 2014 *Manual in terms of the Promotion of Access to Information Act (Act no 2 of 2000)* 20-22.

³⁴² City of Tshwane Metropolitan Municipality date unknown *Section 14 manual* 45-48 and Annexure D of eThekweni Municipality date unknown *Section 14 manual (compiled in compliance with section 14 of chapter 2 of part 2 of the Promotion of Access to Information Act, Act no 2 of 2000 (PAIA))*.

³⁴³ The date of the performance of the research was 17 February 2016.

Municipality have been uploaded onto the website of the Department of Government Communication and Information Systems.³⁴⁴

3.1.1.8 Evaluation: the active disclosure of strategic environmental information in the public sphere

Access to strategic environmental information in the public sphere is not only encouraged in all three spheres of government, but is also legally required. These active disclosure requirements are aimed *inter alia* at promoting access to environmental information by providing guidance on the implementation and use of PAIA when requiring access to information from a specific public body,³⁴⁵ ensuring legal certainty when dealing with environmental matters,³⁴⁶ and providing guidance on strategic environmental planning³⁴⁷ as well as on the implementation, administration and institutional arrangements of environmental matters.³⁴⁸ The active disclosure requirements also promote the constitutional principles of cooperative governance³⁴⁹ and accountability by means of reporting on environmental matters³⁵⁰ and the transparency of information generally related to environmental management.³⁵¹ A few shortcomings have been identified during this study pertaining to the lack of active disclosure requirements related for example to Estuarine Management Plans,³⁵² Community Forestry Agreements,³⁵³ Heritage Agreements,³⁵⁴ Atmospheric Impact Reports,³⁵⁵ the national action list for waste screening,³⁵⁶ Contaminated Land Registers,³⁵⁷ and directives issued in terms of CARA.³⁵⁸ Some shortcomings specifically

³⁴⁴ Department of Government Communication and Information Systems date unknown <http://www.gcis.gov.za/content/resourcecentre/contactdirectory>.

³⁴⁵ See discussion on active disclosure requirements of manuals in terms of PAIA in 3.1.1.1 above.

³⁴⁶ See discussion on active disclosure requirements of policy and legislation in 3.1.1.2 above.

³⁴⁷ See discussion on active disclosure requirements of environmental framework, strategy and scheme documents in 3.1.1.4 above.

³⁴⁸ See discussion on active disclosure requirements of environmental guideline documents in 3.1.1.3 above.

³⁴⁹ See discussion on active disclosure requirements of environmental plans and programmes in 3.1.1.5 above.

³⁵⁰ See discussion on active disclosure requirements of environmental reports in 3.1.1.6 above.

³⁵¹ See discussion on active disclosure requirements of other types of strategic environmental information in 3.1.1.7 above.

³⁵² See 3.1.1.5.1 above.

³⁵³ See 3.1.1.5.1 above.

³⁵⁴ See 3.1.1.5.1 above.

³⁵⁵ See 3.1.1.6.1 above.

³⁵⁶ See 3.1.1.7.1 above.

³⁵⁷ See 3.1.1.7.1 above.

pertaining to the implementation of active disclosure requirements have also been identified, such as outdated or undated published descriptions in terms of section 15,³⁵⁹ the unavailability of updated SoERs,³⁶⁰ outdated PAIA manuals, challenges in obtaining access to the most recent version of PAIA manuals, and PAIA manuals of which the content does not comply with the requirements of PAIA.³⁶¹ Save for the shortcomings identified, it is submitted that, generally, the current legal framework for the active disclosure of strategic environmental information in the public sphere has the potential to adequately promote the right of access to environmental information, subject to the proper implementation thereof.

The requirements pertaining to the active disclosure of strategic environmental information in the private sphere will now be discussed.

3.1.2 The active disclosure of strategic environmental information in the private sphere

The CER is of the opinion that, generally, private bodies demonstrate a better understanding of PAIA and have more resources available to ensure compliance with the provisions of PAIA.³⁶² In addition, international research confirms that larger private companies generally disclose more environmental information than smaller private companies.³⁶³ In this section the most important active disclosure obligations of private bodies pertaining to strategic environmental information and the realisation thereof will be discussed. The publication of manuals in terms of PAIA will be discussed first.

3.1.2.1 Manuals

PAIA requires that the heads of all private bodies are obliged to compile PAIA manuals containing specific information.³⁶⁴ This provision, however, placed a heavy burden on small businesses, which fall within the definition of a private body.³⁶⁵ In order to remove this burden the Minister of Justice and Constitutional Development first exempted all

³⁵⁸ See 3.1.1.7.1 above.

³⁵⁹ See 3.1.1.7 above.

³⁶⁰ See 3.1.1.6.1 above.

³⁶¹ See 3.1.1.1.1 above.

³⁶² CER *Signs of hope?* 10.

³⁶³ Barnard and De Villiers 2000 *Meditari: Research Journal of the School of Accounting Sciences* 16.

³⁶⁴ Section 51 of PAIA.

³⁶⁵ Van der Walt 2006 *South African Journal of Business Management* 25.

private bodies from this requirement.³⁶⁶ Later the Minister exempted only certain private bodies from this requirement.³⁶⁷

The PAIA manuals of private bodies must be updated regularly.³⁶⁸ Although no guidance is provided in PAIA as to what the meaning of "on a regular basis" is, the SAHRC provided guidance by stating that the PAIA manuals of private bodies have to be updated if any material changes related to their content occur.³⁶⁹ In this regard the SAHRC has not defined the term "material changes". As with public bodies' PAIA manuals, PAIA states that the PAIA manuals of private bodies should be made available as prescribed.³⁷⁰ In the Regulations published under PAIA³⁷¹ detail on the manner of disclosure of private bodies' PAIA manuals has been included.³⁷² POPI has also recently extended these active disclosure obligations to PAIA.³⁷³ In addition, private bodies are required to make their PAIA manuals easily accessible to the public.³⁷⁴ Various private

³⁶⁶ GN 1243 in GG 25410 of 29 August 2003. This notice exempted all private bodies from the provisions of section 51(1) of PAIA from 1 September 2003 up to 31 August 2005.

³⁶⁷ GN 865 in GG 27988 of 31 August 2005. In terms of this notice, all private bodies were exempted from the provisions of section 51(1) of PAIA from 1 September 2005 to 31 December 2011, except private bodies which had 50 or more employees, operated within one of the following sectors and had an annual turnover above the different thresholds specified in the notice: Agriculture, mining and quarrying, manufacturing, electricity, gas and water, construction, retail and motor trade and repair services, wholesale trade, commercial agents and allied services, catering, accommodation and other trade, transport, storage and communications, finance and business services, and community, special and personal services. Subsequently GN 1091 in GG 34914 of 30 December 2011 was published. In terms of this notice all private bodies were again exempted for a further period of five years (1 January 2012 to 31 December 2015), except private bodies which had 50 or more employees, operated within one of the sectors listed above and had an annual turnover above the different thresholds specified in this particular notice. Thereafter GN 1222 in GG 39504 of 11 December 2015 was published, in terms which all private bodies were again exempted from the requirements of section 51(1) for a further period of five years (1 January 2016 to 31 December 2020), except private bodies which have 50 or more employees, operate within one of the sectors listed above and have an annual turnover above the different thresholds specified in this notice.

³⁶⁸ Section 51(2) of PAIA.

³⁶⁹ SAHRC 2014 *Guide on how to use the Promotion of Access to Information Act 2 of 2000* 24.

³⁷⁰ Section 51(3) of PAIA.

³⁷¹ GN R187 in GG 23119 of 15 February 2002, as amended by GN R1244 in GG 25411 of 22 September 2003.

³⁷² Regulation 9 of GN R187 in GG 23119 of 15 February 2002 states that "Immediately after the manual has been compiled in terms of section 51(1) or updated in terms of section 51(2) of the Act the head of a private body must make available a copy of the manual to the Human Rights Commission; and the controlling body of which that private body is a member, if applicable; must make available the manual on the web site, if any, of the private body; and the head of a private body may publish the manual in the *Gazette*."

³⁷³ The Schedule of POPI amends s 51(3) of PAIA by requiring that PAIA manuals of private bodies must be published on the website of the private body and be available at the principal place of business of the private body for public inspection during normal business hours.

³⁷⁴ SAHRC 2014 *Guide on how to use the Promotion of Access to Information Act 2 of 2000* 24.

bodies conducting operations that may impact on the environment have published PAIA manuals online.³⁷⁵

The active disclosure obligations pertaining to guideline documents will now be discussed.

3.1.2.2 Strategic environmental guideline documents

An example of strategic environmental guideline documents that must be actively disclosed in the private sphere is the internal rules of the management authorities of protected areas. Where a management authority of a national park, nature reserve, marine protected area or a world heritage site is a private body,³⁷⁶ the duty to publish its internal rules in the *Gazette* also extends to this management authority.³⁷⁷

The active disclosure requirements pertaining to environmental frameworks, strategies, protocols and schemes will now be discussed.

3.1.2.3 Environmental frameworks, strategies, protocols and schemes

An example of an active disclosure obligation in terms of environmental schemes pertains to coastal planning schemes. Any person responsible for the management of a coastal protected area has the mandate to establish coastal planning schemes by notice in the *Gazette*, if the planning scheme relates to that protected area only.³⁷⁸ Coastal planning schemes may also be established by the management authority of a special

³⁷⁵ Examples include ArcelorMittal South Africa Limited 2010 *Manual of ArcelorMittal South Africa Limited and all its subsidiaries and related entities prepared in accordance with section 51 of the Promotion of Access to Information Act no 2 of 2000*, CER 2011 *Manual in terms of section 51 of the Promotion of Access to Information Act, 2000* and Anglo American 2013 *Promotion of Access to Information Act Manual*.

³⁷⁶ In terms of s 1 of NEMPA such a management authority can be either an organ of state or any other person or institution authorised to manage a protected area, consequently including a private body.

³⁷⁷ Section 52 of NEMPA.

³⁷⁸ Section 56(2)-(3) of NEMICMA. Coastal planning schemes seem to be similar to town planning schemes as they define areas within a coastal zone or coastal management area that may be exclusively or mainly used for specified activities or purposes, or wherein specific activities may not be conducted, or wherein activities which do not comply with the rules of the scheme are prohibited or restricted. See Kidd *Environmental law* 233.

management area,³⁷⁹ by notice in the *Gazette*, if the planning scheme relates to the relevant special management area only.³⁸⁰

The active disclosure requirements of environmental information are also included in the *King Report on Corporate Governance in South Africa* (The King III Code).³⁸¹ The King III Code requires that environmental issues be incorporated in corporate strategy, management, assurance and reporting throughout the year, similar to financial matters.³⁸² The revised draft of this Code³⁸³ (the King IV Code) was published in 2016.³⁸⁴

Various strategic environmental plans and programmes in the private sphere have to be actively disclosed. These requirements will now be discussed.

3.1.2.4 Strategic environmental plans and programmes

An example of a strategic environmental programme relevant to the private sphere that has to be actively disclosed is an EMP, which must be made available on a publically accessible website.³⁸⁵ Another example is a biodiversity management plan that can be compiled by any person desirous to contribute to biodiversity management.³⁸⁶ Once approved, this plan must be published in the *Gazette*.³⁸⁷ Amendments to these plans must be published in the *Gazette* as well.³⁸⁸

Certain shortcomings pertaining to the active disclosure requirements of certain plans have been identified. One example is the lack of active disclosure requirements of a

³⁷⁹ A special management area is declared in terms of section 23 of NEMICMA.

³⁸⁰ Section 56(2)-(3) of NEMICMA. For discussion on the relationship between land use, environmental and coastal plans and programmes, including coastal planning schemes, see Van Wyk *Planning Law* 299-300.

³⁸¹ Institute of Directors: Southern Africa *King Report on Corporate Governance in South Africa* (Institute of Directors: Southern Africa 2009) (the King III Code).

³⁸² One of the principles of the King III Code is that governance, strategy and sustainability are inseparable. PricewaterhouseCoopers date unknown <http://www.pwc.co.za/en/king3.html> and 3.2.2 below.

³⁸³ Institute of Directors: Southern Africa *Draft King IV Report on Corporate Governance in South Africa* (Institute of Directors: Southern Africa 2016) (draft King IV Code).

³⁸⁴ See 3.2.2 below for discussion on the lack of disclosure requirements pertaining to all environmental violations in the draft King IV Code.

³⁸⁵ Reg 13(1)(a) of GN R1147 in GG 39425 of 20 November 2015.

³⁸⁶ Section 43(1) of NEMBA.

³⁸⁷ Section 43(3) of NEMBA.

³⁸⁸ Section 46 of NEMBA.

Protected Area Management Plan³⁸⁹ which contains measures relevant to the protection of the relevant area.³⁹⁰ To ensure the cooperation of surrounding communities and visitors to these areas in the protection of these sensitive areas it is submitted that active disclosure of these plans should be required, to ensure that the surrounding communities and visitors to these areas have access to the required information and can assist in the implementation of these plans. A further shortcoming is that, although the content of approved Industry Waste Management Plans compiled by organs of state must be published in the *Gazette*, there is no requirement to actively disclose the content of approved Industry Waste Management Plans compiled by a private person or company.³⁹¹ Industry Waste Management Plans may contain information regarding the amount of waste generated, targets for waste minimisation, and pollution prevention measures.³⁹² It can therefore be argued that active disclosure of these types of plans might assist the public to determine whether or not the relevant industry is infringing upon its constitutional environmental right.

3.1.2.5 Other strategic disclosure requirements

Section 52 of PAIA provides for the submission by private bodies of a description of the categories of records automatically available and the manner in which such records can be obtained. However, this provision differs from section 15 of PAIA³⁹³ in that the submission thereof is not compulsory for private bodies.³⁹⁴ Furthermore, the publication of such descriptions in the *Gazette* is required only if the Minister of Justice and Constitutional Development deems it appropriate.³⁹⁵

³⁸⁹ In relation to a protected area the Minister may assign the management thereof to any organisation or person in terms of s 38(1) of NEMPA. Such a management authority must submit a Protected Area Management Plan to the Minister for approval in terms of s 39(2) of NEMPA. Although public participation is required in the preparation of these plans in terms of s 39(3) of NEMPA, there is no active disclosure requirement pertaining thereto.

³⁹⁰ Section 41 of NEMPA.

³⁹¹ Section 29(7) of NEWMA.

³⁹² Section 30(2) of NEMWA.

³⁹³ See 3.1.1.7.1 above.

³⁹⁴ Section 52(1) of PAIA.

³⁹⁵ Section 52(2) of PAIA.

3.1.2.6 Evaluation: the active disclosure of strategic environmental information in the private sphere

Public bodies have considerably more active disclosure obligations pertaining to strategic environmental information than private bodies. One reason for this could be that the State, as South Africa's public sphere, has the statutory obligation³⁹⁶ to protect and promote everyone's environmental rights, and in order to fulfil this obligation more stringent standards of accountability and transparency must be imposed on the public sphere.³⁹⁷ Therefore public bodies do not have the same interest in keeping information private as private bodies have.³⁹⁸

A few shortcomings have been identified during this study pertaining to the lack of active disclosure requirements in the private sphere related for example to Protected Area Management Plans and Industry Waste Management Plans.³⁹⁹ Save for the shortcomings identified, it is submitted, however, that as in the public sphere the current legal framework for the active disclosure of strategic environmental information in the private sphere generally has the potential to adequately promote the right of access to environmental information, subject to proper implementation thereof.

It is now necessary to investigate the active disclosure requirements pertaining to procedural environmental information.

3.2 The active disclosure of procedural environmental information

As discussed above,⁴⁰⁰ various voluntary and mandatory mechanisms in the form of procedures exist, which facilitate the active disclosure of procedural environmental information.⁴⁰¹ In this section the active disclosure requirements pertaining to environmental permitting application procedures and environmental permits, procedural reporting and other types of procedural environmental information will be discussed. As most of these disclosure requirements are applicable to both public and private bodies,

³⁹⁶ Preamble of NEMA.

³⁹⁷ Cornford 2001 <http://www.bailii.org/uk/other/journals/WebJCLI/2001/issue3/cornford3.html>. Bosch 2006 *South African Law Journal* 619.

³⁹⁸ Cornford 2001 <http://www.bailii.org/uk/other/journals/WebJCLI/2001/issue3/cornford3.html>.

³⁹⁹ See 3.1.2.5 above.

⁴⁰⁰ See 2.2.1.1 above.

⁴⁰¹ Du Plessis "Access to information" 204. Also see 2.2.1.1 above for a discussion on the meaning of "procedural environmental information".

a distinction between these bodies, as was made in section 3.1 above, will not be made in this section. The active disclosure requirements pertaining to environmental permitting application procedures and environmental permits will now be discussed.

3.2.1 Environmental permitting application procedures and environmental permits

With reference to environmental permitting procedures, applicants for various types of environmental authorisations and permits are required to follow a public participation process whereby environmental information has to be publically disclosed.⁴⁰² The most extensive example of the public participation process is the process described in the 2014 Environmental Impact Assessment (EIA) regulations published under NEMA.⁴⁰³ During a basic assessment or scoping and/ or EIA procedure the application documentation must be widely publicised and interested and affected parties must have the opportunity to make comments on the content of the documentation during various stages of the application procedure.⁴⁰⁴ The 2014 EIA regulations require the giving of written notification to all registered interested and affected parties (IAPs) of a decision that has been made regarding an application for a permit, specifically ensuring that all IAPs are provided with access to the actual decision and the reasons for taking such a decision.⁴⁰⁵ Registered IAPs must also be notified of information relating to the available appeal process.⁴⁰⁶

Access to environmental permits can be regarded as vital as these documents regulate the environmental impact of companies.⁴⁰⁷ There are various ways in which the active disclosure of environmental permits could be made compulsory. For example, it could be required by a condition of the permit that such permit be available on site at all times. It could also be required by government departments' PAIA manuals that

⁴⁰² Du Plessis "Access to information" 202. Examples include ss 38(3) and 57 of the NEMAQA, s 16(4), ss 99-100 of NEMBA, s 73 of NEMWA, ss 31-34 in NEMPA, s 53 in NEMICMA, s 22(4) of the MPRDA and s 41(4) of the NWA.

⁴⁰³ Du Plessis "Access to information" 202. Also see chapter 6 of GN R982 in GG 38282 of 4 December 2014.

⁴⁰⁴ Regs 41-43 of GN R982 in GG 38282 of 4 December 2014. For a discussion on the previous position pertaining to the disclosure of EIA documentation see Du Plessis and De la Harpe 2007 *South African Journal of Environmental Law & Policy* 86-87.

⁴⁰⁵ Reg 4(2) of GN R982 in GG 38282 of 4 December 2014.

⁴⁰⁶ Reg 4 of GN R982 in GG 38282 of 4 December 2014.

⁴⁰⁷ Chien and Davis "How increased transparency in the mining sector would facilitate the realisation of environmental rights" 27.

environmental permits be automatically available information. Recently the DEA published an updated description in terms of section 15 of PAIA indicating that it will actively disclose certain environmental permits.⁴⁰⁸ This is seen as a great victory for environmental transparency and indicates a shift in the approach of the authorities to society's engagement in environmental governance.⁴⁰⁹ It has also been indicated that environmental permits are automatically available information in other government departments' PAIA manuals.⁴¹⁰ Up until recently, the active disclosure of water use licences remained a controversial issue. Although water use licences were listed in the previous version of the PAIA manual of the DWS as part of the records that are automatically available, such availability were made subject to third-party notification in terms of section 47 of PAIA.⁴¹¹ This conditional availability did not accord with the aim of section 15 of PAIA, which is to ensure the automatic disclosure of listed records.⁴¹² It has been argued, in motivation of this decision not to divulge the information automatically, that water use licences are deemed confidential information between the DWS and the licence holder.⁴¹³ It has also been argued by the government authorities that, as a result of "client information privilege", a PAIA request is required to obtain access to water use licences.⁴¹⁴ It is unclear to what type of privilege the government authorities referred in this instance. If the authorities meant to refer to legal professional privilege, it is submitted that this reference is incorrect, as legal professional privilege is applicable only between a legal advisor, acting in his or her professional capacity, and his or her client.⁴¹⁵ As government authorities are not

⁴⁰⁸ Schedule 1 of GN 435 in GG 39922 of 15 April 2016. The types of environmental permits that will be actively disclosed are environmental authorisations, waste management licences, atmospheric emission licences, Biodiversity Act permits and General permits for Boat Based Whale Watching and White Shark Cage Diving. Also see CER 2016 <http://cer.org.za/news/victory-for-environmental-rights-department-of-environmental-affairs-makes-environmental-licences-automatically-available>.

⁴⁰⁹ CER 2016 <http://cer.org.za/news/victory-for-environmental-rights-department-of-environmental-affairs-makes-environmental-licences-automatically-available>.

⁴¹⁰ DMR 2014 *PAIA Manual issued in terms of section 14 of the Promotion of Access to Information Act, 2000* 13. The DMR confirms that "detail on existing rights in RSA and past compliance" is voluntarily disclosed. Also see DAFF 2015 *Manual prepared in terms of section 14 of the Promotion of Access to Information Act, 2000* 21 where the DAFF confirms that permit conditions are voluntarily disclosed.

⁴¹¹ Reg 9 of GG 37865 of 24 July 2014.

⁴¹² Section 15(1)(a) of PAIA.

⁴¹³ CER 2013 <http://cer.org.za/news/environmental-rights-blog-never-a-better-time-for-national-water-week>.

⁴¹⁴ CER 2013 <http://cer.org.za/news/environmental-rights-blog-never-a-better-time-for-national-water-week>.

⁴¹⁵ Bowman Gilfillan African Group 2008 <http://www.bowman.co.za/News-Blog/Blog/Legal-Professional-Privilege-Do-you-really-know-what-this-covers-by-Lyle-Perry>. For more discussion on the nature of

regarded as legal advisors, this type of privilege cannot be relied upon. Furthermore, when the government authorities attempt to rely on "client information privilege" to avoid disclosure they are arguing erroneously by regarding only the licence holders as their clients to the exclusion of the general public, despite the fact that the State is regarded as the public trustee of South Africa's water resources.⁴¹⁶ It can be argued that the broad public should be seen as the State's clients as the State is the public trustee of South Africa's water resources.⁴¹⁷ It is submitted that in this instance the relevant government authorities lack a thorough understanding of the provisions of PAIA and their duty to grant access to information in accordance with the law.⁴¹⁸ It must be noted that, in July 2016, the DWS published an updated PAIA manual in which it is now confirmed that water use licences, as well as audit and compliance reports, are now automatically available.⁴¹⁹

The active disclosure of some environmental permits is facilitated by the existence of online systems or databases. Currently four online databases relevant to environmental information exist, namely the South African Mineral Resources Administration System (SAMRAD), the South African Air Quality Information System (SAAQIS), the South African Atmospheric Emission Licensing and Inventory Portal (SAAELIP) and the South African Waste Information Centre (SAWIC).⁴²⁰ However, not all these online databases provide access to environmental permits. Although SAWIC provides public access to all existing waste management licences,⁴²¹ SAMRAD has been designed to provide information only to authorities, applicants for mining rights or permits or amendments thereto, and holders of such rights.⁴²² SAMRAD further only provides an applicant access to information regarding his or her own applications pertaining to mining rights and permits and not to the applications of other companies or actual copies of any existing

legal professional privilege, see *South African Airways Soc v BDFM Publishers (Pty) Ltd* 2016 1 All SA 860 (GJ) paras 40-54.

⁴¹⁶ Section 3 of the NWA. Also see CER 2013 <http://cer.org.za/news/environmental-rights-blog-never-a-better-time-for-national-water-week>.

⁴¹⁷ CER 2013 <http://cer.org.za/news/environmental-rights-blog-never-a-better-time-for-national-water-week>.

⁴¹⁸ Section 2(4)(k) of NEMA.

⁴¹⁹ Regulation 10 of GN R792 in GG 40116 of 1 July 2016.

⁴²⁰ SAWIC is a database that provides the public with access to information on the management of waste in South Africa and is hosted by the DEA.

⁴²¹ DEA date unknown <http://sawic.environment.gov.za/?menu=88>.

⁴²² Chien and Davis "How increased transparency in the mining sector would facilitate the realisation of environmental rights" 28.

mining rights and permits.⁴²³ The SAAQIS facilitates public access to a wide range of air quality information,⁴²⁴ but not to actual licences or registration certificates.⁴²⁵ SAAELIP, on the other hand, has been designed to provide the public with access to actual air emission licences.⁴²⁶ Consequently only air emission licences and waste management licences are automatically available through established public platforms.

Significant discrepancies exist in the private sphere with regard to private companies' active disclosure of environmental permits.⁴²⁷ There seems to be a tendency to make information available in order to comply with the public participation process prior to a permit being obtained.⁴²⁸ However, subsequent to the permits being granted, the availability of the company's information decreases.⁴²⁹ CER requested several private companies to voluntarily disclose their environmental permits on their websites.⁴³⁰ While some of the companies were willing to do so, other companies refused, leaving it to the authorities to decide whether this information was accessible.⁴³¹ One of the private mining companies which refused to upload its environmental permits on its website argued that such permits contain resource, financial and technical information, the disclosure of which was likely to cause damage to its commercial interests.⁴³² In this regard is it submitted that private bodies, and public bodies, for that matter, are obliged to make use of the severability clause in PAIA⁴³³ by disclosing information that can be severed from commercially confidential information the disclosure of which can be refused under PAIA, instead of simply refusing disclosure.⁴³⁴ The mining company

⁴²³ DMR 2011 <http://portal.samradonline.co.za/default.aspx>.

⁴²⁴ For example, the identity of air quality officers, air quality monitoring results and the identification of priority areas. See DEA date unknown <http://www.saaqis.org.za/>.

⁴²⁵ DEA date unknown <http://www.saaqis.org.za/>.

⁴²⁶ DEA date unknown https://saelip.environment.gov.za/SAELIP/SAELIP_FACILITY/Client/SNAEL/Pages/PublicApplicationList.aspx.

⁴²⁷ CER *Turn on the floodlights* 27.

⁴²⁸ CER *Turn on the floodlights* 27.

⁴²⁹ CER *Turn on the floodlights* 27.

⁴³⁰ CER *Unlock the doors* 13 and CER *Turn on the floodlights* 27.

⁴³¹ CER *Turn on the floodlights* 27.

⁴³² CER *Turn on the floodlights* 27.

⁴³³ Section 59(1) of PAIA states the following: "If a request for access is made to a record of a private body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which does not contain; and can reasonably be severed from any part that contains, any such information must, despite any other provision of this Act, be disclosed".

⁴³⁴ Sections 28 and 59 of PAIA. For discussion on the use of severability when processing requests for access to environmental information in the public and private sphere see 4.3.1 and 4.3.2 below. The use of severability, where possible, is also applicable to EIA documentation. In this regard, see Du

further argued that, as such permits run to thousands of pages, the upload thereof would be extremely time consuming and that the company did not have the resources to dedicate to a project of such magnitude.⁴³⁵ It is submitted that there is a tendency to make up excuses for not actively disclosing environmental permits rather than to actively disclose them. In addition, it seems as though the mining industry is generally unwilling to actively disclose the basic rules of environmental management applicable to its operations.⁴³⁶ Mining companies refusing to actively disclose environmental permits cannot see any benefit for themselves deriving from such disclosure.⁴³⁷ This conduct suggests that mining companies believe that secrecy serves their interests better than transparency.⁴³⁸ This is not in line with the provisions of PAIA, as access to information must be for the benefit of the enforcers of human rights,⁴³⁹ including the right in terms of section 24 of the Constitution,⁴⁴⁰ and not for the benefit of the holder of the information.

The active disclosure requirements pertaining to procedural reporting will now be discussed.

3.2.2 Procedural reporting

A statutory mechanism used to facilitate the active disclosure of environmental information is to require the holders of environmental permits or other public or private bodies to record specific information, to report thereon to the relevant authorities, and to disclose the information.⁴⁴¹ Sometimes a condition is included in an environmental permit requiring the reporting of specific environmental information. In addition, the 2014 EIA regulations require that compliance with the conditions of an environmental authorisation, EMP or closure plan must be evaluated and that an audit report must be

Plessis and De la Harpe 2007 *South African Journal of Environmental Law & Policy* 86-87 for a discussion on the use of severability to protect commercially confidential information contained in EIA documentation.

⁴³⁵ CER *Turn on the floodlights* 27.

⁴³⁶ CER *Unlock the doors* 13.

⁴³⁷ CER *Unlock the doors* 13.

⁴³⁸ CER *Unlock the doors* 13.

⁴³⁹ The preamble of PAIA states that one of the aims of PAIA is to "actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights".

⁴⁴⁰ For a discussion on the right in terms of section 24 of the Constitution, see 2.1 above.

⁴⁴¹ Du Plessis "Access to information" 203.

submitted to the competent authority.⁴⁴² This environmental audit report must within 7 days of its submission be published on a publically accessible website, where the holder of the authorisation has such website.⁴⁴³ Additionally, in the most recent version of the PAIA manual of the DWS it is confirmed that audits and compliance reports of an applicant for a Water Use Licence are considered records automatically available.⁴⁴⁴ A further example of this mechanism is that the holders of permits or rights in terms of the MPRDA, the applicants for such permits or rights, or the owners or lawful occupiers of the land subject to the relevant permit or right can be directed to submit specific information to the DMR,⁴⁴⁵ which may be disclosed to anyone in order to give effect to the constitutional right of access to information.⁴⁴⁶ Further examples pertain to annual reports compiled by MECs and the Minister responsible for local government on the performance of local government,⁴⁴⁷ reports on investigations conducted by the Public Protector,⁴⁴⁸ reports of the results of biodiversity monitoring,⁴⁴⁹ non-detriment findings made by a scientific authority related to trade in specific species,⁴⁵⁰ and reports when environmental incidents occurred.⁴⁵¹

Instances of the voluntary active disclosure of procedural environmental information also exist in South Africa.⁴⁵² One such example is corporate reporting of environmental issues in terms of the King Code.⁴⁵³ However, despite the valuable contribution of the King Code to corporate governance in South Africa, the CER is of the opinion that this Code should be stricter on disclosure requirements pertaining to environmental

⁴⁴² Reg 34(1) of GN R982 in GG 38282 of 4 December 2014.

⁴⁴³ Reg 34(6) of GN R982 in GG 38282 of 4 December 2014.

⁴⁴⁴ Reg 10 of GN R792 in GG 40116 of 1 July 2016.

⁴⁴⁵ Section 29 of the MPRDA.

⁴⁴⁶ Section 30 of the MPRDA.

⁴⁴⁷ These annual reports must be published in either the *Gazette* or the *Provincial Gazette*. See ss 47-48 of the *Local Government: Municipal Systems Act* 32 of 2000.

⁴⁴⁸ Section 8(2A) of the *Public Protector Act* 23 of 1994.

⁴⁴⁹ The Minister can require any person to report on the results of biodiversity monitoring conducted, and such reports must be made publically available. See s 49 of NEMBA.

⁴⁵⁰ Any non-detriment findings made by a scientific authority which relate to trade in specific species must be published in the *Gazette*. See s 62 of NEMBA.

⁴⁵¹ When such an incident has occurred, the responsible person must report on various aspects pertaining to the incident *inter alia* to all persons whose health may be affected by the incident, through the most effective means. See s 30(3) of NEMA. The purpose of such reports is to inform authorities and the public of the potential environmental risks associated with the environmental incident. See Du Plessis "Access to information" 204.

⁴⁵² Du Plessis "Access to information" 204.

⁴⁵³ See 3.1.2.4 above.

violations.⁴⁵⁴ Currently, in terms of the draft King IV Code, the level of disclosure is left to the discretion of the Directors.⁴⁵⁵ By not being required to disclose all environmental violations, Directors can continue to hide information from the company's stakeholders, and it is therefore submitted that the disclosure of all environmental violations should be made compulsory.⁴⁵⁶

The active disclosure requirements of other types of procedural environmental information will now be discussed.

3.2.3 Other types of procedural environmental information

The active disclosure requirements are applicable to procedural information pertaining to the judicial,⁴⁵⁷ executive and legislative spheres of government.⁴⁵⁸ Requirements pertaining to the active disclosure of procedural information also relate to various other types of procedural information, of which one example is the directives issued in terms of certain environmental legislation.⁴⁵⁹ These disclosure requirements are not without controversy, as they can be seen as inhibiting environmental authorities' power to act swiftly in urgent situations.⁴⁶⁰ This was illustrated in *MEC Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd*.⁴⁶¹

⁴⁵⁴ CER 2016 <http://cer.org.za/news/king-iv-cer-calls-for-stricter-requirements-for-environmental-disclosure>.

⁴⁵⁵ CER 2016 <http://cer.org.za/news/king-iv-cer-calls-for-stricter-requirements-for-environmental-disclosure>. The draft King IV Code requires only the disclosure of "material or repeated regulatory penalties, sanctions or fines for contraventions of, or non-compliance with, statutory obligations". See Institute of Directors: Southern Africa *Draft King IV Report on Corporate Governance in South Africa* (Institute of Directors: Southern Africa 2016) 55.

⁴⁵⁶ CER 2016 <http://cer.org.za/news/king-iv-cer-calls-for-stricter-requirements-for-environmental-disclosure>.

⁴⁵⁷ Records of the Magistrates' Court and Supreme Court must be made available to the public. See s 7 (1) of the *Magistrates' Court Act* 32 of 1944 and reg 4(3) of GN R1523 in GG 19507 of 27 November 1998.

⁴⁵⁸ The public must have access to information pertaining to legislative and other processes of the National Assembly and the National Council of Provinces, and the conduct of the provincial legislature. See ss 59(1), 72 and 118 of the Constitution.

⁴⁵⁹ See, for example, s 7(3) of the *Conservation of Agricultural Resources Act* 43 of 1983, ss 74 and 162 of the NWA and s 3(2) of the *Mountain Catchment Areas Act* 63 of 1970. Also see Du Plessis "Access to information" 202. These disclosure requirements theoretically contribute to access to information and transparency in the environmental enforcement process. See Du Plessis "Access to information" 202.

⁴⁶⁰ Du Plessis "Access to information" 202.

⁴⁶¹ At *MEC Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* 2002 2 SA 319 (CC) para 41 the Constitutional Court held that, with regard to a directive issued in terms of section 31A of ECA, the authority need not comply with the requirement to publish the directive

Several statutory procedures should be followed to make certain environmental declarations require active disclosure. Various authorities have been mandated to identify activities,⁴⁶² processes⁴⁶³ or products⁴⁶⁴ that are likely to have a detrimental effect on the environment, or that require regulation by notice in the *Gazette*. Furthermore, certain authorities have been mandated to identify or declare, by notice in the *Gazette*, areas,⁴⁶⁵ ecosystems,⁴⁶⁶ objects⁴⁶⁷ or species⁴⁶⁸ requiring regulation because of their cultural or environmental significance, and objects⁴⁶⁹ that should be controlled to minimise detrimental environmental impacts.

The active disclosure requirements are also applicable to other procedural actions such as the delegation of certain powers by the Minister of Environmental Affairs,⁴⁷⁰ applications for exemptions from certain provisions of NEMA,⁴⁷¹ the provisional protection of a heritage resource,⁴⁷² agreements entered into between different authorities and/ or private entities,⁴⁷³ and public recognition programmes for

for a notice period of 30 days, as required by s 32 of ECA, as this would inhibit this authority's power to act immediately to protect the environment.

⁴⁶² Examples include the identification of activities likely to have a significant detrimental environmental impact (ss 24-24A of NEMA), activities resulting in atmospheric emission that are likely to have a significant detrimental environmental impact (s 21(1) of NEMAQA), waste management activities (s 19 of NEMWA), activities that may not be conducted in a protected area (s 51 of NEMPA), stream flow reduction activities "likely to reduce the availability of water in a watercourse" (s 36 of the NWA), controlled activities in terms of water use (s 38 of the NWA), water uses (s 21 of the NWA), coastal activities (ss 63(6) and 65 of NEMICMA) and restricted activities involving listed species (ss 57 and 71 of NEMBA).

⁴⁶³ Such as threatening processes in listed ecosystems identified in terms of s 53 of NEMBA.

⁴⁶⁴ Examples include the identification of products to which the extended producer responsibility applies (s 18 of NEMWA), and the declaration of a type of waste as a priority waste (s 14 of NEMWA).

⁴⁶⁵ Examples include the declaration of a national botanical garden (s 33 of NEMBA), priority areas in terms of air quality management (s 18 of NEMAQA), investigation areas in terms of contaminated land (s 36 of NEMWA), various types of protected areas (ss 18-29 of NEMPA), geographical areas within which water uses must be authorised (s 43 of the NWA), coastal public property (s 8 of NEMICMA), coastal access land (s 19 of NEMICMA), coastal protected areas (s 22 of NEMICMA), national or provincial heritage sites (s 27 of the NHRA), protected areas in terms of heritage (s 28 of the NHRA) and heritage areas (s 31 of the NHRA).

⁴⁶⁶ Section 52 of NEMBA.

⁴⁶⁷ An example is the declaration of heritage resources (s 10 of the NHRA).

⁴⁶⁸ Sections 56 and 70 of NEMBA.

⁴⁶⁹ Examples include the declaration of controlled emitters (s 23 of NEMAQA), controlled fuels (s 26 of NEMAQA) and categories of dams as dams with a safety risk (s 118 of the NWA).

⁴⁷⁰ Section 42(2A) of NEMA.

⁴⁷¹ Reg 4(3)-(5) of GN R994 in GG 38303 of 8 December 2014.

⁴⁷² Section 19 of the NHRA.

⁴⁷³ Examples include an agreement entered into between two municipalities to establish a Joint Municipal Tribunal in terms of s 34 of SPLUMA and an environmental management cooperation agreement entered into between authorities and any other party to promote compliance with the principles of NEMA in terms of s 35 of NEMA.

achievements in the environmental sphere⁴⁷⁴ For instance, companies listed on the JSE may report on their "triple bottom line performance", which includes environmental performance.⁴⁷⁵

3.2.4 Evaluation: the active disclosure of procedural environmental information

It is legally required to disclose specific procedural environmental information. These active disclosure requirements have been incorporated into environmental permitting procedures⁴⁷⁶ and also pertain to the content of environmental permits.⁴⁷⁷ Shortcomings identified relate to the incorrect interpretation and implementation of legal privilege, as well as the provisions of PAIA, by public and private bodies.⁴⁷⁸ Save for the shortcomings identified, however, it is submitted that generally the current legal framework for the active disclosure of procedural environmental information has the potential to adequately promote the right of access to environmental information, subject to the proper implementation thereof.

3.2.5 Evaluation: the active disclosure of environmental information

The active disclosure of strategic and procedural environmental information in the public and the private sphere is not only encouraged, but is also legally required. The CER reported in November 2015 that the active disclosure of environmental information by public and private parties remains poor.⁴⁷⁹ Some shortcomings have been identified pertaining to the lack of active disclosure requirements,⁴⁸⁰ as well as the implementation of the existing active disclosure requirements.⁴⁸¹ In addition, there are various existing challenges pertaining to the realisation of the active disclosure of environmental information that could be contributory to the low level of active disclosure, such as a fear of potential environmental liability⁴⁸² and the fact that the disclosure of information is often not made timeously or in a format easily accessible to the public.⁴⁸³ Unregulated

⁴⁷⁴ S 42 of NEMWA and s 31 of NEMAQA.

⁴⁷⁵ Du Plessis "Access to information" 204.

⁴⁷⁶ See 3.2.1 above.

⁴⁷⁷ See 3.2.1 above.

⁴⁷⁸ See 3.2.1 and 3.2.3 above.

⁴⁷⁹ CER *Signs of hope?* 2.

⁴⁸⁰ See 3.1.1.8, 3.1.2.6 and 3.2.4 above.

⁴⁸¹ See 3.1.1.8, 3.1.2.6 and 3.2.4 above.

⁴⁸² Barnard and De Villiers 2000 *Meditari: Research Journal of the School of Accounting Sciences* 21.

⁴⁸³ Du Plessis "Access to information" 204.

and uncredited voluntary disclosure in the private sphere can simply be regarded as "greenwashing".⁴⁸⁴

After investigating the realisation of the active disclosure of strategic and procedural environmental information in the public and private sphere, it is necessary to investigate the realisation of the passive disclosure of environmental information in the public and private sphere.

⁴⁸⁴ Du Plessis "Access to information" 204.

4 The realisation of the passive disclosure of environmental information

South African legislation makes provision for the passive disclosure⁴⁸⁵ of environmental information⁴⁸⁶ in the public and private sphere.⁴⁸⁷ In this section the mandatory passive disclosure of environmental information in terms of environmental legislation will be discussed. This will be followed by a discussion on the mandatory passive disclosure of environmental information in terms of PAIA. Thereafter a discussion on the current trends and challenges in the passive disclosure of environmental information in the public and private sphere will follow. Lastly the adequacy of elements of the administration and enforcement of the requirements for the passive disclosure of environmental information will be discussed.

The passive disclosure requirements in terms of environmental legislation will now be discussed.

4.1 The mandatory passive disclosure of environmental information in terms of environmental legislation

South African environmental legislation makes provision for the mandatory disclosure of environmental information upon request by public and private bodies.⁴⁸⁸ However, this legislation does not differentiate between the passive disclosure obligations exclusively applicable to either public bodies or private bodies, as with the active disclosure obligations discussed above. Therefore, only in this section, instead of investigating the disclosure obligations of public and private bodies, the realisation of the passive disclosure of environmental information will be discussed by investigating public and private bodies' right of access to requested environmental information. A distinction will also be made between strategic and procedural environmental information.⁴⁸⁹

⁴⁸⁵ See 2.2.1.3 above for discussion pertaining to the meaning of the passive disclosure of environmental information.

⁴⁸⁶ See 2.2.1.1 above for discussion pertaining to the meaning of environmental information.

⁴⁸⁷ Du Plessis "Access to information" 205. See 2.2.1.2 above for discussion pertaining to the meaning of the public and private sphere.

⁴⁸⁸ Du Plessis "Access to information" 205. See 2.2.1.2 above for discussion pertaining to the meaning of public and private bodies.

⁴⁸⁹ See 2.2.1.1 above for discussion pertaining to the meaning of strategic and procedural environmental information.

4.1.1 The mandatory passive disclosure of strategic environmental information

It must be noted that there is no legal requirement in South African environmental legislation to passively disclose strategic environmental information to private bodies. Therefore, in this section the requirements pertaining to the passive disclosure of strategic environmental information to public bodies only will be discussed.

4.1.1.1 The mandatory passive disclosure of strategic environmental information in the public sphere

The requirements to passively disclose specific environmental plans and reports to public bodies have been included in environmental legislation. Examples include the mandatory submission to competent authorities of requested pollution prevention plans in respect of priority air pollutants,⁴⁹⁰ Atmospheric Impact Reports,⁴⁹¹ management plans for specific heritage resources⁴⁹² and a Sustainable Forest Management Plan for a specific area.⁴⁹³ In terms of waste management the Minister of Environmental Affairs may require any person, organ of state or industry to submit an Industry Waste Management Plan⁴⁹⁴ or additional information pertaining thereto.⁴⁹⁵ Furthermore, relevant organs of state must furnish the Minister of Environmental Affairs with the required information to be included in a national or provincial environmental outlook report.⁴⁹⁶

The provisions related to the mandatory passive disclosure of procedural environmental information will now be discussed.

4.1.2 The mandatory passive disclosure of procedural environmental information

South African environmental legislation makes generous provision for the mandatory passive disclosure of procedural environmental information in the public and private

⁴⁹⁰ Section 29(1)(b) of NEMAQA.

⁴⁹¹ Section 30 of NEMAQA.

⁴⁹² Section 9(3)(c) of the NHRA.

⁴⁹³ Section 16(4)(f) of the NFA.

⁴⁹⁴ Sections 28(1) and 29(1) of NEMWA.

⁴⁹⁵ Section 31(1)(b) of NEMWA.

⁴⁹⁶ Section 16A(6) of NEMA.

sphere. In this section the requirements pertaining to the passive disclosure of procedural environmental information to public and private bodies will be discussed.

4.1.2.1 The mandatory passive disclosure of procedural environmental information in the public sphere

In this section a distinction will be drawn between the obligation of passive disclosure to Environmental Management Inspectors (EMIs), passive disclosure requirements pertaining to environmental permitting application procedures, and other types of procedural environmental information.

4.1.2.1.1 Mandatory passive disclosure to Environmental Management Inspectors

EMIs and Environmental Mineral Resources Inspectors (EMRIs) appointed in terms of NEMA can request access to environmental information to enable them to fulfil their statutory enforcement and compliance functions, and any requested document issued in terms of NEMA or a SEMA⁴⁹⁷ must be produced to the EMI or EMRI.⁴⁹⁸ Similar powers have been awarded to Environmental Inspectors appointed in terms of other sectoral environmental legislation pertaining for example to forestry,⁴⁹⁹ marine living resources,⁵⁰⁰ genetically modified organisms,⁵⁰¹ gas,⁵⁰² petroleum pipelines, and mining.⁵⁰³ Most of these provisions are also curtailed by a confidentiality clause prohibiting the disclosure of the information obtained by making use of these provisions.⁵⁰⁴ In most instances the non-disclosure of requested information in terms of these provisions is a statutory offence.⁵⁰⁵

⁴⁹⁷ In terms of s 1 of NEMA specific environmental management acts are currently defined as including the ECA, the NWA, NEMPA, NEMBA, NEMAQA, NEMICMA, NEMWA and the *World Heritage Convention Act* 49 of 1999.

⁴⁹⁸ Sections 31H(1), 31I and 31P of NEMA.

⁴⁹⁹ Section 68(1)(c) of the *National Forests Act* 84 of 1998 (NFA).

⁵⁰⁰ Sections 51(2)(f) and 51(3)(c)(v) of the *Marine Living Resources Act* 18 of 1998.

⁵⁰¹ Section 15(4) of the *Genetically Modified Organisms Act* 15 of 1997 (GMOA).

⁵⁰² Section 29 of the *Gas Act* 48 of 2001. Also see the regulations published under the *Gas Act* 48 of 2001 pertaining to the provision of information to the Gas Regulator, namely regs 2-4 of GN 1251 in GG 32849 of 31 December 2009 and reg 17 of GN R321 in GG 29792 of 20 April 2007.

⁵⁰³ Sections 91-92 read with s 69 of the MPRDA. Also see Du Plessis "Access to information" 205.

⁵⁰⁴ Examples include s 31Q of NEMA, ss 30 and 88 of the MPRDA and s 18 of the GMOA.

⁵⁰⁵ See, for example, ss 49A(o)-(p) of NEMA, s 51 of the NHRA, s 51 of NEMAQA, s 64 of the NFA, s 67 of NEMWA, s 151 of the NWA, s 98 of the MPRDA, s 21(1)(c) of the GMOA and s 60 of the *Marine Living Resources Act* 18 of 1998.

The passive disclosure requirements pertaining to environmental permitting application procedures will now be discussed.

4.1.2.1.2 Environmental permitting application procedures

A number of passive disclosure requirements have been included in environmental legislation pertaining to environmental permitting application procedures. Where the EIA procedure has been identified as the relevant environmental instrument to be used in the decision-making process for an environmental authorisation, the Licensing Authority must require that an environmental management programme (EMPr) be submitted.⁵⁰⁶ When applying for a specific environmental permit, or when an application for the varying, transfer, renewal or surrender of an environmental permit is made, the Licensing Authority may request that any information relevant to such an application be provided prior to making a decision on whether to grant or refuse the application.⁵⁰⁷ In some instances the Licensing Authority must require that the applicant bring the request under the attention of the public and relevant organs of state.⁵⁰⁸ Additional information may also be requested where an application for exemption from the provisions of specific acts is made,⁵⁰⁹ or where an application in terms of section 24G of NEMA or section 22A of NEMAQA is made.⁵¹⁰ Provision has also been made for the submission of written representations by the holder of an authorisation as to why such an authorisation should not be revoked, suspended, cancelled or amended.⁵¹¹ In all these instances, disclosure of the requested information is mandatory if the applicant wants the Licensing Authority to make a decision on whether to grant or refuse the application.

The passive disclosure requirements pertaining to information related to the procedural aspects of environmental permit applications include, for example, the duty of the Minister of Environmental Affairs or MEC to request that the Licensing Authority submit a report *inter alia* on the status of a delay in the decision-making process of an

⁵⁰⁶ Section 24N(1A) of NEMA.

⁵⁰⁷ See, for example, s 24N(5) of NEMA, s 38(1) of NEMAQA, ss 81(2), 88(2)(a) and 89 of NEMBA, ss 47(1)(a) and 57(2)(a) of NEMWA, s 41(2)(a) of the NWA and schedule 2 item 3(2) of the MPRDA.

⁵⁰⁸ See, for example, ss 52(5), 54(3), 55(4) of NEMWA and s 46(3) of NEMAQA.

⁵⁰⁹ Section 74 of NEMWA.

⁵¹⁰ Section 24G(1)(viii) of NEMA and s 22A(4)(g) and (5)(c) of NEMAQA.

⁵¹¹ Section 68(2) of NEMICMA.

environmental permit application.⁵¹² A further example is the duty of state departments to submit written comments during environmental permit application procedures when requested to do so by the Licensing Authority or Environmental Assessment Practitioner.⁵¹³

4.1.2.1.3 Other types of procedural environmental information

The passive disclosure obligations to public bodies also relate to various other types of procedural environmental information, such as monitoring results pertaining to the conservation status of South Africa's biodiversity.⁵¹⁴ With reference to waste management, organs of state required to submit industry waste management plans may require that any person submit relevant information to the organ of state to enable it to compile such plans.⁵¹⁵ Information required for the national waste information system or the management of waste, as well as any information required by a waste management officer held by waste transporters, may be requested to be submitted to the Minister of Environmental Affairs or MEC, as the case may be.⁵¹⁶ When an investigation area with a high risk of land contamination has been identified, the Minister of Environmental Affairs or MEC may request the submission of a site assessment report by the person who conducted the high risk activity.⁵¹⁷ An EMI may also require a person to submit a waste impact report.⁵¹⁸ Furthermore, the Waste Management Bureau has a mandatory obligation to submit additional reports to the Minister of Environmental Affairs or Director-General as required.⁵¹⁹

Water management legislation also contains a large number of passive disclosure requirements pertaining to procedural environmental information. When the Minister of Water and Sanitation is in the process of making regulations, the National Assembly or the National Council of Provinces may request that it reports on the extent to which a comment received has been taken into account or, if it has not been taken into

⁵¹² Sections 24C(2C)(d) and 24C(7) of NEMA and s 36(3A)(d) of NEMAQA.

⁵¹³ Section 240(3) of NEMA.

⁵¹⁴ Section 49(2) of NEMBA.

⁵¹⁵ Section 29(5) of NEMWA.

⁵¹⁶ Sections 25(1)(b) and 63(1) of NEMWA.

⁵¹⁷ Section 37(b) of NEMWA.

⁵¹⁸ Section 66(1) of NEMWA.

⁵¹⁹ Section 34H(2) of NEMWA.

account, on the reasons therefore.⁵²⁰ When a person applies for the verification of an existing water use, the responsible authority may require the submission of any additionally required information.⁵²¹ If the Minister of Water and Sanitation is in the process of establishing a catchment management agency or a water user association, additional information requested by the Minister must be provided.⁵²² When requested, information pertaining to dams with a safety risk,⁵²³ waterworks⁵²⁴ or any information reasonably required for *inter alia* for the management and protection of water resources must be provided to the requesting authority.⁵²⁵ Any information on the affairs and financial position of a water management institution requested by the Minister of Water and Sanitation must be provided.⁵²⁶ A person duly appointed to audit the affairs of a water management institution established in terms of the NWA can also request access to relevant environmental information in the possession of such an institution, and the information must be produced upon request.⁵²⁷

In the mining sector, any information requested by the Minister of Mineral Resources from an applicant or the holder of an authorisation in terms of the MPRDA,⁵²⁸ or the owner of land subject to such authorisation, must be disclosed if it is required to achieve the objectives of the MPRDA.⁵²⁹ When an investigation into the occurrence of mineral resources is planned, particulars of the owner, occupier or person in control of the relevant land must be furnished upon request by the Minister of Mineral Resources.⁵³⁰ When requested, information pertaining to the usage and disbursement of considerations or royalties must be provided.⁵³¹ Furthermore, when applications for mining authorisations⁵³² have been submitted, the Regional Manager must request the

⁵²⁰ Section 69(1)(d) of the NWA. The Minister of Water and Sanitation must adhere to such a request.

⁵²¹ Section 35(3) of the NWA.

⁵²² Sections 78(2) and 92(2) of the NWA.

⁵²³ Section 118(1)(a) of the NWA.

⁵²⁴ Schedule 3 item 5 of the NWA.

⁵²⁵ Section 141 of the NWA.

⁵²⁶ Schedule 4 items 28 and 29(1) of the NWA.

⁵²⁷ Section 107(2) of the NWA.

⁵²⁸ Including a prospecting right, a mining right, a retention permit or a mining permit. See s 29 of the MPRDA.

⁵²⁹ Section 29 of the MPRDA.

⁵³⁰ Section 50(3) of the MPRDA.

⁵³¹ Schedule II item 11(2) of the MPRDA.

⁵³² In this study the term "mining authorisation" refers to a prospecting right, mining right, retention permit, mining permit, reconnaissance permit, exploration permit or production right.

applicant to submit relevant environmental reports as required in chapter 5 of NEMA.⁵³³ The Minister of Mineral Resources may also request specific reports from the Mineral and Petroleum Board that must be submitted.⁵³⁴

In terms of heritage resources, when requested all state departments must submit information on our heritage to SAHRA, including architectural or technical drawings intended to be destroyed.⁵³⁵ Furthermore, the SAHRA Council is obliged to furnish the Minister of Arts and Culture with any information it requests.⁵³⁶

It is now necessary to discuss the provisions relevant to the mandatory passive disclosure of procedural environmental information to private bodies.

4.1.2.2 The mandatory passive disclosure of procedural environmental information in the private sphere

Although not as abundantly as with public bodies, instances do exist where private bodies can request access to environmental information that must be granted.⁵³⁷ In terms of the 2014 EIA regulations, compliance must be verified with the conditions of an environmental authorisation, EMP or closure plan, and an environmental audit report must immediately be made available to anyone upon request.⁵³⁸ Various environmental laws make provision for the mandatory disclosure of written reasons requested by any person pertaining to specific decisions made.⁵³⁹ Also, the identity cards of officials appointed to assist in the enforcement of environmental legislation must be disclosed upon request by a member of the public.⁵⁴⁰

The mandatory passive disclosure to private bodies is also applicable to procedural environmental information in the biodiversity regime. An example is that everyone is entitled to access to information from the DAFF regarding the right of access to state

⁵³³ Sections 16(4), 22(4), 27(5), 74(4), 79(4) and 83(4)(a) of the MPRDA.

⁵³⁴ Section 67 of the MPRDA.

⁵³⁵ Section 9 of the NHRA.

⁵³⁶ Section 16(e) of the NHRA.

⁵³⁷ Du Plessis "Access to information" 208.

⁵³⁸ Reg 34(1) of GG R982 in GG 38282 of 4 December 2014.

⁵³⁹ See, for example, s 10(2)(d) of the NHRA, s 40(4) of NEMAQA and s 42(b) and schedule 6 item 9 of the NWA.

⁵⁴⁰ See, for example, s 31F(2) of NEMA, s 66 of the NFA, s 125(6) of the NWA, s 15(3) of the GMOA, s 91(2) of the MPRDA and s 43(4) of NEMICMA.

forests, including maps and rules, upon payment of a reasonable fee.⁵⁴¹ Another example is that any person may request a competent authority to issue a directive to any person who has contravened provisions of NEMBA.⁵⁴² Upon receipt of such a request the competent authority must provide a response within 30 days.⁵⁴³ Further examples of requirements of mandatory passive disclosure to private bodies include that mine employees may request access to their medical surveillance and occupational health reports⁵⁴⁴ and that all current statements of general policy and adopted conservation management plans must be made available for public inspection upon request.⁵⁴⁵

4.1.3 Evaluation: the mandatory passive disclosure of environmental information in terms of environmental legislation

Obligations to passively disclose strategic and procedural environmental information to public and private bodies in terms of environmental legislation relate *inter alia* to specific environmental plans and reports,⁵⁴⁶ disclosure to EMIs,⁵⁴⁷ and environmental permitting application procedures,⁵⁴⁸ as well as various other types of procedural environmental information.⁵⁴⁹ It is evident, however, that in South African environmental legislation there are no passive disclosure requirements to exclusively private bodies pertaining specifically to strategic environmental information.

It is now necessary to discuss the passive disclosure requirements, specifically in terms of PAIA, pertaining to environmental information.

4.2 The mandatory passive disclosure of environmental information in terms of PAIA: the public interest override

It must be borne in mind that environmental legislative provisions must be interpreted and applied in the context of PAIA.⁵⁵⁰ Generally, access to environmental information

⁵⁴¹ Section 20(13) of the NFA.

⁵⁴² Sections 73(3) and 74(1) of NEMBA.

⁵⁴³ Section 74(2) of NEMBA.

⁵⁴⁴ Section 19 of the *Mine Health and Safety Act* 29 of 1996.

⁵⁴⁵ Section 47(6) of the NHRA.

⁵⁴⁶ See 4.1.1 above.

⁵⁴⁷ See 4.1.2.1.1 above.

⁵⁴⁸ See 4.1.2.1.2 above.

⁵⁴⁹ See 4.1.2.1.3 and 4.1.2.2 above.

⁵⁵⁰ Du Plessis "Access to information" 205. Also see 2.1 above.

must be provided, unless a valid ground for the refusal thereof exists.⁵⁵¹ In addition to the disclosure requirements already discussed, a public interest override has been included in PAIA, which is relevant to all information held by private or public bodies, except to records of the South African Revenue Service.⁵⁵² If the disclosure of the requested information would reveal either an imminent risk to public safety or an environmental risk,⁵⁵³ or a considerable contravention of the law, and, if public interest⁵⁵⁴ clearly outweighs the harm contemplated by the disclosure of the requested information,⁵⁵⁵ access to the information must be provided.⁵⁵⁶ The public interest override is meant to be used as a last resort and only when a ground for the refusal of access to the information applies.⁵⁵⁷ It has been argued, however, that sections 46 and 70 of PAIA place an unnecessarily heavy burden of proof on the requester⁵⁵⁸ and that it has a narrow scope of application.⁵⁵⁹

The public interest override has been applied by courts to grant access to environmental information. One such example is *De Lange v Eskom Holdings Limited*,⁵⁶⁰ where the court ordered access to contracts relevant to electricity supply between Eskom and BHP Billiton on the basis that the disclosure would reveal evidence of a

⁵⁵¹ Du Plessis "Access to information" 205.

⁵⁵² Sections 46 and 70 of PAIA.

⁵⁵³ In *De Lange v Eskom Holdings Limited* 2012 1 All SA 543 (GSJ) para 143 the court defined "public safety or environmental risk" as follow: "... means harm or risk to the environment or public (including individuals in their work place) associated with a product or service which is available to the public, a substance released into the environment, including, but not limited to, the work place, a substance intended for human or animal consumption, a means of public transport, or an installation or manufacturing process or substance which is used in that installation or process".

⁵⁵⁴ The term "public interest" can be seen as anything that has the potential to affect the public's rights at large, or a common concern amongst members of the public in the affairs and management of government. See The Free Dictionary by Farlex date unknown <http://legal-dictionary.thefreedictionary.com/Public+Interest>. In *De Lange v Eskom Holdings Limited* 2012 1 All SA 543 (GSJ) the court was of the opinion that the term "public interest", in context of PAIA, may also include the "public interest in upholding the law as well as the public's awareness of public safety or environmental risks. There may also be the public interest in furthering the general goals of the Act." See *De Lange v Eskom Holdings Limited* 2012 1 All SA 543 (GSJ) para 139.

⁵⁵⁵ In *Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd* 2013 3 SA 315 (SCA) para 14 it was confirmed that, whether the public interest outweighs the harm contemplated by the disclosure, is a fact-sensitive enquiry of which the outcome will depend on the particular facts of the case.

⁵⁵⁶ Sections 46 and 70 of PAIA.

⁵⁵⁷ Roling *Transparency and access to information in South Africa* 35. Also see *President of the Republic of South Africa v M & G Media Limited* 2014 4 All SA 319 (SCA) paras 26-27.

⁵⁵⁸ SAHRC 2014 *The Promotion of Access to Information Act Annual Report 2013 – 2014* 25.

⁵⁵⁹ Roling *Transparency and access to information in South Africa* 35.

⁵⁶⁰ *De Lange v Eskom Holdings Limited* 2012 1 All SA 543 (GSJ).

serious public safety or environmental risk.⁵⁶¹ However, the current application of the public interest override outside the courts seems to be below standard, as in 2014 the SAHRC confirmed a decrease in the number of requests granted on the basis of public interest, although there was an increase in the number of requests for such information.⁵⁶² In 2015 the PAIA Civil Society Network reported that public bodies routinely ignore their obligation to consider the applicability of the public interest override when processing a request for access to information.⁵⁶³ In the light of this it seems as if public and private bodies simply do not understand how this override is intended to work, or simply refuse to submit to this override by continuing to refuse requests made in public interest even when the information might reveal a serious risk to public safety or the environment.

The current trends and challenges pertaining to the passive disclosure of environmental information in the public and private sphere will now be discussed.

4.3 Current trends in and challenges to the passive disclosure of environmental information

In 2010 the CER lodged a project named *Transparency and Accountability in Environmental Governance*,⁵⁶⁴ which included a number of activities aimed at verifying the extent to which members of the public can access from public and private bodies environmental information that would enable them to hold these bodies accountable for their environmental impacts.⁵⁶⁵ As part of this project, the CER lodged requests for access to environmental information to various public and private bodies, of which some of the results are reflected in this section. In this section the realisation of the passive disclosure of environmental information in the public and private sphere will be discussed with reference to current trends and challenges observed in both the public and the private sphere. Thereafter current trends and challenges observed exclusively in either the public or the private sphere will be discussed with specific reference to recent case law as relevant to the right of access to environmental information.

⁵⁶¹ *De Lange v Eskom Holdings Limited* 2012 1 All SA 543 (GSJ) para 152.

⁵⁶² SAHRC 2014 *The Promotion of Access to Information Act Annual Report 2013 – 2014* 31.

⁵⁶³ PAIA Civil Society Network *Shadow Report 2014* 3.

⁵⁶⁴ CER date unknown <http://cer.org.za/programmes/transparency>.

⁵⁶⁵ CER *Unlock the doors* 4.

4.3.1 *Current trends and challenges pertaining to the passive disclosure of environmental information in both the public and the private sphere*

The CER reported in 2015 that since 2011 there has been a slow trend towards the improved disclosure of environmental information, an increase in the level of awareness of obligations in terms of PAIA, and an increased investment in capacity to process PAIA requests in both the public and the private sphere.⁵⁶⁶ However, despite these improvements PAIA remains poorly implemented.⁵⁶⁷ The CER noted that instances exist where public and private bodies used the law to avoid the disclosure of information rather than to improve the realisation of the right of access to environmental information.⁵⁶⁸ Misinterpretation and poor implementation often frustrate requests for access to information.⁵⁶⁹ A culture of secrecy still exists in the public and private sphere, and transparency is seen as a business risk rather than the default position.⁵⁷⁰

Officials of public bodies and employees of private bodies are sometimes unhelpful and even aggressive when corresponding with information requesters.⁵⁷¹ This attitude discourages requesters from submitting requests for access to information and following up thereon.⁵⁷² There is a belief in the public and private sphere that any information related to mining operations, including EMPs and mining rights, and the conditions under which private bodies may operate, as well as the level of compliance to these conditions, are confidential.⁵⁷³ It has also been observed that the public interest override is not considered when processing PAIA requests.⁵⁷⁴ Furthermore, it was observed that internal appeals are sometimes treated as initial requests - a

⁵⁶⁶ CER *Signs of hope?* 1.

⁵⁶⁷ CER *Money talks* 1 and CER *Signs of hope?* 1.

⁵⁶⁸ CER *Unlock the doors* 19 and CER *Barricading the doors* 1.

⁵⁶⁹ Chien and Davis "How increased transparency in the mining sector would facilitate the realisation of environmental rights" 26.

⁵⁷⁰ PAIA Civil Society Network *Shadow Report 2014* 2.

⁵⁷¹ CER *Unlock the doors* 19.

⁵⁷² CER *Unlock the doors* 19.

⁵⁷³ PAIA Civil Society Network *Shadow Report 2014* 10 and CER *Unlock the doors* 15. When the CER requested access to six oil refineries' AELs and compliance reports during 2013-2014 and obtained access to only some of these records, in which some information had been blacked out, it was observed that these private companies' management teams are of the view that the conditions under which they may operate as well as the level of compliance to these conditions should be secret. See CER *Money talks* 14.

⁵⁷⁴ PAIA Civil Society Network *Shadow Report 2014* 10. Also see 4.2 above for discussion on the public interest override.

response to the PAIA request is provided rather than to the internal appeal.⁵⁷⁵ In addition, responses to internal appeals remain few.⁵⁷⁶ The failure to consider the possibility of severance of information is also evident in the public and private sphere.⁵⁷⁷ Further, when a refusal is communicated to a requester, it is seldom substantiated by giving proper reasons for the refusal, or supported by a properly commissioned, substantial affidavit.⁵⁷⁸ In the event that a request is granted but actual disclosure does not occur, there is currently no remedy available for the requester in terms of PAIA.⁵⁷⁹

The current trends and challenges observed exclusively in the public sphere will now be discussed.

4.3.2 Current trends and challenges in the passive disclosure of environmental information in the public sphere

During the CER's project named *Transparency and Accountability in Environmental Governance*⁵⁸⁰ it was observed that the percentage of the actual disclosure of information requested from public bodies⁵⁸¹ by the CER has significantly increased since 2012.⁵⁸² However, a percentage of 50% of the actual disclosure of requested records is still unacceptable.⁵⁸³ In this section the challenges hindering the effective implementation of PAIA in the public sphere will be discussed, followed by the implications of the *Protection of State Information Bill, 2010* on the right of access to

⁵⁷⁵ CER *Money talks* 8 and PAIA Civil Society Network *Shadow Report 2014* 12.

⁵⁷⁶ CER *Signs of hope?* 8. Most of the internal appeals that the CER has submitted to the DMR since 2013 remain unanswered. Also see PAIA Civil Society Network *Shadow Report 2014* 7-8 and CER *Barricading the doors* 2. No response had been received on 44% of all internal appeals lodged by the PAIA Civil Society, and consequently they are deemed to have been dismissed. Furthermore, the DWS was found to be one of the departments that failed to respond to more than 75% of internal appeals lodged against its decisions. In 2013 the CER reported that by the end of 2012 the DMR had not responded to any of the twenty appeals submitted against refusals of access to information since 2010.

⁵⁷⁷ PAIA Civil Society Network *Shadow Report 2014* 10.

⁵⁷⁸ CER *Signs of hope?* 3 and PAIA Civil Society Network *Shadow Report 2014* 10. One of the main obstacles hindering the DMR's sufficient implementation of PAIA is the inappropriate use of a generic partial grant or refusal letters. See CER *Money talks* 8 and CER *Unlock the doors* 9.

⁵⁷⁹ PAIA Civil Society Network *Shadow Report 2014* 12. Another large obstacle hindering the DMR's sufficient implementation of PAIA is the failure to deliver information to which access was granted. See CER *Money talks* 8 and CER *Unlock the doors* 9.

⁵⁸⁰ CER date unknown <http://cer.org.za/programmes/transparency>.

⁵⁸¹ The CER submitted requests to the DMR, DWS, DEA and various provincial and local bodies.

⁵⁸² CER *Signs of hope?* 3. The level of actual disclosure increased from as low as 24% in 2012 to 50% in 2015.

⁵⁸³ CER *Signs of hope?* 4.

environmental information. A discussion on recent case law pertaining to the realisation of the right of access to environmental information in the public sphere will then follow.

The current trends and challenges in the public sphere will now be discussed.

4.3.2.1 Current trends and challenges in the public sphere

The CER found that it remains very difficult to obtain actual access to requested records in the public sphere, even if a decision was made to grant access.⁵⁸⁴ In 2015 the CER reported that government departments increasingly make use of the option to extend the initial response periods.⁵⁸⁵ Although this is preferable to the absolute refusal of requests, these extensions delay access to requested information that may be required for the exercise or protection of rights, and also suggests poor record-keeping, a lack of communication between different offices, and under-resourcing.⁵⁸⁶ However, since 2010 a decrease in the number of deemed refusals by public bodies has occurred.⁵⁸⁷ One exception to this statistic is the DMR. In 2014 and 2015 it was found that the number of deemed refusals⁵⁸⁸ by the DMR had increased since 2013.⁵⁸⁹ The number of actual refusals has also increased since 2010, and as a result the number of internal appeals filed has similarly increased.⁵⁹⁰ Furthermore, in the event that requests are granted, it was found that instances exist where records disclosed were either incomplete or incorrect.⁵⁹¹ In general, public bodies are constrained by capacity and funding challenges and often demonstrate reluctance and inexperience when processing PAIA requests.⁵⁹²

⁵⁸⁴ CER *Barricading the doors* 2.

⁵⁸⁵ CER *Signs of hope?* 2. Section 26 of PAIA gives public bodies an option to extend the initial response period of 30 days with an additional period of not more than 30 days.

⁵⁸⁶ PAIA Civil Society Network *Shadow Report 2014* 4. Also see CER *Signs of hope?* 2, CER *Money talks* 8 and CER *Unlock the doors* 9.

⁵⁸⁷ CER *Signs of hope?* 4-5 and CER *Money talks* 9. For example, there were no deemed refusals by the DEA during the 2014-2015 period.

⁵⁸⁸ Section 27 of PAIA states that a request of access to environmental information is deemed to be refused if an information officer fails to make a decision on such a request within the period contemplated in s 25(1) of PAIA.

⁵⁸⁹ CER *Money talks* 7 and CER *Signs of hope?* 8.

⁵⁹⁰ CER *Money talks* 7.

⁵⁹¹ This trend was observed specifically pertaining to the DMR and DWS. See CER *Money talks* 8 and Chien and Davis "How increased transparency in the mining sector would facilitate the realisation of environmental rights" 26.

⁵⁹² CER *Money talks* 1.

The most common challenge hindering the effective implementation of PAIA in the public sphere was identified as the absence of policies and systems outlining how PAIA should be implemented by government departments.⁵⁹³ The CER indicated in 2012 that the main obstacles hindering the DWS from sufficiently implementing PAIA include its failure to appoint Deputy Information Officers as required by PAIA,⁵⁹⁴ A lack of training and understanding of PAIA provisions and an incorrect approach in the counting of days when processing PAIA requests are further obstacles.⁵⁹⁵ The SAHRC reported in 2014 that public bodies do not substantively comply with the provisions of PAIA, but instead adopt a "tick box approach".⁵⁹⁶ Inconsistency in the processing of PAIA requests by individual officials and different government departments further challenges the timeous realisation of the right of access to environmental information.⁵⁹⁷ Requesters are being sent from pillar to post, which prevarication limits their access to these records.⁵⁹⁸

The SAHRC reported in 2014 that when refusing requests some national and provincial departments negligently fail to refer to a specific section in PAIA as the basis of the refusal.⁵⁹⁹ Instances have also occurred where public bodies incorrectly cite PAIA, or refer to sections that do not exist.⁶⁰⁰ This places an unreasonably heavy burden on the requester to try to interpret the response received from the public body.⁶⁰¹ While information officers have a duty to provide assistance to requesters to enable them to comply with the procedural requirements of PAIA,⁶⁰² the SAHRC reported that public

⁵⁹³ SAHRC 2014 *The Promotion of Access to Information Act Annual Report 2013 – 2014* 22.

⁵⁹⁴ Section 17 of PAIA.

⁵⁹⁵ CER *Money talks* 6 and CER *Unlock the doors* 5-6.

⁵⁹⁶ SAHRC 2014 *The Promotion of Access to Information Act Annual Report 2013 – 2014* 22.

⁵⁹⁷ CER *Unlock the doors* 6.

⁵⁹⁸ Some government departments, like the DWS, for instance, are of the view that records prepared by private bodies and submitted to the department must be requested from the private body and not the department, despite the fact that the department is responsible for granting licences and maintaining the records. On the other hand, the DMR, for example, has instructed private bodies not to release requested environmental information, indicating that the requester must approach the DMR for such information and not the private body. See Chien and Davis "How increased transparency in the mining sector would facilitate the realisation of environmental rights" 27.

⁵⁹⁹ SAHRC 2014 *The Promotion of Access to Information Act Annual Report 2013 – 2014* 32.

⁶⁰⁰ PAIA Civil Society Network *Shadow Report 2014* 6.

⁶⁰¹ PAIA Civil Society Network *Shadow Report 2014* 6.

⁶⁰² Section 19(1)(b) of PAIA.

bodies instead use the procedural requirements of PAIA to refuse access to information.⁶⁰³

Although instances exist where a third party must be notified of a request for access to information held by public bodies,⁶⁰⁴ it has been observed that government departments over-use the third-party notification procedure, and that this causes unnecessary delays in disclosure.⁶⁰⁵ It has also been observed that government departments are of the view that they are obliged to refuse access to requested information if a third party objects to such a disclosure.⁶⁰⁶ The holder of information must, in fact, make an independent assessment of whether to disclose a record or not.⁶⁰⁷

There are specific grounds for refusal that are currently being overused by public bodies to refuse requests for access to environmental information. One such ground is the ground for refusal related to the protection of the commercial information of third parties.⁶⁰⁸ Although a definition of "commercially confidential information" has been included in NEMA,⁶⁰⁹ no similar definition has been included in PAIA. As a result, there is no exact guideline as to what type of information would be considered commercially confidential. Public bodies usually consider a wide variety of information confidential or commercially sensitive, without establishing whether the disclosure of the relevant

⁶⁰³ SAHRC 2014 *The Promotion of Access to Information Act Annual Report 2013 – 2014* 32.

⁶⁰⁴ Section 47 of PAIA states that a public body's information officer must take all reasonable steps to inform a third party to whom the requested information relates if such information might be a record in terms of ss 34(1) (if the disclosure of this information would involve the unreasonable disclosure of the private information of a third party, even if deceased), 35(1) (records of the South African Revenue Service held by the Service for purposes of enforcing law related to the collection of revenue), 36(1) (if a record contains trade secrets or "financial, commercial, scientific or technical information" or other trade secrets that could prejudice the third party), 37(1) (if the disclosure would constitute an action for breach of confidence owed to a third party in terms of an agreement) or s 43(1) (if the information contains information about research being or to be carried out by or on behalf of a third party and that disclosure may seriously disadvantage such a third party or research) of PAIA.

⁶⁰⁵ PAIA Civil Society Network *Shadow Report 2014* 11 and CER *Signs of hope?* 5.

⁶⁰⁶ CER *Money talks* 5 and CER *Signs of hope?* 5.

⁶⁰⁷ CER *Signs of hope?* 5. Also see *Conservation South Africa v Director General: Department of Mineral Resources* (WCC) (unreported) case number 3599/14 of 16 September 2015 and 4.3.2.1 below as an example indicating the extent to which public bodies fail to apply their minds to requests in terms of PAIA. See PAIA Civil Society Network *Shadow Report 2014* 14.

⁶⁰⁸ Section 36 of PAIA and CER *Money talks* 1 and CER *Signs of hope?* 2.

⁶⁰⁹ Section 1 of NEMA. Commercially confidential information has been defined to mean "commercial information, the disclosure of which would prejudice to an unreasonable degree the commercial interests of the holder: Provided that details of emission levels and waste products must not be considered to be commercially confidential notwithstanding any provision of this Act or any other law".

information would in fact harm the genuine interests of a third party.⁶¹⁰ It is submitted that the inclusion of a clear definition of commercially confidential information in PAIA would provide direction in correctly applying the ground for refusal related to the protection of the commercial information of third parties.

In many instances a claim by a third party that information is commercially confidential is easily accepted without determining whether this is in fact a legitimate claim.⁶¹¹ Holders of information should rather make use of severability or the "blacking-out" of specific content of the requested records if such information is deemed commercially confidential, rather than refusing access to the requested record in its entirety.⁶¹² In such a case the reasons for the use of severability must be provided.⁶¹³ It has been observed that a culture of secrecy exists in parts of the local sphere of government. When the CER requested access to six oil refineries' AELs and compliance reports during 2013-2014 it obtained access to only some of these records, and some of the information had been blacked out.⁶¹⁴ What was observed was that, notwithstanding the harmful health impacts of these refineries' emissions, the relevant municipalities were of the view that they had to protect the secrecy of the AEL conditions, as seen by the management teams of these refineries.⁶¹⁵ It was also observed that there is inconsistency among municipalities, creating the impression that some refineries' AEL conditions are more confidential than others.⁶¹⁶ A reason for this conduct could be that additional safeguarding of these refineries is required, and that this need for confidentiality is interpreted by the municipalities as the necessity to refuse access to related information, as some of the refineries have been declared as National Key Points under the *National Key Points Act*.⁶¹⁷

⁶¹⁰ CER *Signs of hope?* 2.

⁶¹¹ CER *Signs of hope?* 3.

⁶¹² CER *Signs of hope?* 3. Section 59 of PAIA provides that in the event that a record of a public body is requested that contains information that must be refused in terms of one of the grounds for refusal identified in PAIA, every part of such record that does not contain such information or can reasonably be severed from such information must be disclosed.

⁶¹³ Section 56(3)(a) of PAIA.

⁶¹⁴ CER *Money talks* 14.

⁶¹⁵ CER *Money talks* 14.

⁶¹⁶ CER *Money talks* 14.

⁶¹⁷ *National Key Points Act* 102 of 1980. In terms of s 2 of the *National Key Points Act* 102 of 1980 the Minister of Defence may declare a place or area as a National Key Point if the place or area is of such importance "that its loss, damage, disruption or immobilisation may prejudice the Republic, or

Another ground for the refusal of access to environmental information frequently used by public bodies is that records cannot be found or do not exist.⁶¹⁸ There was an instance where a government department alleged that a record did not exist when the record did in fact exist, as the requester obtained the record from another source.⁶¹⁹ This suggests negligence and poor record keeping, or poses the possibility that information officers are acting dishonestly.⁶²⁰ It was also observed that, in the event that a record does not exist, officials sometimes refuse to declare this under oath⁶²¹ and thereby fail to comply with the requirements of section 23(1) of PAIA.⁶²² Furthermore, information initially refused based on the grounds that it does not exist is sometimes found to exist after all, once an internal appeal has been filed and litigation has been initiated.⁶²³ This hinders the public's ability to access information required to monitor the conduct of mining companies, for example, and to assist the state in identifying areas of non-compliance.⁶²⁴

With regard to specific national government departments' compliance with PAIA, the CER found in 2011, 2012 and 2015 that the DMR's compliance was "consistently poor," and the DMR remains one of the poorest implementers of PAIA.⁶²⁵ Considering the great deal of environmental damage caused by the mining industry, this lack of performance is simply unacceptable.⁶²⁶ It was found that the DWS significantly improved in the

whenever he considers it necessary or expedient for the safety of the Republic or in the public interest". Chevron Refinery, Sasol Secunda and Engen Refinery were part of the six oil refineries from which information was requested. These refineries have been declared as National Key Points in terms of the *National Key Points Act* 102 of 1980. See Right 2 know 2015 <http://www.r2k.org.za/2015/01/23/revealed-list-of-national-key-points/>.

⁶¹⁸ PAIA Civil Society Network *Shadow Report 2014* 5. Also see CER *Signs of hope?* 3 and ss 23(1) and 55(1) of PAIA.

⁶¹⁹ CER *Signs of hope?* 3.

⁶²⁰ CER *Signs of hope?* 3.

⁶²¹ CER *Money talks* 6 and CER *Unlock the doors* 5.

⁶²² Section 23(1) of PAIA provides the following: "If all reasonable steps have been taken to find a record requested; and there are reasonable grounds for believing that the record is in the public body's possession but cannot be found; or does not exist, the information officer of a public body must, by way of affidavit or affirmation, notify the requester that it is not possible to give access to that record". See, for example, *Mandag Centre for Investigative Journalism v Minister of Public Works* 2014 ZAGPPHC 226 para 34.

⁶²³ Chien and Davis "How increased transparency in the mining sector would facilitate the realisation of environmental rights" 26.

⁶²⁴ Chien and Davis "How increased transparency in the mining sector would facilitate the realisation of environmental rights" 26.

⁶²⁵ CER *Barricading the doors 2*, CER *Signs of hope?* 1 and CER *Unlock the doors* 7. The CER reported that the actual release rate of requested information in 2015 by the DMR was 12,5%.

⁶²⁶ CER *Signs of hope?* 1.

processing of PAIA requests in 2015, as more resources had been allocated for this purpose.⁶²⁷ The DEA was found to be consistent in granting access to and releasing information.⁶²⁸

With regard to the performance of the provincial and local sphere the CER reported in 2012 that generally the provincial and local sphere of government performed far better than the national sphere, and that these spheres had an improved understanding of the tools available to them in terms of PAIA.⁶²⁹ Municipalities' responses to requests made in terms of PAIA for environmental information varied significantly.⁶³⁰ While some municipalities took their performance in terms of PAIA seriously and were adequately resourced to handle PAIA requests,⁶³¹ most municipalities were at a loss when processing requests in terms of PAIA.⁶³²

With regard to parastatals such as Eskom, a positive trend has been observed since 2010.⁶³³ Eskom has developed, for example, its own internal appeal process to enable it to reconsider requests for access to information.⁶³⁴

The implications of the *Protection of State Information Bill, 2010* for the realisation of the right of access to environmental information will now be discussed.

4.3.2.2 The implications of the *Protection of State Information Bill, 2010* for the realisation of the right of access to environmental information

Currently the management of public records and non-public records with national significance is regulated by the *National Archives And Record Service of South Africa Act*.⁶³⁵ One of the objectives of this Act is to make these records accessible and to promote their use by the public.⁶³⁶ The acceptance by Parliament of the *Protection of State Information Bill, 2010*, also known as the Secrecy Bill, is highly controversial as

⁶²⁷ CER *Signs of hope?* 6.

⁶²⁸ CER *Money talks* 5.

⁶²⁹ CER *Unlock the doors* 11.

⁶³⁰ CER *Signs of hope?* 9-10.

⁶³¹ The City of Cape Town and Ekurhuleni Metropolitan Municipalities' performance in terms of the processing of PAIA requests is most notable.

⁶³² CER *Signs of hope?* 10.

⁶³³ CER *Money talks* 10.

⁶³⁴ CER *Money talks* 10.

⁶³⁵ *National Archives and Record Service of South Africa Act* 43 of 1996.

⁶³⁶ Section 3(b) of the *National Archives and Record Service of South Africa Act* 43 of 1996.

this Bill seems to be aimed at limiting the constitutional right of access to information.⁶³⁷ Although there has been extensive public opposition to the Secrecy Bill, including legal experts expressing the opinion that it is unconstitutional, the Bill was accepted by Parliament and is now awaiting sign-off by the President.⁶³⁸ Chapter 5 of the Secrecy Bill deals with the classification and declassification of state information and seems to be in conflict with the principle of transparency.⁶³⁹ The Bill provides for the centralisation of classification⁶⁴⁰ and the monitoring of state information⁶⁴¹ by the State Security Agency (SSA), which is problematic, as this body will be the only legal body responsible for decision-making on access to state information.⁶⁴² This will most likely result in delays while requesters seek the declassification of state information requested under PAIA.⁶⁴³ The absence of a "reviewer" to oversee the actions of the SSA poses a risk that the culture of secrecy present in the public sphere will continue or worsen.⁶⁴⁴ The Secrecy Bill will also make it a criminal offence to obtain information in a way deemed unlawful or improper by the SSA, and no provision has been made for an exemption to allow the disclosure of information if such disclosure would be in public interest, providing only limited protection for whistle blowers.⁶⁴⁵ Further underlying problems with this Bill include the open-ended definition of "national security," which could allow for the over-classification of information, the absence of a requirement to publicise classifications, which could also allow for the over-classification of information, and the fact that the Bill applies retrospectively to all information classified under previous legislation, including *Apartheid*-era records, with no deadline defined for declassification.⁶⁴⁶ By the

⁶³⁷ PAIA Civil Society Network *Shadow Report 2014* 1.

⁶³⁸ PAIA Civil Society Network *Shadow Report 2014* 1.

⁶³⁹ PAIA Civil Society Network *Shadow Report 2014* 20.

⁶⁴⁰ "Classification of state information" has been defined in clause 1 of the *Protection of State Information Bill, 2010* as to mean "a process used to determine (a) the manner in which such state information may be classified in terms of sections 12 and 14, and (b) the level of protection assigned to such state information".

⁶⁴¹ "State information" has been defined in clause 1 of the *Protection of State Information Bill, 2010* as meaning "information generated, acquired or received by organs of state or in the possession or control of organs of state".

⁶⁴² PAIA Civil Society Network *Shadow Report 2014* 20.

⁶⁴³ PAIA Civil Society Network *Shadow Report 2014* 20.

⁶⁴⁴ PAIA Civil Society Network *Shadow Report 2014* 20.

⁶⁴⁵ Right 2 know 2014 <http://www.r2k.org.za/2014/09/11/whats-still-wrong-with-the-secrecy-bill/> and also see PAIA Civil Society Network *Shadow Report 2014* 20. Also see clause 43 of the *Protection of State Information Bill, 2010*.

⁶⁴⁶ Right 2 know 2014 <http://www.r2k.org.za/2014/09/11/whats-still-wrong-with-the-secrecy-bill/>.

same token it would also be possible to classify environmental information that could reveal serious environmental pollution, which information would then be inaccessible.

Recent case law pertaining to the passive disclosure of environmental information in the public sphere will now be discussed.

4.3.2.3 Recent case law pertaining to the passive disclosure of environmental information in the public sphere

Various disputes related to the passive disclosure of environmental information in the public sphere have ended up in court. In 2012 the CER instituted legal proceedings against the DMR, based on the deemed refusal of requests for access to information pertaining to the financial provisioning of mining companies and the auditing thereof.⁶⁴⁷ The DMR consented to a court order made against it and undertook to provide access to the records within an agreed time period, but did not comply with the order.⁶⁴⁸ Subsequently the DMR agreed to provide some of the requested information but did not comply with the court order, as only a portion of the information was provided.⁶⁴⁹

Another example is the case of *South Durban Community Environmental Alliance and Vaal Environmental Justice Alliance v eThekweni Metropolitan Municipality*,⁶⁵⁰ where the CER instituted legal proceedings on behalf of VEJA and the South Durban Community Environmental Alliance against the eThekweni Metropolitan Municipality to compel the disclosure of the atmospheric emission licences and compliance reports of two south Durban refineries.⁶⁵¹ The Municipality refused the requests, alleging that the requested information was commercial and contained trade secrets or other information, the disclosure of which was likely to harm the commercial or financial interests of the licence holders, or that the disclosure of the requested information was likely to put the licence holders at a disadvantage or prejudice them.⁶⁵² The applicants argued that neither the compliance reports nor the licences contained commercially sensitive

⁶⁴⁷ *Centre for Environmental Rights v Director-General: Department of Mineral Resources* (GNP) (unreported) case number 67649/2011. Also see CER *Barricading the doors* 4.

⁶⁴⁸ CER *Barricading the doors* 4.

⁶⁴⁹ CER *Barricading the doors* 4.

⁶⁵⁰ *South Durban Community Environmental Alliance and Vaal Environmental Justice Alliance v eThekweni Metropolitan Municipality* (KZD) (unreported) case number 4072/2015.

⁶⁵¹ CER *Signs of hope?* 3.

⁶⁵² CER *Signs of hope?* 4.

information or trade secrets, as NEMAQA subjects air emission licence applications to public participation processes.⁶⁵³ Furthermore, the applicants argued that the public interest override was applicable to this case.⁶⁵⁴ The court is yet to decide on this matter.⁶⁵⁵

In *Conservation South Africa v Director General: Department of Mineral Resources*⁶⁵⁶ Conservation South Africa (CSA) lodged an application to force the DMR to disclose information pertaining to amendments to financial provisioning related to the transfer of mining rights from De Beers Consolidated Mines (De Beers) to a subsidiary of TransHex Limited.⁶⁵⁷ The DMR refused the request on the basis that the requested information was considered the commercial information of a third party in terms of section 36 of PAIA.⁶⁵⁸ CSA then filed an internal appeal against the DMR's refusal, which was ignored by the DMR.⁶⁵⁹ When the CSA lodged an application in the High Court to compel the DMR to disclose the requested information, the DMR reconsidered its response to the CSA's request and undertook to provide the requested information.⁶⁶⁰ However, prior to the DMR's disclosing the information, De Beers opposed the CSA's application.⁶⁶¹ Subsequently the DMR withdrew its undertaking to disclose the information.⁶⁶² The court held that the DMR must provide the requested information to the CSA as the requested information would provide insight into the reasons for the reduction of as much as 70% in the amount of financial provision for rehabilitation prior to the sale to a

⁶⁵³ CER 2015 <http://cer.org.za/news/media-release-environmental-justice-organisations-sue-ethekwini-for-access-to-refinery-licences>. Also see s 38(3)(a) of NEMAQA.

⁶⁵⁴ The applicants argued that it was likely that the disclosure of the records would reveal a substantial legal contravention or a serious and imminent public environmental or safety risk, and that the public interest in the disclosure would outweigh potential harm to a third party. See CER 2015 <http://cer.org.za/news/media-release-environmental-justice-organisations-sue-ethekwini-for-access-to-refinery-licences>. Also see 4.2 above and s 46 of PAIA.

⁶⁵⁵ CER *Signs of hope?* 4.

⁶⁵⁶ *Conservation South Africa v Director General: Department of Mineral Resources* (WCC) (unreported) case number 3599/14 of 16 September 2015.

⁶⁵⁷ CER *Signs of hope?* 8.

⁶⁵⁸ CER *Signs of hope?* 8. Section 36 of PAIA states that an information officer must refuse to grant access to information if that information contains trade information of a third party, or commercial, technical, financial or scientific information the disclosure of which is likely to cause harm to the financial or commercial interests of the third party.

⁶⁵⁹ PAIA Civil Society Network *Shadow Report 2014* 14.

⁶⁶⁰ PAIA Civil Society Network *Shadow Report 2014* 14.

⁶⁶¹ PAIA Civil Society Network *Shadow Report 2014* 14.

⁶⁶² PAIA Civil Society Network *Shadow Report 2014* 14.

subsidiary of TransHex.⁶⁶³ This case clearly indicates the extent to which public bodies fail to apply their minds to requests in terms of PAIA and internal appeals.⁶⁶⁴

A further example of a dispute that ended up in court is *Trustees: Biowatch Trust v Registrar: Genetic Resources*.⁶⁶⁵ In this case Biowatch requested access to information related to matters pertaining to the use of genetically modified organisms (GMOs) from the Registrar of Genetic Resources on four occasions, motivating the request as being in public interest.⁶⁶⁶ In support of its claim, Biowatch relied on provisions of the GMOA, the Constitution and NEMA, but not on PAIA.⁶⁶⁷ Biowatch's requests were made between the promulgation date⁶⁶⁸ and commencement date⁶⁶⁹ of PAIA.⁶⁷⁰ The Registrar did not respond adequately to all these requests, and where he did respond, the response was either late or incomplete.⁶⁷¹ Defences raised against Biowatch included that PAIA was applicable to this case and that Biowatch had not complied with the provisions of PAIA by not exhausting the internal appeal procedure prior to resorting to litigation, the fact that the information requested was commercially confidential, and that Biowatch had failed to properly indicate the information sought.⁶⁷² The Respondents also argued that Biowatch was obliged to follow the internal appeal procedure in terms of section 19 of the GMOA, which it had failed to do.⁶⁷³

The court firstly held that PAIA's provisions did not apply retrospectively, as this would unfairly render Biowatch's requests for access to information made prior to the commencement of PAIA invalid in the light of its non-compliance with PAIA's provisions.⁶⁷⁴ However, the court held that PAIA could apply retrospectively to the extent that the Registrar would be entitled to rely on the provisions of PAIA related to

⁶⁶³ CER *Signs of hope?* 8.

⁶⁶⁴ PAIA Civil Society Network *Shadow Report 2014* 14.

⁶⁶⁵ *Trustees: Biowatch Trust v Registrar: Genetic Resources* 2005 4 SA 111 (T) (the *Biowatch* case). Also see Dugard 2008 *South African Journal on Human Rights* 229.

⁶⁶⁶ *Biowatch* case para 18. Also see Lim Tung 2011 *Word and Action* 30 and Humby 2009 *Potchefstroom Electronic Law Journal* 109.

⁶⁶⁷ *Biowatch* case para 2. Also see Humby 2009 *Potchefstroom Electronic Law Journal* 108.

⁶⁶⁸ PAIA was promulgated on 2 February 2000.

⁶⁶⁹ The commencement date of PAIA was 9 March 2001.

⁶⁷⁰ *Biowatch* case para 18. Also see Humby 2009 *Potchefstroom Electronic Law Journal* 108.

⁶⁷¹ *Biowatch* case paras 18, 20-21.

⁶⁷² *Biowatch* case para 25. Also see Humby 2009 *Potchefstroom Electronic Law Journal* 110.

⁶⁷³ *Biowatch* case para 38 and Humby 2009 *Potchefstroom Electronic Law Journal* 109. Section 19 of the GMOA provides for an internal appeal procedure against any decision made by the Registrar, any inspector in terms of the GMOA, or the Executive Council for Genetically Modified Organisms.

⁶⁷⁴ *Biowatch* case para 29.

the grounds for refusal of access,⁶⁷⁵ and that this would not be unfair, as Biowatch never had an absolute right of access to information.⁶⁷⁶ Furthermore, the court held that Biowatch was not obliged to internally appeal against the refusal of its request that was made after the commencement of PAIA, as the Registrar was not a public body in terms of paragraph (a) of the definition of a public body against whom an internal appeal could be lodged.⁶⁷⁷ With regard to the alleged requirement that Biowatch follow the internal appeal procedure in terms of the GMOA, the court found that, as the only obvious action of the Registrar was the refusal to disclose the coordinates of the field trials undertaken, any appeal lodged against this one action would hardly provide sufficient redress for Biowatch in the circumstances.⁶⁷⁸ In addition, the GMOA does not expressly require that its internal appeal procedure must be followed prior to instituting legal proceedings.⁶⁷⁹ The court also held that, although requests for access to information must not be formulated too generally, the Registrar was not entitled to adopt an inert role in this regard.⁶⁸⁰ If after engagement with Biowatch the Registrar was of the opinion that the request was inarticulate or vexatious, he should have refused the request on that ground, which he had failed to do.⁶⁸¹ With regard to the confidentiality of the information, the court held that the constitutional right of access to information was not an unqualified right and that it had to be balanced with admissible private and governmental concerns for maintaining the confidentiality of specific information.⁶⁸² This balancing act would have to be conducted every time that a court was dealing with the interpretation of a confidentiality clause contained in environmental legislation and when considering the application of the grounds for refusal as included in PAIA.⁶⁸³

The court found that Biowatch had acted in public interest and had established that it had a clear right to some of the requested information that was not regarded as

⁶⁷⁵ Chapter 4 of part 2 of PAIA.

⁶⁷⁶ *Biowatch* case para 40. Also see Humby 2009 *Potchefstroom Electronic Law Journal* 111.

⁶⁷⁷ *Biowatch* case para 32. Also see ss 1 and 74(1) of PAIA. Paragraph (a) of the definition of "public body" reads "any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government".

⁶⁷⁸ *Biowatch* case para 38.

⁶⁷⁹ *Biowatch* case para 38.

⁶⁸⁰ *Biowatch* case para 43.

⁶⁸¹ *Biowatch* case para 43.

⁶⁸² *Biowatch* case para 39.

⁶⁸³ Du Plessis "Access to information" 215.

confidential, and that the Registrar's failure to provide access to this information infringed on Biowatch's constitutional right of access to information.⁶⁸⁴ The court subsequently made an order that granted Biowatch the right of access to some of the requested information, subject to the fact that access thereto could be refused in terms of PAIA.⁶⁸⁵ However, a costs order was made against Biowatch in the light of the manner in which Biowatch had formulated the relief sought in the court papers.⁶⁸⁶ This worried the public interest law community.⁶⁸⁷ Biowatch eventually appealed to the Constitutional Court that held that the proper approach to cost awards should be whether or not specific constitutional rights were emphasised by the relevant party.⁶⁸⁸ The primary concern must be how the cost order would either promote or hinder constitutional justice.⁶⁸⁹ Cost orders should not be used to indicate a court's "disapproval of a lack of precision in the formulation of an applicant's claims".⁶⁹⁰

4.3.2.4 Evaluation: current trends and challenges in the passive disclosure of environmental information in the public sphere

The realisation of the right of access to environmental information in the public sphere remains challenging. Challenges and trends, in this regard, include the over-use of extended response periods,⁶⁹¹ capacity and funding challenges,⁶⁹² a lack of experience and training,⁶⁹³ a lack of communication between different spheres of government,⁶⁹⁴ poor document control⁶⁹⁵ and a lack of policies and systems pertaining to the implementation of PAIA.⁶⁹⁶ It was found that the provincial and local sphere of government generally performed far better in implementing PAIA than national

⁶⁸⁴ Cullinan 2009 *Without Prejudice* 8 and Dugard 2008 *South African Journal on Human Rights* 229. Also see *Biowatch* case para 66.

⁶⁸⁵ *Biowatch* case para 67.

⁶⁸⁶ Cullinan 2009 *Without Prejudice* 8 and Humby 2009 *Potchefstroom Electronic Law Journal* 111.

⁶⁸⁷ Cullinan 2009 *Without Prejudice* 8.

⁶⁸⁸ *Biowatch Trust v Registrar Genetic Resources* 2009 10 BCLR 1014 (CC) para 20. Also see Cullinan 2009 *Without Prejudice* 10.

⁶⁸⁹ Cullinan 2009 *Without Prejudice* 10.

⁶⁹⁰ Cullinan 2009 *Without Prejudice* 10. For discussion on the fundamental rules on costs in public interest litigation see Humby 2009 *Potchefstroom Electronic Law Journal* 95-131.

⁶⁹¹ See 4.3.2.1 above.

⁶⁹² See 4.3.2.1 above.

⁶⁹³ See 4.3.2.1 and 4.3.2.2 above.

⁶⁹⁴ See 4.3.2.2 above.

⁶⁹⁵ See 4.3.2.1 above.

⁶⁹⁶ See 4.3.2.1 above.

departments.⁶⁹⁷ It is also believed that the promulgation of the *Protection of State Information Bill, 2010* will have a very negative impact on the realisation of the right of access to environmental information in the public sphere.⁶⁹⁸ Recent jurisprudence pertaining to the right of access to environmental information, however, indicates the view of the judiciary, as well as of the community members involved, that the right of access to environmental information and a culture of transparency must be promoted in the public sphere.⁶⁹⁹

The current trends and challenges specifically observed in the private sphere will now be discussed.

4.3.3 Current trends and challenges in the passive disclosure of environmental information in the private sphere

The CER is of the opinion that private bodies, contrary to public bodies, generally demonstrate an enhanced understanding of PAIA and are also more adequately resourced to process PAIA requests timeously, as they usually have dedicated internal legal departments.⁷⁰⁰ In this section the challenges hindering the effective implementation of PAIA will be discussed generally as they pertain to the private sphere, followed by a discussion on the passive disclosure of confidential environmental information obtained during an audit. Thereafter recent case law pertaining to the realisation of the right of access to environmental information in the private sphere will be discussed.

4.3.3.1 Current trends and challenges in the private sphere in general

In 2012 it was reported that although PAIA requests were not being ignored by private bodies as before, more than 50% of the requests submitted to private bodies by CER were actively refused.⁷⁰¹ There has been a significant improvement in the implementation of PAIA in the private sphere since 2013.⁷⁰² In 2015 it was reported that the percentage of the actual disclosure of information requested from private bodies

⁶⁹⁷ See 4.3.2.3 above.

⁶⁹⁸ See 4.3.2.4 above.

⁶⁹⁹ See 4.3.2.5 above.

⁷⁰⁰ CER *Signs of hope?* 10.

⁷⁰¹ CER *Barricading the doors* 3.

⁷⁰² CER *Signs of hope?* 10.

had significantly increased and was also significantly higher than the disclosure percentage of public bodies.⁷⁰³

In addition to the trends and challenges discussed above,⁷⁰⁴ it was found that sometimes private bodies did not sufficiently understand the provisions of PAIA, being seized with doubt when deciding whether or not to grant access to information requested. For example, when the Vaal Environmental Justice Alliance (VEJA) requested access to water quality monitoring reports from Anglo Operations Limited pertaining to its New Vaal Colliery in October 2012, VEJA was provided access to such records.⁷⁰⁵ However, all figures on the disclosed records were blacked out and no motivation for this censorship was provided.⁷⁰⁶ Subsequently, in December 2012, Anglo Operations Limited reversed its decision to grant access to this information on the grounds that VEJA had failed to prove that access to this information was required for the protection or exercise of its rights.⁷⁰⁷

The main obstacles identified as obstructing the sufficient implementation of PAIA in the private sphere include the failure of private bodies to respond to requests for access to information, the fact that no internal appeal procedure is available against a refusal of access to information,⁷⁰⁸ the referral of requests for access to information to public bodies who also hold the requested information, and the failure to acknowledge the applicability of PAIA.⁷⁰⁹ There have also been instances where requesters have been threatened with legal action by the private body in possession of the requested information.⁷¹⁰

⁷⁰³ PAIA Civil Society Network *Shadow Report 2014* 9 and CER *Signs of hope?* 3.

⁷⁰⁴ See 4.3.1 above.

⁷⁰⁵ CER *Barricading the doors* 4.

⁷⁰⁶ CER *Barricading the doors* 4.

⁷⁰⁷ CER *Barricading the doors* 4.

⁷⁰⁸ For discussion on the availability of internal appeal procedures against refusals by private bodies see 4.4.2.1 below.

⁷⁰⁹ PAIA Civil Society Network *Shadow Report 2014* 10 and CER *Unlock the doors* 15. When the CER requested access to six oil refineries' AELs and compliance reports during 2013-2014 and obtained access to only some of these records in which some information had been blacked out, it was observed that these private companies' management teams were of the view that the conditions under which they were permitted to operate as well as the level of compliance with these conditions should be kept secret. See CER *Money talks* 14.

⁷¹⁰ CER *Unlock the doors* 15.

The CER observed that the grounds for refusal most frequently used by private bodies include the refusal where disclosure would prejudice the security of property or plans or methods for the protection of the public or an individual,⁷¹¹ where the requested record contains trade secrets, commercial, technical, financial or scientific information that, if disclosed, could harm the financial or commercial interests of the private body, or where the requested record contains information the disclosure of which could prejudice the private body in contractual or other negotiations, or in commercial competition.⁷¹²

A controversial issue is the passive disclosure obligations of environmental auditors pertaining to confidential environmental information during audits. This issue will now be discussed.

4.3.3.2 The passive disclosure of confidential environmental information obtained during an audit

Nothing prohibits a requester from requesting access to environmental information, often highly confidential in nature, from an auditor.⁷¹³ It must be noted that the 2014 EIA regulations require that compliance be verified with the conditions of an environmental authorisation, EMP or closure plan, and that the environmental audit report must be made available to anyone upon request immediately.⁷¹⁴ However, with regard to a legal compliance audit or another type of environmental audit the scope of which is not limited to an environmental authorisation, EMP or closure plan, the question to be asked is whether this information would be regarded as protected under privilege against self-incrimination, or whether this information could be requested from an environmental auditor for use in legal proceedings.⁷¹⁵ Various authors⁷¹⁶ are of the opinion that this information should be treated as privileged.⁷¹⁷ Access to such information can be refused also on the basis that such disclosure would constitute a breach of the confidence due to a third party in terms of an agreement, if the

⁷¹¹ Section 66(b) of PAIA.

⁷¹² Section 68(1) of PAIA. Also see CER *Money talks* 15.

⁷¹³ Du Plessis "Access to information" 216.

⁷¹⁴ Reg 34(1) of GN R982 in GG 38282 of 4 December 2014.

⁷¹⁵ Du Plessis "Access to information" 216.

⁷¹⁶ Kidd 2004 *Comparative and International Law Journal of Southern Africa* 84-95 and Du Plessis and De la Harpe 2007 *South African Journal of Environmental Law & Policy* 83-103.

⁷¹⁷ Du Plessis "Access to information" 216.

agreement entered into between the auditor and the client contains a confidentiality clause.⁷¹⁸ It must be borne in mind that the public interest override would be applicable to environmental information obtained during an audit if the disclosure of the requested information would reveal either an imminent risk to public safety or an environmental risk, or a substantial contravention of the law, and if public interest clearly outweighs the harm contemplated by the disclosure of the requested information.⁷¹⁹ In such a case the environmental auditor would be obliged to disclose this information.

Recent case law pertaining to the passive disclosure of environmental information in the private sphere will now be discussed.

4.3.3.3 Recent case law pertaining to the passive disclosure of environmental information in the private sphere

The CER has instituted legal proceedings against private bodies on behalf of VEJA in more than one instance. One such instance is in *VEJA v Omnia Holdings Limited*,⁷²⁰ in which VEJA compelled Omnia to grant access to water monitoring data that must be disclosed to the DWS in terms of the conditions of Omnia's Water Use Licence.⁷²¹ Omnia refused the request by arguing that the information was the commercially confidential information of a third party and that access thereto was not required for the exercise or protection of VEJA's rights.⁷²² The CER further assisted Bronkhorstspuit and Wilge River Conservancy Association by instituting legal proceedings against Malachite Mining (Pty) Ltd upon their ignoring a request for access to its mining right and EMP.⁷²³ Subsequently Malachite Mining (Pty) Ltd disclosed the requested information and paid a contribution to the Bronkhorstspuit and Wilge River Conservancy Association's legal

⁷¹⁸ Du Plessis "Access to information" 216 and s 37(1) of PAIA. Auditors who perform audits in terms of the *Standards Act* 8 of 2008 are sometimes required to sign non-disclosure agreements in terms of s 30 of the *Standards Act* 8 of 2008 which states that "any person who is or was involved in the performance of any function in terms of this Act, must not disclose any information which he or she obtained in the performance of such a function".

⁷¹⁹ Section 46 of PAIA and 4.2 above.

⁷²⁰ *Vaal Environmental Justice Alliance v Omnia Holdings Limited* (GSJ) (unreported) case number 38166/12.

⁷²¹ CER *Barricading the doors* 5.

⁷²² CER *Barricading the doors* 5.

⁷²³ *Bronkhorstspuit and Wilge River Conservancy Association v Malachite Mining Pty Ltd* (GSJ) (unreported) case number 11/40655. Also see CER date unknown <http://cer.org.za/programmes/transparency/litigation>.

costs.⁷²⁴ Although access to this information was secured without a court hearing, unnecessary litigation costs were incurred that could have been prevented if an internal appeal mechanism existed against decisions by private bodies to refuse access to information.⁷²⁵

One of the most ground-breaking court cases pertaining to access to environmental information in the private sphere is the *AMSA* case. In December 2011 VEJA requested access to environmental information of ArcelorMittal South Africa Limited (AMSA), more specifically an Environmental Master Plan (the Plan) developed for the rehabilitation of its Vanderbijlpark site, together with progress reports on the implementation thereof in terms of PAIA.⁷²⁶ A second request was made in February 2012, in which VEJA requested access to information pertaining to the closure and rehabilitation of AMSA's Vereeniging site, where hazardous materials had been dumped.⁷²⁷ In both request forms submitted, VEJA motivated that the requested documents were necessary for the protection of the constitutional right as included in section 24 of the Constitution, and stated that the documents were requested in public interest.⁷²⁸ Furthermore, VEJA argued that it required the requested documents to ensure that AMSA fulfilled its obligations in terms of NEMA, NEMWA and the NWA, that pollution was prevented, and that rehabilitation was adequately planned for and implemented.⁷²⁹ AMSA's attorneys responded to the first request within a month, requiring an extension to conduct internal investigations.⁷³⁰ A month later AMSA's attorneys requested proof of VEJA's attorney's mandate to act on behalf of VEJA and requested a precise description of the documents required and information on how the existence of the documents came to VEJA's knowledge.⁷³¹ Furthermore, AMSA's attorneys requested an explanation pertaining to the basis on which VEJA was of the opinion that it might "usurp the role of

⁷²⁴ CER date unknown <http://cer.org.za/programmes/transparency/litigation>.

⁷²⁵ CER date unknown <http://cer.org.za/programmes/transparency/litigation>. Also see CER *Unlock the doors* 16.

⁷²⁶ ENCA 2015 <https://www.enca.com/south-africa/landmark-case-reveals-truth-about-arcelormittal-sa-pollution-vanderbijlpark/>. Also see *AMSA* case para 8.

⁷²⁷ *AMSA* case para 9.

⁷²⁸ *AMSA* case para 8.

⁷²⁹ *AMSA* case para 11.

⁷³⁰ *AMSA* case para 11.

⁷³¹ *AMSA* case para 12.

the relevant regulating authorities in ensuring our client's statutory compliance".⁷³² VEJA's attorneys responded and pointed out that government authorities have inadequate resources to monitor compliance at all facilities in South Africa, and that the public could play an active role in that regard.⁷³³

In April 2012 AMSA's attorneys informed VEJA that its request was refused based on VEJA's failure to indicate a right that was entitled to be protected or exercised as required by section 50(1)(a) of PAIA.⁷³⁴ Subsequently VEJA lodged an application in the High Court to compel AMSA to disclose the requested environmental information.⁷³⁵ AMSA argued that the Plan was outdated and incorrect, that it therefore did not reflect AMSA's current environmental practices, and that it therefore could not be used to protect the right alleged by VEJA.⁷³⁶ Furthermore, AMSA argued that the Plan contained scientific and technical flaws, as inappropriate standards had been used to assess environmental quality in the area.⁷³⁷ As a result thereof, environmental impacts had frequently been identified as unacceptable in the Plan when, in reality, the impacts were within acceptable limits posed in terms of South African legislation.⁷³⁸ VEJA in turn argued (a) that although outdated, the Plan would provide a valuable baseline for data pertaining to pollution levels in the area;⁷³⁹ (b) that the evaluation of the data was scientifically unfounded in the Plan - it was not the data itself that were flawed;⁷⁴⁰ and (c) that AMSA had relied on this very Plan when it obtained environmental permits for its activities – it had been fundamental to AMSA's environmental drive.⁷⁴¹

⁷³² *AMSA* case para 12. It must be noted that ArcelorMittal's attorneys did offer to disclose all environmental-related permits, consents and authorisations to assist VEJA in ensuring that ArcelorMittal complied with its statutory duties.

⁷³³ *AMSA* case para 13.

⁷³⁴ ENCA 2015 <https://www.enca.com/south-africa/landmark-case-reveals-truth-about-arcelormittal-sa-pollution-vanderbijlpark/>. Also see *AMSA* case para 15. Section 50(1)(a) of PAIA is relevant to requests for access to information held by private bodies and states that "a requester must be given access to any record of a private body if that record is required for the exercise or protection of any rights".

⁷³⁵ *AMSA* case para 16.

⁷³⁶ *AMSA* case para 21.

⁷³⁷ *AMSA* case para 23.

⁷³⁸ *AMSA* case para 23.

⁷³⁹ *AMSA* case para 30.

⁷⁴⁰ *AMSA* case para 31.

⁷⁴¹ *AMSA* case para 32.

The High Court held that if VEJA's request were to be refused this would hamper it in advocating the protection of the environment.⁷⁴² It further held that the participation of public interest groups was required for the protection of the environment and rejected AMSA's allegation that VEJA was seizing the state's role to enforce environmental legislative provisions.⁷⁴³ It also agreed with VEJA that although the Plan was outdated it provided a valuable baseline for information.⁷⁴⁴ As the Plan had been communicated to AMSA's stakeholders on various occasions and had also been cited in numerous annual reports as a primary strategic tool, it was found to be relevant and should be considered by entities such as VEJA.⁷⁴⁵ The High Court set aside AMSA's decision to refuse VEJA's request for information and ordered AMSA to provide VEJA with copies of the requested information within 14 days of that order.⁷⁴⁶

AMSA appealed the order of the High Court.⁷⁴⁷ The Supreme Court of Appeal (SCA) basically confirmed the High Court ruling. It first dealt with the PAIA threshold requirement in terms of section 50(1)(a).⁷⁴⁸ It held that VEJA had met the threshold requirement of PAIA to request the information.⁷⁴⁹ It further held that the word "required" must be interpreted as meaning "reasonably required in the circumstances".⁷⁵⁰ Therefore it had to be determined whether or not the requester of information had laid an adequate foundation for why the requested information was reasonably required for the protection or exercise of his or her rights.⁷⁵¹ The history of AMSA's operational environmental impact was important as its industrial activities had had an impact on communities in the immediate vicinity.⁷⁵² As it was a major polluter in the areas in which it operated, AMSA's activities were of public interest and importance.⁷⁵³ The SCA agreed with the High Court and held that there was no evidence that VEJA was acting as an alternative authority – it was honourably advocating

⁷⁴² *AMSA* case para 42.

⁷⁴³ *AMSA* case paras 42-43.

⁷⁴⁴ *AMSA* case para 44.

⁷⁴⁵ *AMSA* case para 45.

⁷⁴⁶ *AMSA* case para 48.

⁷⁴⁷ *AMSA* case para 48.

⁷⁴⁸ *AMSA* case para 49.

⁷⁴⁹ *AMSA* case para 74.

⁷⁵⁰ *AMSA* case paras 49-50.

⁷⁵¹ *AMSA* case para 50. Also see *Davis v Clutchco (Pty) Ltd* 2004 1 SA 75 (C) para 12.

⁷⁵² *AMSA* case para 52.

⁷⁵³ *AMSA* case para 52.

environmental justice.⁷⁵⁴ As a result the SCA confirmed that members of the public were entitled to protect and exercise their constitutional right in terms of section 24 of the Constitution by seeking access to information that would enable them to assess environmental impacts and act as a watchdog.⁷⁵⁵ With regard to the relevance of the Plan, the SCA also agreed with the High Court that it was an important baseline document of which the asserted flaws could be affirmed or challenged.⁷⁵⁶

The SCA went on to criticise ArcelorMittal's attitude leading up to and including the litigation in the light of its claiming ignorance of the existence of the Environmental Master Plan, and confirmed that there was no room for secrecy in relation to the environment in circumstances such as these.⁷⁵⁷

The *AMSA* case was unusual as it involved access to environmental information held by a private body.⁷⁵⁸ It emphasised the importance of accountability and transparency pertaining to private bodies' environmental impacts.⁷⁵⁹ It can also be argued that the DEA committed to actively disclosing certain environmental permits because of this judgement.⁷⁶⁰ Rather than this judgement's being seen as a threat to companies in the private sphere, it should be seen as an opportunity to act more transparently regarding the environmental impacts of private enterprises, especially by those companies in the industrial and mining sector believed to have a significant environmental impact.⁷⁶¹ There is far more to be gained from proactively disclosing environmental information and setting an agenda for debate than from refusing to disclose environmental information and being slapped on the wrist like *AMSA*.⁷⁶²

⁷⁵⁴ *AMSA* case para 53.

⁷⁵⁵ Chien and Davis "How increased transparency in the mining sector would facilitate the realisation of environmental rights" 27.

⁷⁵⁶ *AMSA* case para 56.

⁷⁵⁷ *AMSA* case paras 81-82.

⁷⁵⁸ Business Day Live 2014 <http://www.bdlive.co.za/opinion/editorials/2014/11/28/editorial-shining-a-light-on-murky-waste-plan>.

⁷⁵⁹ Chien and Davis "How increased transparency in the mining sector would facilitate the realisation of environmental rights" 26-27.

⁷⁶⁰ See 3.2.1 above for a discussion on the DEA's commitment to actively disclose certain environmental permits.

⁷⁶¹ Business Day Live 2014 <http://www.bdlive.co.za/opinion/editorials/2014/11/28/editorial-shining-a-light-on-murky-waste-plan>.

⁷⁶² Business Day Live 2014 <http://www.bdlive.co.za/opinion/editorials/2014/11/28/editorial-shining-a-light-on-murky-waste-plan>.

4.3.3.4 Evaluation: current trends and challenges in the passive disclosure of environmental information in the private sphere

From the above it is evident that the realisation of the right of access to environmental information remains challenging in the private sphere too. Although it has been found that private bodies have an enhanced understanding of PAIA and are better resourced to process PAIA requests timeously, challenges and trends still exist, including *inter alia* an unwillingness to disclose environmental information,⁷⁶³ non-responsiveness to requests⁷⁶⁴ and a lack of understanding of disclosure obligations pertaining to confidential environmental information obtained during an audit, for example.⁷⁶⁵

The lack of an internal appeal procedure against private bodies' decisions to refuse access to information remains a significant challenge.⁷⁶⁶ In addition, recent jurisprudence pertaining to the right of access to environmental information indicates the view of the judiciary, as well as of the community members involved, that the right of access to environmental information and a culture of transparency must be promoted in the private sphere.⁷⁶⁷

4.3.4 Evaluation: current trends and challenges pertaining to the passive disclosure of environmental information in the public and private sphere

Although there has been some improvement in the performance of the passive disclosure of environmental information and the awareness of bodies' PAIA obligations, the level of the proper implementation of PAIA remains low. The reasons for this unsatisfactory state of affairs include misinterpretation, or a lack of knowledge of the provisions of PAIA,⁷⁶⁸ the view that transparency is as a business risk⁷⁶⁹ and the bad attitude of officials and employees.⁷⁷⁰ Additional challenges and trends that have been identified exclusively in the public sphere include the over-use of extended response

⁷⁶³ See 4.3.3.1 above.

⁷⁶⁴ See 4.3.3.1 above.

⁷⁶⁵ See 4.3.3.2 above.

⁷⁶⁶ See 4.3.3.1 above.

⁷⁶⁷ See 4.3.3.3 above.

⁷⁶⁸ See 4.3.1 above.

⁷⁶⁹ See 4.3.1 above.

⁷⁷⁰ See 4.3.1 above.

periods,⁷⁷¹ capacity and funding challenges,⁷⁷² a lack of experience and training,⁷⁷³ a lack of communication between different spheres of government,⁷⁷⁴ poor document control⁷⁷⁵ and a lack of policies and systems pertaining to the implementation of PAIA.⁷⁷⁶ It was found that the provincial and local sphere of government performed far better in implementing PAIA than the national departments.⁷⁷⁷ It is also believed that the promulgation of the *Protection of State Information Bill, 2010* will have a very negative impact on the realisation of the right of access to environmental information in the public sphere.⁷⁷⁸

Although it has been found that private bodies have a better understanding of PAIA and are better resourced to process PAIA requests timeously, challenges and trends still exist in the private sphere. These include, *inter alia*, an unwillingness to disclose environmental information,⁷⁷⁹ non-responsiveness to requests,⁷⁸⁰ and a lack of understanding of the disclosure obligations pertaining to confidential environmental information obtained during an audit, for example.⁷⁸¹

Shortcomings have also been identified in terms of some aspects of the statutory framework regulating the passive disclosure of environmental information, such as the lack of a remedy against the non-disclosure of information of which access was indeed granted,⁷⁸² the lack of a clear definition of commercially confidential information in PAIA,⁷⁸³ and the lack of an internal appeal procedure against private bodies' decisions to refuse access to information.⁷⁸⁴ Recent jurisprudence pertaining to the right of access to environmental information, however, indicates the view of the judiciary, as well as of

⁷⁷¹ See 4.3.2.1 above.

⁷⁷² See 4.3.2.1 above.

⁷⁷³ See 4.3.2.1 and 4.3.2.2 above.

⁷⁷⁴ See 4.3.2.2 above.

⁷⁷⁵ See 4.3.2.1 above.

⁷⁷⁶ See 4.3.2.1 above.

⁷⁷⁷ See 4.3.2.3 above.

⁷⁷⁸ See 4.3.2.4 above.

⁷⁷⁹ See 4.3.3.1 above.

⁷⁸⁰ See 4.3.3.1 above.

⁷⁸¹ See 4.3.3.2 above.

⁷⁸² See 4.3.1 above.

⁷⁸³ See 4.3.2.1 above.

⁷⁸⁴ See 4.3.3.1 above.

community members involved, that the right of access to environmental information and a culture of transparency must be promoted.⁷⁸⁵

It is now necessary to investigate the adequacy of the administration and enforcement of the passive disclosure of environmental information.

4.4 The administration and enforcement of the passive disclosure of environmental information

In this section specific elements pertaining to the administration and enforcement of the passive disclosure of environmental information will be discussed, namely the adequacy of the SAHRC and the various legal remedies available to requesters upon the refusal of requests.

4.4.1 The adequacy of the South African Human Rights Commission

Various public institutions have been established in terms of Chapter 9 of the Constitution, as well as in terms of other legislation, with the aim of promoting constitutional democracy by helping requesters to obtain access to environmental information, one of which is the SAHRC.⁷⁸⁶ These institutions must perform their duties independently,⁷⁸⁷ impartially and without prejudice.⁷⁸⁸ While they play an important role in the realisation and administration of PAIA, it can be argued that they are not ideally resourced or placed to properly promote the right of access to environmental information, or to hold private and public bodies accountable for non-compliance with PAIA.⁷⁸⁹ In this section the adequacy of the SAHRC to properly administer and enforce

⁷⁸⁵ See 4.3.2.5 and 4.3.3.3 above.

⁷⁸⁶ CER *Unlock the doors* 17.

⁷⁸⁷ In *Van Rooyen v S* 2002 8 BCLR 810 (CC) para 32 the Constitutional Court confirmed the general test for independence as "whether, from the objective standpoint of a reasonable and informed person, there will be a perception that the institution enjoys the essential conditions of independence".

⁷⁸⁸ Section 181(2) of the Constitution and s 39 of the POPI. The Asmal Committee, which was established to conduct a review of the performance of the institutions established in terms of Chapter 9 of the Constitution, concluded that specific factors for verifying the independence of a specific institution may include institutional independence in matters related to the execution of its constitutional mandate, financial independence, security of the tenure of appointed office bearers, and appointment procedures. See Parliament of the Republic of South Africa *Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions* 9-10. Also see Mubangizi 2012 *Comparative and International Law Journal of Southern Africa* 312, where it was confirmed that independence is the attribute that underpins a public body's credibility and legitimacy.

⁷⁸⁹ CER *Unlock the doors* 17.

the passive disclosure of environmental information in the public and private sphere will be discussed.

The SAHRC plays an important role as a watchdog in the investigation, monitoring and reporting of the non-compliances of public and private bodies in terms of PAIA, as well as in providing support to the requesters of environmental information.⁷⁹⁰ It can be argued, however, that the fact that the commissioners of the SAHRC are appointed by the President on the recommendation of the National Assembly,⁷⁹¹ together with the fact that the SAHRC is financially dependent on the President in consultation with the Cabinet and the Minister of Finance,⁷⁹² creates murkiness pertaining to whether the SAHRC can operate independently and free from political pressure. It is submitted that, to ensure that the SAHRC can independently fulfil its duties, political and financial independence are required.

Section 32 of PAIA equips the SAHRC with a powerful information-gathering tool relevant to the public sphere: all public bodies are required to submit annual reports to the SAHRC on the implementation of PAIA with specific reference to the number of requests for access to information received, granted and refused, the number of internal appeals lodged and the number of court applications that were lodged as a result of the dismissal of internal appeals.⁷⁹³ It must be noted that no such tool is available pertaining to the private sphere. The SAHRC must also report annually to the National Assembly on the implementation of the provisions of PAIA related to the passive disclosure of information, again only in the public sphere.⁷⁹⁴ It has been argued, however, that the tabling of formal reports to the SAHRC or National Assembly on its own is not enough to enable the SAHRC to promote the realisation of the right of access to environmental information.⁷⁹⁵ A further challenge facing the SAHRC if it is to

⁷⁹⁰ Section 184(2) of the Constitution. Also see CER *Unlock the doors* 17, SAHRC 2014 *Guide on how to use the Promotion of Access to Information Act 2 of 2000* 14 and Nomthandazo 2004 *Law, Democracy and Development* 213.

⁷⁹¹ Section 193 of the Constitution and s 5(a)(iv) of the *South African Human Rights Commission Act* 40 of 2013.

⁷⁹² Section 9 of the *South African Human Rights Commission Act* 40 of 2013. Also see s 85 of PAIA, which states that "Any expenditure in connection with the performance of the Human Rights Commission's functions in terms of this Act must be defrayed from moneys appropriated by Parliament to that Commission for that purpose".

⁷⁹³ Nomthandazo 2004 *Law, Democracy and Development* 213.

⁷⁹⁴ Section 84 of PAIA.

⁷⁹⁵ Nomthandazo 2004 *Law, Democracy and Development* 214.

adequately fulfil its constitutional obligation to realise the right of access to information is that although the SAHRC can take steps to secure suitable compensation where human rights have been violated, like instituting litigation or proposing recommendations to the relevant public or private bodies,⁷⁹⁶ the decisions or recommendations of the SAHRC are not binding on public or private bodies, and the SAHRC cannot enforce compliance with the provisions of PAIA.⁷⁹⁷ Consequently the SAHRC has the duty to promote and advocate PAIA but cannot enforce PAIA.⁷⁹⁸

The *Protection of Personal Information Act 4 of 2013* (POPI) provides for the establishment of an independent Information Regulator that will take over the functions and duties of the SAHRC.⁷⁹⁹ The Information Regulator has promotional, mediational, advisory and binding enforcement functions, which the SAHRC lacks, relevant to the promotion of the right of access to information in the public and private sphere.⁸⁰⁰ However, the Information Regulator has not yet been established as required.⁸⁰¹ Furthermore, it can also be argued that the Information Regulator is not adequately placed to fulfil its duties independently and free from political pressure, as the Chairperson and members of the Information Regulator must, in the same manner as the SAHRC, be appointed by the President on recommendation of the National Assembly,⁸⁰² and as the Information Regulator will also be financially dependent on the President in consultation with the Cabinet and the Minister of Finance.⁸⁰³ Allan and Currie⁸⁰⁴ have argued that, in order to ensure the independence of a body like the Information Regulator, parliamentary rather than executive accountability and control is

⁷⁹⁶ Section 184(2)(b) of the Constitution, s 13 of the *South African Human Rights Commission Act 40 of 2013* and s 83(3) of PAIA. Also see Nomthandazo 2004 *Law, Democracy and Development* 208.

⁷⁹⁷ Sections 32 and 83 of PAIA and s 184(3) of the Constitution. Also see CER *Unlock the doors* 17, Nomthandazo 2004 *Law, Democracy and Development* 207 and Richter 2005 *Law, Democracy and Development* 229.

⁷⁹⁸ Richter 2005 *Law, Democracy and Development* 229.

⁷⁹⁹ Section 39 of the *Protection of Personal Information Act 4 of 2013* (POPI). Also see parts 4-5 of PAIA. It must be noted that, despite the transfer of the PAIA mandate to the Information Regulator, the SAHRC will still have to adhere to its constitutional mandate. See SAHRC 2014 *The Promotion of Access to Information Act Annual Report 2013 – 2014* 26.

⁸⁰⁰ Sections 40 and 95 of POPI. It must be noted that the commencement dates sections of POPI relevant to the enforcement functions of the Information Regulator have not yet been proclaimed.

⁸⁰¹ PAIA Civil Society Network *Shadow Report 2014* 13. The Information Regulator was to be established immediately after the commencement date of section 39 of POPI, which was 11 April 2014.

⁸⁰² Section 41 of POPI.

⁸⁰³ Section 85 of PAIA read with schedule 1 of POPI.

⁸⁰⁴ Allan and Currie 2007 *South African Journal on Human Rights: Sexuality and the Law: Special Issue* 3582.

required.⁸⁰⁵ It is therefore submitted that, once the Information Regulator is established, it must be ensured that all of its functions can be performed independently from one another and free from political pressure.⁸⁰⁶

The adequacy of the current provisions related to the available legal remedies against the refusal of requests will now be discussed.

4.4.2 The legal remedies available to requesters upon the refusal of requests

When a requester is desirous to appeal a decision of a public or private body to refuse requests for access to environmental information, the requester has specific legal remedies. Part 4 of PAIA deals with appeals against decisions *inter alia* to refuse access to information, including environmental information, and differentiates between internal appeals and applications to court. A requester seeking relief against a decision to refuse access to environmental information can also lodge a complaint with the Public Protector.⁸⁰⁷ Currently PAIA does not, however, expressly provide for penalties to be imposed on officials of private or public bodies for acting in an undisciplined manner or negligently when processing a request for access to environmental information.⁸⁰⁸ Such penalties can be imposed only by the courts and the Public Protector.⁸⁰⁹

In this section the adequacy of the current provisions related to the legal remedies against the refusal of requests for access to environmental information by public and private bodies will be discussed.

4.4.2.1 Internal appeals

Section 74 of PAIA states that an appeal may be lodged by a requester against a decision made by an Information Officer of a public body as defined in paragraph (1) of

⁸⁰⁵ Allan and Currie 2007 *South African Journal on Human Rights: Sexuality and the Law: Special Issue* 3 582.

⁸⁰⁶ Allan and Currie 2007 *South African Journal on Human Rights: Sexuality and the Law: Special Issue* 3 583.

⁸⁰⁷ Richter 2005 *Law, Democracy and Development* 229.

⁸⁰⁸ Richter 2005 *Law, Democracy and Development* 229.

⁸⁰⁹ Richter 2005 *Law, Democracy and Development* 229.

the definition of public bodies.⁸¹⁰ Section 74 of PAIA therefore limits the availability of internal appeals against the decisions of public bodies and consequently no internal appeal procedure is available against decisions of public bodies defined as any other institution performing a constitutional duty or a public function in terms of other legislation.⁸¹¹ This restriction is abused by the Information Officers of this type of public body who ignore their obligations to requesters, knowing that requesters can resort only to costly litigation to challenge their conduct.⁸¹²

It has been confirmed that one of the clearest defects of the South African access to information regime is that it lacks an accessible, independent and authoritative mechanism for dispute resolution that is cheap and effective.⁸¹³ With regard to the effectiveness of the internal appeal mechanism, the PAIA Civil Society found in 2014 that it appears to be working only slightly better than in the past.⁸¹⁴ The paucity of responses to internal appeals lodged points to the need for an independent regulator to be capacitated to deal with complaints against decisions in a cheap and swift manner.⁸¹⁵

Another defect is that no internal appeal procedure currently exists to appeal against a refusal of a private body to disclose environmental information. In an attempt to address these shortcomings the POPI provides for the establishment of the Information Regulator that would enable a requester to appeal against decisions of private bodies to refuse access to information, including environmental information, prior to resorting to costly litigation by lodging complaints to the Information Regulator.⁸¹⁶ Furthermore, the Information Regulator will also have the power to make use of dispute resolution mechanisms to resolve disputes.⁸¹⁷ However, as the Information Regulator is yet to be established, the only current legal remedy for a requester seeking information from a

⁸¹⁰ Section 74 of PAIA. Paragraph (a) of the definition of "public body" in s 1 of PAIA states the following: "Any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government".

⁸¹¹ Section 1 of PAIA.

⁸¹² SAHRC 2014 *The Promotion of Access to Information Act Annual Report 2013 – 2014* 25.

⁸¹³ Allan and Currie 2007 *South African Journal on Human Rights: Sexuality and the Law: Special Issue* 3 571-572 and 578.

⁸¹⁴ See 4.3.1-4.3.3 above for discussion on responses to internal appeals in the public and private sphere.

⁸¹⁵ PAIA Civil Society Network *Shadow Report 2014* 7.

⁸¹⁶ Section 39 and schedule 1 of the *Protection of Personal Information Act* 4 of 2013 (POPI). The sections specifically pertaining to the Information Regulator (ss 39-54) commenced on 11 April 2014.

⁸¹⁷ Section 40 of POPI.

private body remains costly litigation, and no alternative independent mechanism for dispute resolution exists.⁸¹⁸

4.4.2.2 The Public Protector

Section 91 of PAIA amended the *Public Protector Act 23* of 1994 to enable the Public Protector to investigate incidents of maladministration in PAIA matters.⁸¹⁹ The Public Protector was established in the Constitution to investigate unsatisfactory conduct in state affairs or suspicious public administration, and the work thereof must be characterised *inter alia* by transparency.⁸²⁰ The Constitutional Court recently confirmed that the Public Protector is "one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance".⁸²¹ The role of the Public Protector is to enable marginalised and poor South African citizens to challenge injustice through the mediation of an institution more accessible than costly litigation in the courts.⁸²² The Constitutional Court, in the same judgement, affirmed the legally binding effect of remedial action ordered by the Public Protector.⁸²³

All members of the Public Protector must act independently and impartially when performing their duties.⁸²⁴ Consequently, in order for the Public Protector to be able to adequately fulfil its statutory duties, it must, as must the SAHRC, be "free from political pressure".⁸²⁵ It can be argued, however, that the Public Protector, too, is not adequately placed to fulfil its duties free from political pressure.⁸²⁶ One reason for this is that although the Public Protector enjoys priority over other institutions when exercising its duties, it has to act together with the judiciary and other chapter 9 institutions.⁸²⁷ Furthermore, the fact that the Public Protector is appointed by the President on

⁸¹⁸ PAIA Civil Society Network *Shadow Report 2014* 13.

⁸¹⁹ Section 91 of PAIA. Also see Richter 2005 *Law, Democracy and Development* 229.

⁸²⁰ Marumoagae 2014 *De Rebus* 33. Also see ss 181-182 of the Constitution and s 6(4) of the *Public Protector Act 23* of 1994.

⁸²¹ *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 ZACC 11 para 52 (hereafter the *EFF* case).

⁸²² *EFF* case para 52.

⁸²³ *EFF* case paras 66-68.

⁸²⁴ Section 3(13)(a) of the *Public Protector Act 23* of 1994.

⁸²⁵ Mubangizi 2012 *Comparative and International Law Journal of Southern Africa* 312.

⁸²⁶ CER *Unlock the doors* 18.

⁸²⁷ Mubangizi 2012 *Comparative and International Law Journal of Southern Africa* 312.

recommendation of the National Assembly, together with the fact that it is financially dependent on the executive sphere of government, creates further murkiness pertaining to the actual level of independence of the Public Protector.⁸²⁸ The Public Protector's level of independence during the performance of its duties has also been criticised in court.⁸²⁹

4.4.2.3 Litigation

A requester may resort to litigation only once the available internal appeal procedures have been exhausted.⁸³⁰ Prior to November 2009 PAIA matters could be adjudicated only by High Courts.⁸³¹ This restriction compromised the realisation of the right of access to environmental information by those unable to afford high court litigation.⁸³² The Rules Board for Courts of Law (Rules Board) passed the *Rules of Procedure for application to Court in terms of the Act*⁸³³ and confirmed that PAIA matters can also be adjudicated by Magistrates Courts, which are cheaper and more accessible than High Courts.⁸³⁴ Recently the Rules Board proposed amendments to the Rules aimed at ensuring uniformity with the rules applicable to Magistrates Courts and High Courts.⁸³⁵ Although these proposed amendments are praiseworthy, additional efforts to remove current obstructions to commencing with a PAIA application in the Magistrates Court are required.⁸³⁶ This is vital as the only current legal remedy for appeal against a decision of a private body to refuse access to information requested is litigation.⁸³⁷ One such additional measure that was implemented on 8 January 2016 is included in section 91A of PAIA. It requires that Magistrates be specifically designated and trained⁸³⁸ prior

⁸²⁸ Sections 1A and 2(2) of the *Public Protector Act* 23 of 1994 and s 193 of the Constitution.

⁸²⁹ In *The Public Protector v Mail and Guardian* 2011 4 SA 420 (SCA) para 140 the court criticised the Public Protector for refusing to investigate the alleged siphoning off of state money by a state-owned oil company to the African National Congress (ANC). In para 141 the court held that "even so far as the Public Protector purported to investigate the remnants with which he was left, the investigation was so scant as not to be an investigation at all".

⁸³⁰ Section 78(1) of PAIA.

⁸³¹ Section 79(2) of PAIA. Also see SAHRC 2014 *The Promotion of Access to Information Act Annual Report 2013 – 2014* 24.

⁸³² SAHRC 2014 *The Promotion of Access to Information Act Annual Report 2013 – 2014* 24.

⁸³³ GN R965 in GG 32622 of 9 October 2009.

⁸³⁴ SAHRC 2014 *The Promotion of Access to Information Act Annual Report 2013 – 2014* 24.

⁸³⁵ PAIA Civil Society Network *Shadow Report 2014* 20.

⁸³⁶ PAIA Civil Society Network *Shadow Report 2014* 20.

⁸³⁷ PAIA Civil Society Network *Shadow Report 2014* 20.

⁸³⁸ Section 91A(5) of PAIA states that the South African Judicial Education Institute must compile and implement the training courses to be used for presiding officers.

to being able to adjudicate PAIA matters.⁸³⁹ A list of designated Magistrates must be compiled and kept by the Magistrates Commission.⁸⁴⁰ It must be ensured that Magistrates are designated and trained timeously, as required.

4.4.3 Evaluation: the administration and enforcement of the passive disclosure of environmental information

Although the SAHRC and the Public Protector play important roles in the enforcement of PAIA, it can be argued that the SAHRC is not ideally resourced or equipped to fulfil its duties. It can, furthermore, be argued that neither the SAHRC nor the Public Protector is adequately placed to independently promote and enforce the right of access to environmental information in both the public and the private sphere.⁸⁴¹ Although the SAHRC's functions and duties have been taken over by the Information Regulator in terms of POPI, and binding enforcement functions have been added to the previous brief, the Information Regulator has, to date, not been established and it can also be argued that the Information Regulator is not adequately placed to fulfil its duties independently and free from political pressure.⁸⁴²

The legal remedies available to requesters upon the refusal of requests include internal appeals, which are available against the refusals of some public bodies only, and are also poorly implemented,⁸⁴³ the lodgement of a complaint at the Public Protector,⁸⁴⁴ and litigation, which is beyond some requesters' reach due to the high costs associated therewith.⁸⁴⁵ One of the clearest defects in the South African access to information regime is that it lacks an accessible, independent and authoritative mechanism for dispute resolution that is cheap and effective.⁸⁴⁶

⁸³⁹ Section 91A of PAIA.

⁸⁴⁰ Section 91A(4) of PAIA.

⁸⁴¹ See 4.1.1 and 4.4.2.2 above.

⁸⁴² See 4.1.1 above.

⁸⁴³ See 4.4.2.1 above.

⁸⁴⁴ See 4.4.2.2 above.

⁸⁴⁵ See 4.4.2.3 above.

⁸⁴⁶ See 4.4.2.1 above.

5 Conclusion and recommendations

5.1 Conclusion

For modern society to be able to address current environmental challenges the mobilisation of the intellectual input, goodwill and determination of all interested parties is required.⁸⁴⁷ One key mechanism to involve society in environmental matters is by ensuring sufficient access to relevant environmental information.⁸⁴⁸ In this regard transparency in the public and private sphere is vital, as the right to know is indispensable to achieving sustainability⁸⁴⁹ and can serve to promote environmental compliance.⁸⁵⁰

The main aim of this study was to determine how the right of access to environmental information in the public and private sphere is currently realised. The right of access to information is vital in the public and private sphere in the environmental context.⁸⁵¹ This right can be relied upon to ensure the effective administration of environmental law.⁸⁵² Distinctions were made, firstly, between the active⁸⁵³ and the passive⁸⁵⁴ disclosure of environmental information and, secondly, between the disclosure of strategic⁸⁵⁵ and procedural⁸⁵⁶ environmental information.

With regard to the active and the passive disclosure of strategic and procedural environmental information in the public and private sphere it was found that such disclosure is not only encouraged but is also legally required.⁸⁵⁷ However, some shortcomings pertaining to the statutory framework and the implementation of the legal obligations pertaining to the active and the passive disclosure of environmental information have been identified. The shortcomings pertaining to the statutory framework of the active disclosure of environmental information include the lack of

⁸⁴⁷ Nealer 2005 *Journal of Public Administration* 470.

⁸⁴⁸ See 2.2.1.1 above for discussion on the meaning of "environmental information".

⁸⁴⁹ Nealer 2005 *Journal of Public Administration* 470. See 2.1 above.

⁸⁵⁰ Chien and Davis "How increased transparency in the mining sector would facilitate the realisation of environmental rights" 29.

⁸⁵¹ See 2.1 above.

⁸⁵² See 2.1 above.

⁸⁵³ See 3 above.

⁸⁵⁴ See 4 above.

⁸⁵⁵ See 3.1 and 4.1.1 above.

⁸⁵⁶ See 3.2 and 4.1.2-4.3 above.

⁸⁵⁷ See 3 and 4 above.

active disclosure requirements pertaining for example to Estuarine Management Plans,⁸⁵⁸ Atmospheric Impact Reports,⁸⁵⁹ the national action list for waste screening, Contaminated Land Registers and directives issued in terms of CARA,⁸⁶⁰ Protected Area Management Plans, Community Forestry Agreements, Heritage Agreements and Industry Waste Management Plans.⁸⁶¹ The shortcomings pertaining to the statutory framework of the passive disclosure of environmental information include, for example, the lack of a remedy against the non-disclosure of information to which access was indeed granted,⁸⁶² the lack of a clear definition of commercially confidential information in PAIA⁸⁶³ and the lack of an internal appeal procedure against some public bodies and all private bodies' decisions to refuse access to information.⁸⁶⁴

Shortcomings specifically pertaining to the implementation of the active disclosure of environmental information in the public sphere include, for example, outdated or undated descriptions in terms of section 15,⁸⁶⁵ the unavailability of updated SoERs,⁸⁶⁶ the unavailability of the most recent versions of PAIA manuals, and outdated and non-compliant PAIA manuals.⁸⁶⁷ Additional challenges in the public and private sphere that could contribute to reluctance to engage in active disclosure include, for example, a fear of potential environmental liability.⁸⁶⁸ Unregulated and uncredited voluntary disclosure in the private sphere can, furthermore, simply be regarded as "greenwashing".⁸⁶⁹ The fact that the draft King IV Code leaves the level of environmental disclosure to the discretion of the Directors is also problematic.⁸⁷⁰ It is submitted that some public and private bodies still lack a thorough understanding of the

⁸⁵⁸ See 3.1.1.5.1 above.

⁸⁵⁹ See 3.1.1.6.1 above

⁸⁶⁰ See 3.1.1.7.1 above.

⁸⁶¹ See 3.1.2.5 above.

⁸⁶² See 4.3.1 above.

⁸⁶³ See 4.3.2.1 above.

⁸⁶⁴ See 4.3.3.1 above.

⁸⁶⁵ See 3.1.1.7 above.

⁸⁶⁶ See 3.1.1.6.1 above.

⁸⁶⁷ See 3.1.1.1.1 above.

⁸⁶⁸ Barnard and De Villiers 2000 *Meditari: Research Journal of the School of Accounting Sciences* 21.

⁸⁶⁹ Du Plessis "Access to information" 204.

⁸⁷⁰ See 3.2.2 above.

provisions of PAIA and the extent of their duty to actively disclose information in accordance with the law.⁸⁷¹

Although there have been some improvements pertaining to the passive disclosure of environmental information and the awareness of public and private bodies' PAIA obligations, the level of compliance with passive disclosure obligations in the public and private sphere remains low. The reasons for this include, *inter alia*, the view that transparency is a business risk,⁸⁷² and the bad attitude of officials and employees.⁸⁷³ Additional challenges that have been identified exclusively in the public sphere include the over-use of extended response periods,⁸⁷⁴ capacity and funding challenges,⁸⁷⁵ a lack of experience and training,⁸⁷⁶ a lack of communication between different spheres of government,⁸⁷⁷ poor document control,⁸⁷⁸ and a lack of policies and systems pertaining to the implementation of PAIA.⁸⁷⁹ It is also believed that the promulgation of the *Protection of State Information Bill*, 2010 will have a very negative impact on the realisation of the right of access to environmental information in the public sphere.⁸⁸⁰

Although it has been found that private bodies have an enhanced understanding of PAIA and are better resourced to process PAIA requests timeously, challenges still exist, including their frequent unwillingness to disclose environmental information,⁸⁸¹ their non-responsiveness to requests,⁸⁸² and their lack of understanding of the disclosure obligations pertaining to confidential environmental information obtained during an audit, for example.⁸⁸³ In addition, both public and private bodies do not understand how the public interest override is intended to work, or simply refuse to submit themselves to this override by continuing to refuse requests made in public interest.⁸⁸⁴ Recent jurisprudence pertaining to the right of access to environmental information, however,

⁸⁷¹ See 3.2.1 and 4.3.1 above.

⁸⁷² See 4.3.1 above.

⁸⁷³ See 4.3.1 above.

⁸⁷⁴ See 4.3.2.1 above.

⁸⁷⁵ See 4.3.2.1 above.

⁸⁷⁶ See 4.3.2.1 and 4.3.2.2 above.

⁸⁷⁷ See 4.3.2.2 above.

⁸⁷⁸ See 4.3.2.1 above.

⁸⁷⁹ See 4.3.2.1 above.

⁸⁸⁰ See 4.3.2.4 above.

⁸⁸¹ See 4.3.3.1 above.

⁸⁸² See 4.3.3.1 above.

⁸⁸³ See 4.3.3.2 above.

⁸⁸⁴ See 4.2 above.

indicates the view of the judiciary, as well as of the community members involved, that the right of access to environmental information and a culture of transparency must be promoted.⁸⁸⁵

Specific elements pertaining to the administration and enforcement of the passive disclosure of environmental information were also discussed, namely the adequacy of the SAHRC and the various legal remedies available to requesters upon the refusal of requests.⁸⁸⁶ It was found that although the SAHRC and the Public Protector play important roles in the enforcement of PAIA, it can be argued that the SAHRC is not ideally resourced or equipped to fulfil its duties. It can also be argued that neither the SAHRC nor the Public Protector are adequately placed to independently promote and enforce the right of access to environmental information in both the public and private sphere.⁸⁸⁷ Although the SAHRC's functions and duties have been taken over by the Information Regulator in terms of POPI, and binding enforcement functions have been added to the brief, the Information Regulator has to date not been established. It can also be argued that the Information Regulator is not adequately placed to fulfil its duties independently and in a manner free from political pressure.⁸⁸⁸

The legal remedies available to requesters upon the refusal of requests include internal appeals, which are available against the refusals of some public bodies only and are also poorly implemented,⁸⁸⁹ the lodgement of a complaint at the Public Protector,⁸⁹⁰ and litigation, which is beyond some requesters' reach due to the high costs associated therewith.⁸⁹¹ One of the clearest defects of the South African access to information regime is that it lacks an accessible, independent and authoritative mechanism for dispute resolution which is both cheap and effective.⁸⁹²

⁸⁸⁵ See 4.3.2.5 and 4.3.3.3 above.

⁸⁸⁶ See 4.4. above.

⁸⁸⁷ See 4.1.1 and 4.4.2.2 above.

⁸⁸⁸ See 4.1.1 above.

⁸⁸⁹ See 4.4.2.1 above.

⁸⁹⁰ See 4.4.2.2 above.

⁸⁹¹ See 4.4.2.3 above.

⁸⁹² See 4.4.2.1 above.

5.2 Recommendations

Various recommendations can be made to address the shortcomings and challenges identified. To address the shortcomings pertaining to the statutory framework of the active and passive disclosure of environmental information, firstly it is recommended that PAIA be amended in such a way as to produce clarity pertaining to the counting of days, improved specificity on the grounds of refusal to avoid the abuse of discretion, provision for access to information in urgent cases, and the creation of a lower threshold to be reached to authorise the use of the public interest override.⁸⁹³ It would also be beneficial to make the acknowledgement of the receipt of PAIA requests compulsory for both public and private bodies.⁸⁹⁴ It is also recommended that a remedy against the non-disclosure of information to which access was indeed granted be included in PAIA.

The vagueness of the requirement that the PAIA manuals of public bodies be updated⁸⁹⁵ must be removed by specifying the circumstances in which an update would be required. It is also recommended that PAIA be amended to require more specific means of the public disclosure of PAIA manuals to ensure harmonisation throughout the public and private sphere. The incentivisation of the active disclosure of environmental information may also motivate public and private bodies to adhere to the provisions of PAIA.⁸⁹⁶ Although compliance to the King Code is voluntary, it is submitted that the disclosure of all environmental violations would contribute to Directors being held accountable for their companies' environmental impacts and must, therefore, be made compulsory in the draft King IV Code.

Secondly, it is recommended that various environmental laws be amended to make the active disclosure of the records identified above⁸⁹⁷ compulsory, as this would improve people's ability to enforce their right to an environment not harmful to their wellbeing. To improve the active disclosure specifically of environmental permits, it is

⁸⁹³ CER *Unlock the doors* 20.

⁸⁹⁴ Richter 2005 *Law, Democracy and Development* 231.

⁸⁹⁵ See 3.1.1.1.1 above.

⁸⁹⁶ CER *Turn on the floodlights* 29.

⁸⁹⁷ For example, Estuarine Management Plans, Atmospheric Impact Reports, the national action list for waste screening, Contaminated Land Registers and directives issued in terms of CARA, Protected Area Management Plans, Community Forestry Agreements, Heritage Agreements and Industry Waste Management Plans.

recommended that statutory active disclosure obligations be inserted into environmental legislation and environmental permits. These obligations should include clear specifications on the manner of disclosure. This would promote consistency and certainty regarding the manner in which environmental information can be obtained.

To address the shortcomings identified pertaining to the implementation of the active and the passive disclosure of environmental information, adequate resources, including financial resources, must be allocated for ensuring compliance with PAIA.⁸⁹⁸ Public and private bodies' PAIA obligations have to be assigned, in writing, to specific officials or employees in their organisations.⁸⁹⁹ Such officials or employees must receive specified legal training on the effective implementation of PAIA. This would improve general awareness of and the implementation of companies' obligations under PAIA. After the Information Regulator has been established, the SAHRC could focus on such training, which could play an important role in changing the attitudes of officials and employees towards PAIA requests.⁹⁰⁰ If private and public bodies were not to see transparency as a business risk, this might result in an increase in the extent of the active and the passive disclosure of environmental information. The proactive disclosure of environmental information must be encouraged.

The compilation and implementation of internal organisational procedures on PAIA obligations could assist in promoting the realisation of the right of access to environmental information. In addition, it is recommended that record management expertise and implementation be strengthened throughout the public and private sphere.⁹⁰¹ With regard to document control procedures, it is recommended that such procedures cater for the potential high staff turnover of public and private bodies by including the creation of back-ups of information.⁹⁰² If this were done less time would be spent on the orientation and training of new employees in the retrieval of information and the processing of PAIA requests. It is also recommended that current communication systems between the national, provincial and local sphere of

⁸⁹⁸ PAIA Civil Society Network *Shadow Report 2014 22*.

⁸⁹⁹ CER *Unlock the doors* 21.

⁹⁰⁰ Richter 2005 *Law, Democracy and Development* 231.

⁹⁰¹ PAIA Civil Society Network *Shadow Report 2014 22*.

⁹⁰² CER *Unlock the doors* 21.

government be scrutinised, formalised and improved, to ensure effective communication between different spheres of government.

A single, combined publically accessible registry of all types of environmental permits should be established and maintained.⁹⁰³ Such a registry would promote certainty regarding the manner in which environmental information can be obtained, thus promoting the right of access to environmental information. In this regard, SAWIC can be used as a blueprint.⁹⁰⁴ This would decrease the number of PAIA requests received and therefore lessen the administrative burden experienced by officials and employees in processing PAIA requests, as well as the related administrative costs.

With regard to the enforcement of the passive disclosure of environmental information it is recommended that the current provisions relating to internal appeal against some public bodies' refusal of access to information be amended to extend the availability of internal appeal against refusals by all public bodies.⁹⁰⁵ To ensure that the SAHRC, Information Regulator and Public Protector can independently fulfil their duties, these bodies should be politically and financially independent. It should be ensured that the Information Regulator, with binding enforcement functions, is established as soon as possible to ensure the availability of internal appeal against refusals by private bodies and an accessible, independent and authoritative mechanism for dispute resolution.

Save for the shortcomings identified, it is submitted that generally the current legal framework for the active and the passive disclosure of environmental information has the potential to adequately promote the right of access to environmental information, subject to the proper implementation thereof. However, to improve the realisation of the right of access to environmental information, substantial efforts from all, including the commitment of management, are required in the public and private sphere.

⁹⁰³ CER *Turn on the floodlights* 28.

⁹⁰⁴ Chien and Davis "How increased transparency in the mining sector would facilitate the realisation of environmental rights" 28.

⁹⁰⁵ SAHRC 2014 *The Promotion of Access to Information Act Annual Report 2013 – 2014* 25.

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