



# In pursuit of equity and social justice for access to information: Is freedom of information 'free' in South Africa?

**Mpho Ngoepe**

Associate Professor at the University of South Africa (UNISA).

[ngoepms@unisa.ac.za](mailto:ngoepms@unisa.ac.za)

<https://orcid.org/0000-0002-6241-161X>

**Makutla Mojapelo**

Lecturer at the University of South Africa (UNISA).

[mojapmg@unisa.ac.za](mailto:mojapmg@unisa.ac.za)

<https://orcid.org/0000-0001-8647-4669>

**Submitted on:** 05/21/2023. **Approved on:** mm/dd/yyyy. **Published on:** mm/dd/yyyy.



## ABSTRACT

Just like in many countries around the world, access to information in South Africa is a fundamental human right enshrined in the Constitution and subsequently in freedom of information (FOI) legislation. Despite the fact that FOI is a constitutionally guaranteed human right, evidence suggests that exercising this right requires considerable effort and, to some extent, comes at a cost. The cost in the context of this study refers to requests and access fees set forth in South Africa's Promotion of Access to Information Act, as well as money spent on appeals and litigation by ordinary citizens seeking to exercise their rights of access to public information. The purpose of this study is to explore the freedom of access to public information in South Africa, with a view to establishing whether ordinary citizens have free access to information for social justice. Interviews with experts through the Delphi Technique and document analysis were used in this qualitative study to evaluate the cost of accessing information in South Africa. Findings suggest that the cost of access to information is unbearable, especially for marginalised groups whose rights are violated every day. As a result, ordinary citizens do not have access to information and therefore may not be able to participate in the decision-making of public bodies as required in a democratic state. There is a need for the government in South Africa to put measures in place to regulate FOI fees in order to ensure equal access to information for all and make freedom of information 'free.'

**Keywords:** access to information; freedom of information; records; archives; South Africa.

## **INTRODUCTION**

Freedom of Information (FOI) is essential to achieving a meaningful and complete democracy. The passage of FOI legislation demonstrates the government's commitment to combating corruption and promoting democracy through public participation, openness, and transparency. FOI provides mechanisms for holding government representatives accountable for their decisions. Meyer-Resende (2011) contends that if ordinary members of the public do not have access to adequate information and official records, they will be unable to hold the authorities accountable for their actions. Every state that considers itself to be at the forefront of democracy must practise a high level of openness and transparency by encouraging the adoption of policies that promote access to a wide range of information in all spheres of government to allow proper scrutiny. According to Neuman (2002), democracy is dependent on a well-informed citizenry with equal access to justice and the ability to deal decisively with a government that undermines the will of the people. The maturity level of democracy can be measured by the extent to which the right to access information is protected by legislation, such as FOI legislation, and how well it is implemented. According to Mendel (2003), even if FOI is a constitutionally guaranteed socioeconomic right, it must be enforced by specific legislation outlining in detail the roles and responsibilities of all parties involved in the access to information process. Indeed, the passage of FOI legislation, in theory, indicates a government's willingness to provide access to a wide range of information. Adoption of the legislation, on the other hand, is insufficient without implementation. Access to information in African countries has been challenging and laborious.

Many African countries, including South Africa, have FOI legislation in place. The Promotion of Access to Information Act (Act No 43 of 1996) is South Africa's FOI legislation (Republic of South Africa, 2000). Despite the availability of this Act, citizens continue to struggle to gain access to information for a variety of reasons, including poor legislation implementation, a lack of support from information officers, and, to some extent, affordability. As a result, the public sector has failed to provide citizens with transparency, accountability, and good governance. Indeed, despite a remarkable trend towards the adoption of FOI laws, international trends have demonstrated that this does not automatically translate into the fulfilment of people's right to information. High costs, turnaround time to process requests, lack of capacity in relation to recorded information, lack of training, and assigning responsibility for oversight mechanisms are identified as gaps for FOI implementation in South Africa by Ngoepe and Mojapelo (2022), all of which prevent the legislation's general goals from being met. This study seeks to answer the question of whether information freedom in South Africa is free and to contribute to the promotion of transparency, accountability, and good governance. Transparency is regarded as a byproduct of FOI and is another component of good governance, owing to the fact that it allows citizens to assess the functionality of the government based on available information. Transparency entails providing information openly in an easily understandable format and medium, which is also a requirement for good governance. Good

governance entails conducting business in an ethical manner rather than abusing power by those in positions of public trust. A commitment to FOI laws, by definition, sends a strong message of radicalism, change, and empowerment, which is clearly well received by citizens (Worthy, 2017). This study focused on information disclosure and information access costs, drawing on South African FOI legislation.

## **LITERATURE REVIEW**

If there is an agreement that all public records belong to the public, as the name suggests, then why pay a price for something that belongs to you? This is the question that many scholars are asking, with little hope of getting reasonable and justified answers. Even if there is an attempt to justify the answers, the justification still “holds no water,” simply because paying someone to account is absolutely unwarranted. Scholars such as Govender (1995), Grupe (1995), Shepherd and Ennion (2007) and Asogwa and Ezema (2017) questioned the issue of fees, arguing that, most frequently, the government charges unreasonably high fees as a tactic to deny people access to information. The absence of national or international regulations on payments makes things worse as public authorities use their discretion to make decisions on charges. Govender (1995) and Shepherd and Ennion (2007) deplore the fact that the use of access fees in Australia and Ireland has made the right to access information too costly for many citizens. Grupe (1995) claims that government agencies in some countries are making public information a “sealable commodity” by deliberately seeking to charge rates that are much higher than the legal copying costs.

A comparative study was conducted to compare the experiences of FOI requests submitted to selected police agencies in Canada and the United States of America. It was discovered that in Canada, public bodies have the right to charge fees for search and preparation time associated with FOI requests, and such rights are enshrined in the country’s FOI legislation, although this does not materialise in practise because the charges cannot be equated to the search and preparation because they are high. This demonstrates the importance of countries around the world establishing policies to control the cost of access to public information. While the legislation may be used as a tool to provide for stringent measures to control the fees, it is clear that the legislation alone will not suffice because, in some cases, public officials intentionally act outside the scope of the legislation. Butt (2013) claims that fee regulation is a difficult task to manage.

In South Africa, members of the public are charged access fees to request their own personal information. In South Africa, the requester of information must pay two types of fees: the request fee (payable by the requester other than the personal requester) and the access fee (payable by all requesters). A request fee is the cost of simply making a request, whereas an access fee covers the cost of locating and copying the necessary records (SAHRC, 2017). Section 29(1) of the PAIA states that an access fee should be paid only after receiving notification that a request for access has been granted (Republic of South Africa, 2000).

The PAIA, on the other hand, gives the minister the authority to exempt anyone from paying the fees. According to Section 8 of the PAIA, the minister in charge of the administration of justice in South Africa has the authority to: exempt any category of person from paying the fees; set the ceiling price; determine how the fees should be calculated; and decide which category records are affected by the fee. According to Section 29 of the PAIA, it appears that South Africa is attempting to control pricing. The current study, however, seeks to determine whether this translates into practice (Republic of South Africa, 2000). The practice in South Africa is consistent with the Centre for Law and Democracy's (CLD, 2015) recommendation that access fees be centrally controlled to prevent abuse of power. The purpose of this study is to explore the costs of accessing public information in South Africa in order to determine whether ordinary citizens have free access to information for social justice.

## **METHODOLOGY**

The study used a qualitative approach to collect data from a panel of experts chosen using the snowball technique as well as an analysis of FOI legislation in South Africa, namely the Promotion of Access to Information Act (PAIA). The data were augmented with interviews through the Delphi technique. To ensure content integrity, a Delphi design with two rounds of interviews comprised six (6) experts from South Africa. Participants' descriptions are critical in Delphi studies because they serve as the foundation for arguing for genuine opinions. According to Keeney, Hasson and McKenna (2011), researchers must keep in mind that opinions cannot be supported by evidence and, in some cases, cannot be proven with any supporting documentation. Therefore, it is critical to choose relevant people who are extremely knowledgeable in the area under investigation. These experts participate as individuals, not on behalf of any organisation. One issue with organisation representatives is that their impartiality and openness may be compromised, as some may try to only speak on topics that their organisations allow or endorse. The study was divided into two rounds, with the first serving as an idea generation round in which the researcher sought general ideas from the participants. The findings from both rounds are presented. Since the Delphi study relies more on expertise, the participant profile remains important. The experts (hereafter referred to as participants) selected for the current study have extensive experience in FOI, and their roles are described below. To ensure that the ethical principle of anonymity was followed, researchers did not reveal the actual names of the participants in the analysis. Instead, codes were used to identify each participant from SA1 to SA6.

- **Participant SA1** – is a professor and a former National Archivist. He has over fifteen (15) years of experience in the field of FOI. He contributed to FOI by creating a sensitive information section to handle PAIA requests. He also formed a joint committee with the Department of Justice and Correctional Services. SA1 has done FOI advocacy work and has published several research papers in peer-reviewed journals.

- **Participant SA2** – is a Senior Lecturer with twelve (12) years of experience in the field of FOI. He was the head of the Freedom of Information Programme, and he was in charge of monitoring the PAIA's implementation and compliance. As part of his work, SA2 developed the Monitoring Assessment Tool for the Presidency's Department of Monitoring and Evaluation, which allows government departments to assess their level of compliance with the PAIA. All national and provincial departments were given access to the monitoring tool. SA2 also produced a documentary as an advocacy tool to encourage communities to use the PAIA. He also collaborated with a number of civil society organisations to facilitate PAIA training and develop PAIA learning materials.

- **Participant SA3** – handles legal costs and is also involved in case law management, which deals with records management. SA3 has over six (6) years of FOI experience, though she is no longer actively involved in FOI matters. Much of her work involves dealing with attorneys and courts. SA3 provided training on the PAIA, POPIA, and records management as part of her contribution to the FOI. SA3 also assists the general public with information requests. Her previous job required her to train DIOs on their PAIA roles and responsibilities. She was involved in the planning, organising, and facilitating of the NDIOF.

- **Participant SA4** – is the Head of Leadership and Knowledge Development. He has thirty (30) years of FOI experience. As an activist, SA4 was involved in the PAIA drafting process. He also led an NGO that was outspoken about the PAIA's implementation. His NGO advocated for the PAIA to be amended. SA4 has published several research papers on FOI in peer-reviewed journals.

- **Participant SA5** – is the Head of Strategic Support and Governance. He has nine (9) years of experience in the field of FOI. As part of his contribution to FOI implementation, SA4 was given the opportunity to serve as Acting Head of the PAIA unit, where he was tasked with monitoring compliance with the PAIA. He was also responsible for ensuring that the organisation complied with the PAIA's relevant provisions. SA4 also advised some of the public entities on how to comply with the Act. Furthermore, SA4 was in charge of reporting on PAIA implementation issues.

- **Participant SA6** – is the Head of Research, and he has twenty (20) years of experience in the FOI. In terms of his contribution to FOI implementation, SA6 assisted his employer in developing various policies, including FOI policies. SA6 also wrote several reports for Parliament. He also contributed to the drafting of the PAIA reports.

Themes were used to categorise the findings of the study.

## **RESULTS AND DISCUSSIONS**

The results of this study are divided into two themes: information disclosure and access costs. This is to determine whether or not access is free.

### **Information disclosure**

This section discusses four principles: maximum disclosure, obligation to publish, limited scope of exception, and disclosure takes precedence. The principle of maximum disclosure promotes the view that all information held by public bodies should be accessible to everyone. First, the PAIA legislation was analysed. Section 7 of the PAIA limits the law's scope by prohibiting the disclosure of certain records. According to Section 7 of the Act, records requested for criminal or civil proceedings after the start of the proceedings are not covered by the Act. Furthermore, pursuant to Section 9 of the Act, PAIA intends to:

- Give effect to the constitutional right of access to any information held by the state or any other person—the right holder component.
- Ensure that the right to access to information is exercised with justifiable limitations aimed at reasonably protecting the rights to privacy, commercial confidentiality, and good governance in a manner that balances the privacy right with other rights in the Constitution—the procedural component.
- The State's constitutional obligation to come up with mechanisms to enable enjoyment by the right holders of efficient access to information as "swiftly, inexpensively, and effortlessly as reasonably possible"—the duty bearer component (Republic of South Africa, 2000).

PAIA, by means, goes against the spirit of maximum disclosure because it requires that any information provided under the Act be used to protect human rights. Article 19 (2016) states unequivocally that maximum disclosure stems from the assumption that public information belongs to people, and thus requiring members of the public to explain or justify their need for access to information is unjust. Principle of maximum disclosure promotes social justice in the sense that it encourages the sharing of information to systematically address inequality and empower marginalised communities. This is even more necessary for South Africa because the country is regarded by the World Bank (2022) as one of the most unequal countries in the world. Duff, Flinn, Suurtamm and Wallace (2013) underscore the necessity for countries to employ archives and documentary material to tackle the struggle for social justice. According to Mutula and Wamukoya (2009), the principles of maximum disclosure advocate for access to public information as a socio-economic right rather than a privilege.

In terms of the second aspect covered in this section, the obligation to publish, FOI legislation requires public bodies to widely disseminate any information that may be of public interest in an accessible format, rather than just the requested information. Section 15 of the PAIA requires information officers in public entities to submit a list of categories of records



that are available automatically without the need for a request under the PAIA on a regular basis to the minister responsible for the administration of justice (currently the minister of the Department of Justice and Correctional Service) (Republic of South Africa, 2000).

The principle of limited scope of exception is the third topic covered in this section. Every FOI legislation has limitations, which means that not all information can be provided for a variety of reasons. FOI is not absolute, and there may be reasons to limit access in some cases. FOI legislation is expected to adequately provide for exceptions, which should be limited to “harm” and “public interest” (Article 19, 2016). The PAIA includes sections that restrict access to information. Section 7 of the Act, for example, makes an exception for records requested for criminal or civil proceedings. A further exception is made in Section 7(b) of the Act for information sought for the purpose of civil or criminal proceedings if the request for access is made after the proceedings have begun. If a record is obtained in violation of Section 7 of the Act, it may be inadmissible as evidence in the aforementioned criminal proceedings. Section 12 of the Act contains additional provisions for records that are not covered by the Act (Republic of South Africa, 2000). These records include cabinet and committee records, judiciary records, and records of a member of parliament or a provincial legislature. The PAIA appears to provide a broad scope for records excluded under the Act.

According to the PAIA, information may not be disclosed in certain circumstances for a variety of reasons. For example, Chapter Four of the PAIA specifies the grounds for denying access to information. Third-party privacy; certain records of the South African Revenue Service (SARS); third-party commercial information; confidential information; individual and property safety; police dockets in bail proceedings; law enforcement and legal proceedings; records protected from production in legal proceedings; the republic’s defence, security, and international relations; and economic interest are among the grounds listed in Chapter Four of the PAIA.

Sections 34 (for public bodies) and 63 (for private bodies) of the Act specify the grounds for denying access to personal information. Sections 34 and 63 of the Act make it more necessary to strike a balance between the implementation of the PAIA and privacy legislation, namely the POPIA. It should be noted, however, that POPIA takes precedence over all other legislation. Section 3 (2)(a) and (b) of POPIA, for example, state that “(a) the Act applies to the exclusion of any provision of any other legislation that regulates the processing of personal information and is materially inconsistent with an object or a specific provision of the Act; (b) if any other legislation provides for conditions for lawful processing of personal information that are more extensive than those set out in Chapter Three, the extensive conditions prevail.” (Republic of South Africa, 2000). Section 33 of the Act states that an information officer may not deny access to a public record if disclosure is in the public interest. Section 46 of the PAIA states that “the public interest outweighs the harm” (Republic of South Africa, 2000). Ngoepe (2021) questions whether the public interest should take precedence over all other grounds for refusal.

The fourth aspect covered in this section is the principle of disclosure taking precedence. Article 19 (2016, p. 12)<sup>1</sup> states that “laws that are inconsistent with the principle of maximum disclosure should be amended or repealed.” Having legislation that restricts access to information on the one hand and legislation that promotes access to information on the other may be counterproductive. The PAIA makes no mention of repealing any legislation that seeks to undermine the promotion of access to information (Khumalo; Mosweu; Bhebhe, 2016). Section 5 of the Act, on the other hand, states that the PAIA applies to the exclusion of any provision of other legislation that (a) prohibits or restricts the disclosure of a public or private body’s record and (b) is materially inconsistent with an object, or a specific provision, of this Act (Republic of South Africa, 2000).

## Information access

This section addresses two principles: the process for facilitating access and the costs. The requester always wishes to have their requests processed in a timely manner. A process to facilitate access must be quick and simple. When access to information is denied for whatever reason, an independent review mechanism must be in place. As previously stated, the PAIA provides for the appointment of information officers who will be in charge of delegating DIOs. PAIA clearly defines the DIOs’ responsibilities, which include assisting information requestors in filing applications for information requests. The PAIA also establishes clear guidelines for how the Act should be used. The Act also specifies the request procedure in detail. The PAIA Section 10 guide contains detailed instructions on how to use the Act. The PAIA Section 10 guide provides information about the legislation in order to assist people in making information requests under the Act. The guide contains detailed information on how PAIA has been used in the past to advance human rights. Section 10 of the Act specifies all of the important information that must be included in the Section 10 guide.

The PAIA also specifies what should be done if the requested information cannot be located or does not exist. Section 23 of the Act, for example, requires the information officer to write an affidavit or affirmation to notify the requestor that the requested information could not be located. Section 23 also states that if such a record is discovered later, the requester should be given a chance to access it, unless access is denied under the Act (Republic of South Africa, 2000).

The PAIA requires public and private entities to publish manuals that explain how to use the Act to access their records (SAHRC, 2015). Section 14 of the PAIA, for example, requires public bodies to publish a manual in at least three official languages to assist information requestors in making information requests. Similarly, Section 51 of the Act requires private bodies to create a PAIA manual that includes information on how access to information is facilitated as well as the types of records available in the organisation. The PAIA’s Section 51 does not apply to all private bodies (Republic of South Africa, 2000).

---

1



The section 14 manual must include enough information to facilitate a request to access records within the entity, according to the PAIA. Furthermore, the manual must include a detailed description of which categories of records are automatically accessible and which require a formal request. The minister can exempt any entity from submitting the aforementioned manual. Section 14(5) of the PAIA states that for security, administrative, or financial reasons, the minister may exempt any public entity or category of public entities from submitting section 14 PAIA manuals (Republic of South Africa, 2000). This provision may apply to private entities as well as public entities. The provision exempting other public entities from publishing the manuals, like other sections of the Act, may be abused, especially if it is left too open without any subclause to ensure more stringent measures to prevent abuse.

The PAIA's waiting period is lengthy because the legislation provides for 30 days with a possible extension of another 30 days, for a total of 60 days. Jimerson (2010) explains how archives are necessary to hold human rights violators to account and also supporting redress. This is even more relevant to South African context as the country emerge from a period between 1848 and 1990 which is the era marked by severe human rights violations. Based on this past experience, a lengthy waiting period has the potential to undermine the effectiveness of individuals seeking to exercise their rights which will eventually undermine transparency and accountability. Perhaps it is necessary to revisit the Article 19 (2016)'s principle on "process to facilitate access", which states that the process to facilitate access must be quick and simple. Furthermore, the PAIA specifies what should be done if the requested information cannot be located or does not exist. The Act requires the information officer to write an affidavit or affirmation to notify the requestor that the requested information could not be found. The Act also states that if such a record is later discovered, the requester should be given the opportunity to access it, unless access is denied under the Act.

In the administration of justice system, appeals are always a critical to allow errors to be corrected. Same applies to FOI, as appeals remains an integral part of a functioning transparency and accountability. In order to promote trust and foster confidence in the process, appeals are supposed to be handled at three levels. In the event of a refusal to provide information, Article 19 (2016) states that an independent review should be conducted to ensure that the requestors are satisfied with the results of their requests. According to PAIA section 10 guide, appeals are provided at follows: to the relevant body, complain to the regulator and launch proceeding in court. PAIA appeals are covered by section 74 and 75 of the legislation. When no amicable solution is found, a court can be petitioned for relief. Internal appeals must be filed within sixty (60) days of receiving the original PAIA request's refusal, though late appeals may be accepted if the requestor shows good cause for the delay. If the appeal requires notice to be given to a third party for reasons such as disclosure of the third party's personal information, disclosure of confidential information, or disclosure of other related information, the appeal must be filed within 30 days of the notice being given to that third party. A requester filing an appeal must pay a fee if one is available, and the appeal will

not be processed if the fee is not paid, according to section 75(3)(a). According to Section 77(3) of the Act, the relevant authority must rule on the internal appeal as soon as reasonably possible (Republic of South Africa, 2000).

If the requester is dissatisfied with the results of the internal appeal, they can seek relief from a court of law, according to the PAIA. Before the matter is taken to court, Article 19 (2016) allows for an appeal through an oversight body; however, the PAIA did not provide for the second layer of appeal through the oversight body. However, the SAHRC was assisting in terms of playing a mediation role to resolve PAIA disputes. This was done to ensure that the primary objective of the Act which is to promote a culture of human rights and social justice for people of South Africa remains intact. Since its establishment, the SAHRC has been playing a role in investigating, monitoring and educating people about human rights, which includes the rights of access to information. Now the newly established information regulator has taken over PAIA function, but that doesn't mean the SAHRC no longer have a role to play in protection of human rights. The Information Regulator will handle appeals only after the internal processes has been fully exhausted (Osawe, 2022).

Internal appeals are necessary to foster transparency, accountability and good governance because it enable individuals to challenge decisions regarding information requests. As highlighted earlier, the SAHRC raised concerns regarding some of the information requests which were ignored for no apparent reason. A clear and fair appeals system can build trust in the system. According to the observation made by SAHRC (2019, 2020) internal PAIA appeals in South Africa are effective. Majority of the people who rely on PAIA to add hope into their socio-economic rights are marginalised communities. Evidence seem to suggest that, when used effectively, PAIA has the potential to effectively in uplift marginalised communities by providing them with means to access information, challenge injustice and actively participate in activities that will improve their living conditions. As a result, internal appeals may be the best way for requesters to avoid a lengthy legal process in court. The legal system can be time-consuming and expensive (Van Der Berg, 2017).

Even though the PAIA sidelined the necessity to allow for an appeal to an independent body, it is worth noting that the SAHRC, as the organisation entrusted with the responsibility to protect and monitor human rights, has received complaints about the refusal of information by state and private entities (SAHRC, 2020), and more complaints are expected in the future. This brings the question of willingness of those in power to share information. In response to a call for justice, Jimerson (2010) postulates that archivists, who some happens to be Deputy Information Officers (DIOs) in terms of PAIA, must actively promote open government, accountability and public participation, which is what the first black president of South Africa, Mr Nelson Mandela labelled as real justice. The IRSA has the same authority as the High Court in terms of POPIA (Robinson, 2016). As a result, scholars like Mojapelo (2020) and Adams and Adeleke (2020) contend that the IRSA has more authority than the SAHRC.

Internal appeals under the PAIA can only be made to government departments and municipalities, to the detriment of other state-owned entities. Other public entities (national,

provincial, and municipal) do not have an internal appeal process, according to SAHRC (2015). Court processes are long and can be costly to majority of the poor people. It would have been better if PAIA cases were heard at Magistrate court which is believed to be more accessible to the majority of the citizens. Most of PAIA cases are currently heard at High Court and this poses a significant financial burden to those who are economically disadvantaged. From the humanistic and social justice point of view, there is a necessity to treat PAIA cases differently, especially because this has to do with socio-economic rights. Chamberlain (2019) expressed her views regarding cost awards arguing that it has the potential to discourage poor litigants from using PAIA to protect their socio-economic rights.

One of the most contentious aspects of the FOI legislation is the cost. People are divided on whether they should pay to file information requests. According to Wagner and Cuillier (2023), fees are obstacles to people's pursuit for social justice. As previously stated, Article 19 (2016) recognises that costs cannot be avoided because responding to some FOI requests costs the information holder money. The study discovered that PAIA has a cost structure that is adaptable. The only reasonable costs, according to Article 19 (2016)'s cost principle, would be those for record reproduction. Cost remains one of the most significant impediments to people gaining access to information through FOI legislation.

As a result, in order to encourage people to submit information requests, costs are expected to be kept as low as possible (Article 19, 2016). Indeed, Ebrahim (2010) is correct in asserting that a balance should be struck between the rights to information and the financial constraints that public bodies face. According to Wallace (2020), archives serve as an important resource to challenge injustice for the betterment of the society at large. In some cases, a large number of resources are required to make requested information available. Given South Africa's socioeconomic situation, direct costs for information access may disadvantage unemployed citizens. Although the PAIA attempts to address this issue by charging different fees to different groups of people based on their economic status. Requesters who earn less than R14,712 (if single) or R27,192 (if married or in a life partnership) per year, for example, are exempt from paying the request fee. The latter would go a long way towards ensuring that the PAIA is used by a large portion of the South African population to protect their socioeconomic rights. A Statistics South Africa (Stats SA) (2018) survey found that roughly half of South African adults live below the upper bound poverty line (UBPL).

The PAIA requires information requesters to pay two separate fees, as stated in Chapters Two and Four: a request fee and an access fee. The amount to be paid for the request is not specified in the IRSA's new PAIA section 10 guide. The request fee is the money paid by the requester to file an information request. According to the previous PAIA section 10 guide, the request fee for public bodies is R35 and the fee for private bodies is R50 (SAHRC, 2015). It is worth noting that unless a requester is exempted under the Act, a mandatory fee of R35 (for public bodies) or R50 (for private bodies) will not be processed (Sebina, 2009; Nkwe; Ngoepe, 2021). Requesters earning less than R14,712 (if single) or R27,192 (if married or in a life partnership) per year, for example, are exempt from paying

the request fee. This would imply that people who are unable to pay the mandatory fee may be denied access to records. Furthermore, the principle of costs in Article 19 (2016) states that requests should be free of charge. As a result, the PAIA's request fee is in violation of the cost-sharing principle enshrined in the Article 19 (2016) principles. Paying a request fee when you are unsure whether your request will be granted is unjust.

If a request for access is granted, the requester must pay an access fee determined by the body to whom the request is made based on the effort required to make the information available, according to the Act. Sections 7(a) and (b) specify that the access fee must be reasonable and may include a fee for making copies, transcription of a record's content, a postal fee, and reasonable time required to search and prepare the record for disclosure. Furthermore, the information officer or DIO of a private or public body may charge fees for the following: request fee payable by the person making the request; reproduction of documents; transcription; information search and preparation; postage or any electronic transfer, according to the PAIA section 10 guide (Information Regulator South Africa, 2021). The latter presents the most difficult challenge when a large volume of information is requested. According to Ngoepe (2021) and Dick (2005), SAHA was charged more than R5000 for 30 files in 2003. The R5000 access fee covered the Act's requirements for search, preparation, and copying (Dick, 2005).

When a request for personal information is made, the PAIA also provides an exemption. According to Section 22(1) of the Act, the information officer of the public body to which a request for access to information is made must issue a notice requiring the requester to pay a prescribed request fee (unless the request is made by a personal requester) (Republic of South Africa, 2000). The PAIA defines a personal requester as "[...] a requester seeking access to a record containing personal information about the requester" (Republic of South Africa, 2000, p. 8). Given the nature of the PAIA, it is critical to avoid a "all size fits all" approach, which means that some special cases must be handled differently to accommodate everyone, particularly when it comes to finances. This is also true in countries where fees are based on the type of information requested, such as Canada (Luscombe; Walby; Lippert, 2017). Indeed, Sorensen (2003) is correct in arguing that the PAIA should provide some form of financial relief.

Request processing should be efficient in order to encourage people to submit information requests. Long wait times will discourage citizens from submitting information requests. Article 19 (2016) states that information requests must be processed as soon as possible. Participants were polled on their opinions on the processing time for information requests as well as the fee structure. Fee structures were also seen as a tool used by politicians to discourage people from requesting information under the Freedom of Information Act. Some countries, as mentioned in the literature review, would charge exorbitant fees as part of a strategy to discourage people from requesting information. Participants in South Africa agree that the 30-day period is excessive; however, they believe it is influenced by a number of factors, including the government's record-keeping. According to SA2, the waiting period

appears to be 30 days, but it is actually 60 days because the PAIA allows for an extension if the requested information cannot be found to allow sufficient time to search for it. Article 19 (2016) does not specify a time limit for processing requests; however, countries may use the Africa Model on Access to Information to determine the waiting period. According to the Africa Model on Access to Information, a reasonable waiting period is 21 days. According to SA2, a 60-day turnaround time is excessively long and should be reconsidered in favour of a more reasonable turnaround time. SA2 asserts that:

“Compared to other FOI legislation, such as the Nigeria Freedom of Information Act, the 60-day period may be unbearable for the requesters of the information.”

The Nigeria Freedom of Information Act makes it the responsibility of public institutions to provide requested information within seven days. SA3 indicates that when records are poorly managed, it will not help to reduce wait times. In her experience, public officials rarely met the 30-day deadline and always requested an extension, which speaks volumes about record management in government entities, according to SA3. SA4 indicates that he does not have a proposed waiting period, but based on his experience working with the PAIA, he believes that the waiting period is excessive and may discourage requests. According to SA4, public officials are required to respond to requests in a timely manner; however, in some cases, they request extensions, resulting in process abuse.

The government, according to SA6, must demonstrate its commitment to testing the legislation by providing a reasonable turnaround time. SA6 claims that:

“Processing of requests within a specific timeframe will also depend on the availability of dedicated individuals, especially information officers who are required to handle the requests, but as it stands, many government departments do not have the incumbents.”

According to SA5, the turnaround time is specified in the legislation, but no one follows the provision because most requests are simply ignored. According to SA5, it is clear that government departments are not prepared to process requests quickly. SA6 indicates, on the other hand, that waiting period of 21 working days does not take into account the fact that people work under tight deadlines. SA6 also stated:

“For people who are in the media, waiting for 30 days for you to break the story will not work because by the time you get the information, that information is no longer newsworthy.”

In terms of the fee structure, all South African participants believe that it is fair and was determined in good faith because requests can sometimes cost the government money, particularly when information must be reproduced (i.e., copies or in another format). According to



SA1 and SA3, fees were established as a mechanism to pool resources to support information requests; hence, they are required. SA3 also states that fees are required to prevent abuse of information requests. SA2 is concerned:

“Several departments are historically known to use fee estimates to stifle access to information.”

According to SA2, the fee structure should be reconsidered so that it affects private companies and organisations rather than ordinary people making requests. According to SA2, there is no reason to charge a poor person for access to information. The most difficult challenge with fees is that not all requesters can afford to pay the prescribed fees. SA3 recommends that, in order to avoid this disparity:

“The fee should not be fixed, but rather be determined based on the requester’s financial situation.”

However, determining the requester’s financial situation will add administrative burden to the institution from which the information is requested. SA5 concurs that fees are excessive, especially for public information. According to SA5, members of the public should not pay for information because they have the right to access it. According to SA5, the government must absorb the fees because the working class and businesses pay taxes to keep the government entities running. SA6 agrees that, given South Africa’s high level of inequality, the flexibility of the FOI request fee should be considered in order to avoid excluding low-income families. According to the International Monetary Fund (IMF) (2020), South Africa has one of the highest levels of inequality in the world.

## **FINAL CONSIDERATIONS**

It is clear from the discussion that the weaknesses in FOI implementation in South Africa have always been identified as the length of time it takes to process requests, which is 30 days; access and request fees, which are R15 and R35, respectively; and ineffective means for resolving disputes under the Act. Members of the public, ironically, are charged request fees (payable by the requester other than the personal requester) and access fees (payable by all requesters) for information.

However, as previously stated, the PAIA gives the minister the authority to exempt anyone from paying the fees. According to Section 8 of the PAIA, the minister has the authority to: exempt any category of person from paying the fees; set the ceiling price; determine how the fees should be calculated; and decide which category records are affected by the fee. While the Act attempts to control pricing, whether this is implemented is another matter, as it takes a significant amount of resources to make requested information available. For example,



the South African History Archive (SAHA) had to pay around R5000 in one instance to gain access to Truth and Reconciliation Commission (TRC) records. SAHA has put PAIA to the test by requesting access to military records, nuclear records, TRC records, and gay and lesbian records. According to the Act, anyone can request records from public and private bodies without providing a reason. Public and private entities now have 30 days to respond to the request (down from 60 days prior to March 2003 and 90 days prior to March 2002). Given the socioeconomic situation in South Africa, direct costs for access to information may disadvantage unemployed citizens, though the PAIA attempts to address this issue by establishing different fees for different categories of people based on their economic status. Requesters earning less than R14,712 per year (if single) or R27,192 per year (if married or in a life partnership), for example, are exempt from paying the request fee. While FOI provides mechanisms for holding government officials accountable for their decisions, the fees and lack of awareness of legislation can be prohibitive. Ordinary members of the public will be unable to hold the authorities accountable if they do not have adequate information and public access to official records. And the freedom advocated by FOI will not be free. Democracy is dependent on informed citizens who have access to a wide range of information, allowing them to receive equal access to justice and deal decisively with a government that undermines popular will. The maturity level of democracy can be measured by the extent to which the right to information is protected by legislation, such as FOI legislation, and its implementation.

It could be argued that FOI in South Africa is not free. Article 19 (2016)'s cost-sharing principle is violated by the request fee. Paying a request fee when you are unsure whether your request will be granted is unjust. The nine principles of Article 19 (2016) form the foundation for a variety of elements considered necessary to be protected by FOI legislation, including the obligation to publish, promotion of open government, limited scope of exceptions, processes to facilitate access, costs, open meetings, and whistleblower protection. FOI as an idea and culture has yet to take root in South Africa due to a variety of factors, including citizen awareness and poor information management by the public sector. According to Ngoepe (2021), FOI is fully realised in South Africa when citizens have free access to information without having to file a request under the PAIA legislation. Maximum disclosure, the process for facilitating access, the appeal mechanism, costs, open meetings, and the repeal of other legislation that is inconsistent with the FOI legislation are all aspects of the legislation that must be reviewed. The FOI should cover everyone, regardless of nationality or citizenship status, according to the principle of maximum disclosure. Furthermore, the principle of maximum disclosure requires that no reason be provided when requesting access to information, but the FOA has ignored this because the legislation requires requesters to provide a reason for their requests.

## **REFERENCES**

ADAMS, R.; ADELEKE, F. Protecting information rights in South Africa: the strategic oversight role of the South African Human Rights Commission and the Information Regulator. **International Data Privacy Law**, [s. l.], v. 10, n. 2, p. 146-159, 2020.

ARTICLE 19. **The public's right to know**: principles on right to information legislation. London: Article 19, 2016. ISBN: 978-1-910793-09-1. Available at: [https://www.article19.org/data/files/RTI\\_Principles\\_Updated\\_EN.pdf](https://www.article19.org/data/files/RTI_Principles_Updated_EN.pdf). Access on: 11 May 2021.

ASOGWA, B. E.; EZEMA, J. I. Freedom of access to government information in Africa: trends, status and challenges. **Records Management Journal**, [s. l.], v. 27, n. 3, p. 318-338, 2017.

BUTT, S. Freedom of information law and its application in Indonesia: a preliminary assessment. *Asian Journal of Comparative Law*, [s. l.], v. 8, n. 1, p. 1-42, 2013.

CENTRE FOR LAW AND DEMOCRACY (CLD). **Tanzania**: note on the draft access to information act, 2015. [S. l.], Halifax, 2015. Available at: [www.law-democracy.org/live/wp-content/uploads/2015/05/ATI-Law-analysis.rev\\_.pdf](http://www.law-democracy.org/live/wp-content/uploads/2015/05/ATI-Law-analysis.rev_.pdf). Access on: 11 May 2021.

CHAMBERLAIN, L. A costly blunder: *South African History Archive v The South African Reserve Bank*. **South African Journal on Human Rights**, [s. l.], v. 53, n. 3, p. 288-297, 2019. DOI: <https://doi.org/10.1080/02587203.2019.1663129>.

DICK, A. Power is information: South Africa's promotion of access to information act in context. **Mousaion**: South African Journal of Information Studies, [s. l.], v. 23, n. 1, p. 1-18, 2005.

DUFF, W. M.; FLINN, A.; SUURTAMM, K. E.; WALLACE, D. A. Social justice impact of archives: a preliminary investigation. **Archival Science**, [s. n.], v. 13, p. 317-348, 2013.

EBRAHIM, F. **The promotion of access to information act**: a blunt sword in the fight for freedom of information? MIS Dissertation (Degree Magister Legum), University of the Western Cape, 2010.

GOVENDER, K. Access to information: enforcement mechanisms and fees. **SA Public Law**, [s. l.], v. 10, n. 2, p. 346-355, 1995.

GRUPE, F. H. Commercialising public information: a critical issue for governmental IS professionals. **Information and Management**, [s. l.], v. 28, n. 4, p. 229-282, 1995.

HAZEL, R.; WORTHY, B. Assessing the performance of freedom of information. **Government Information Quarterly**, [s. l.], v. 27, n. 4, p. 352-359, 2010.

INFORMATION REGULATOR SOUTH AFRICA. **Guide on how to use Promotion of Access to Information Act 2 of 2000, as amended**. [2021]. Available at: [https://infoeregulator.org.za/wp-content/uploads/2020/07/PAIA-Guide-English\\_20210905.pdf](https://infoeregulator.org.za/wp-content/uploads/2020/07/PAIA-Guide-English_20210905.pdf). Access on: 11 May 2021.

INTERNATIONAL MONETARY FUND. Six charts explain South Africa's inequality. **IMF country focus**, 2020. Available at: <https://www.imf.org/en/News/Articles/2020/01/29/na012820six-charts-on-south-africas-persistent-and-multi-faceted-inequality>. Access on: 11 May 2021.

JIMERSON, R. C. Responding to the call of justice. **Tidsskrifted Arkiv**, [s. l.], v.1, p.1-10, 2010. DOI: <https://doi.org/10.7577/ta.923>.

KEENEY, S.; HASSON, F.; MCKENNA, H. P. **The Delphi technique in nursing and health research**. Oxford: Willey-Blackwell, 2011.

KHUMALO, N. B.; MOSWEU, O.; BHEBHE, S. A comparative study of freedom of information legislation in Botswana, South Africa and Zimbabwe. **Mousaion: South African Journal of Information Studies**, [s. l.], v. 34, n. 4, p. 108-131, 2016. DOI 10.25159/0027-2639/1912.

LUSCOMBE, A.; WALBY, K.; LIPPERT, R. K. Brokering access beyond the border and in the wild: comparing freedom of information law and policy in Canada and the United States. **Law and Policy**, Denver, v. 39, n. 3, p. 259-279, 2017.

MCKINLEY, D. T. **The state of access to information in South Africa**. South Africa: CSV, 2003. Available at: <https://help.csvr.org.za/wp-content/uploads/2004/01/stateofaccess.pdf>. Access on: 11 May 2021.

MENDEL, T. **Freedom of information: a comparative legal survey**. Paris: UNESCO, 2003.

MEYER-RESENDE, M. **Democracy reporting: International**. Berlin: Democracy Reporting International, 2011.

MOJAPPELO, M. Strengthening public sector records management through the Information Regulator in South Africa. **Journal of the South African Society of Archivists**, [s. l.], v. 53, p. 90-102, 2020. DOI 10.4314/jsasa.v53i1.7.

MUTULA, S.; WAMUKOYA, J. Public sector information management in east and southern Africa: Implications for FOI, democracy and integrity in government. **International journal of information management**, [s. l.], v. 29, n. 5, p. 333-241, 2009.

NEUMAN, L. **Access to information: a key to democracy.** Jamaica: Carter Centre, 2002.

NGOEPE, M. Balancing and reconciling the conflicting values of information access and personal data laws in South Africa. In: OCHOLLA, D. N.; EVANS, N. D.; BRITZ, J. (eds.). **Information knowledge and technology for development in Africa.** Cape Town: AOSIS, 2021. p. 71-84.

NGOEPE, M.; MOJAPELO, M. Are we afraid of the dark or the light? A comparative analysis of freedom of information laws in South Africa and Zimbabwe. In: GERALDES, E. (ed.). **Dez anos da lei de acesso a informação: limites, perspectivas e desafios.** Sao Paulo: Intercom, 2022.

NKWE, M.; NGOEPE, M. Compliance with freedom of information legislation by public bodies in South Africa. **Government Information Quarterly**, [s. l.], v. 38, n. 2, p. 1-13, 2021.

OSAWA, O. A. A comparative analysis of the right of access to information under the Nigerian Freedom of Information Act 2011 and the South African Promotion of Access to Information Act 2001. **African Human Rights Law Journal**, Pretoria, v. 22, n. 2, p. 476-492, 2022. DOI 10.17159/1996-2096/2022/v22n2a7.

REPUBLIC OF SOUTH AFRICA. Promotion of Administrative Justice Act (Act No. 3 of 2000). **Republic of South Africa Government Gazette**, Cape Town, v. 416, n. 20853, Feb. 2000.

ROBINSON, R. PAIA has holes, but it is not the only law giving access to information. **People's Assembly, Cape Town**, 5 Sept. 2016. Available at: <https://www.pa.org.za/blog/paia-has-holes-not-only-law-giving-access-informat>. Access on: 21 May 2022

SORENSEN, R. Impact of South Africa's promotion of access to information act after three and half years: a perspective. **ESARBICA Journal**, v. 22, p. 50-63, 2003. DOI 10.4314/esarjo.v22i1.30955.

SAHRC [South African Human Rights Commission]. **Promotion of Access to Information Act annual report 2014/15.** Johannesburg: SAHRC, 2015.

SAHRC [South African Human Rights Commission]. **Promotion of Access to Information Act annual report 2016/17.** Johannesburg: SAHRC, 2017.

SAHRC [South African Human Rights Commission]. **Promotion of Access to Information Act Annual Report 2018/19.** Johannesburg: SAHRC, 2019.

SAHRC [South African Human Rights Commission]. **Promotion of Access to Information Act Annual Report 2019/20.** Johannesburg: SAHRC, 2020.

SEBINA, P. Freedom of Information: erosion of the archive? **Journal of the Society of Archivists**, [s. l.], v. 30, n. 2, p. 147-165, 2009.

SHEPHERD, E.; ENNION, E. How has the implementation of the UK Freedom of Information Act 2000 affected archives and records management service? **Records Management Journal**, [s. l.], v. 17, n. 1, p. 32-51, 2007.

STATISTICS SOUTH AFRICA. **National poverty lines**. [S. l.], 2018. Available at: <https://www.statssa.gov.za/publications/P03101/P031012018.pdf>. Access on: 11 May 2021.

VAN DER BERG, S. Strengthening access to information institutions to promote a culture of transparency. **South African Journal on Human Rights**, [s. l.], v. 33, n. 2, p. 167-192, 2017.

WALLACE, D. A. Defining the relationship between archives and social justice. *In*: WALLACE, D. A.; DUFF, W. M.; SAUCIER, R.; FLINN, A. (eds.). **Archives, Recordkeeping and Social Justice**. London: Routledge, 2020. p. 22-51.

WAGNER, A. J.; CUILIER, D. To fee or not to fee: Requester attitudes towards freedom of information charges. **Government Information Quarterly**, [s. l.], v. 40, n. 4, p. 101879, 2023. DOI 10.1016/j.giq.2023.101879.

THE WORLD BANK. **Inequality in Southern Africa**: an assessment of the Southern African customs union. Washington, 2022. Available at: <https://documents1.worldbank.org/curated/en/099125303072236903/pdf/P1649270c02a1f06b0a3ae02e57eadd7a82.pdf>. Access on: 11 May 2021.

WORTHY, B. **The politics of freedom of information**: how and why governments pass laws that threaten their power. Oxford: Oxford University Press, 2017.

## **ACKNOWLEDGEMENTS**

The financial assistance of the National Institute for the Humanities and Social Sciences, in collaboration with the South African Humanities Deans Association (SAHUDA) towards this research is hereby acknowledged. Opinions expressed and conclusions arrived at are those of the authors and not necessarily to be attributed to the NIHSS and SAHUDA.