

Barricading the doors: Instead of improving access to environmental information, public and private bodies try to use the law to avoid disclosure

The latest on our work on transparency in environmental governance in South Africa
February 2013

In April 2012, the Centre for Environmental Rights (CER) published its report *Unlock the Doors: How greater transparency by public and private bodies can improve the realisation of environmental rights*. This report set out the results of 18 months of work attempting to access environmental information on behalf of civil society organisations and communities, and made recommendations that included both a far greater consideration of voluntary disclosure about environmental governance and regulation by public bodies, as well as increased obligations and incentives for private bodies to disclose information about environmental management.

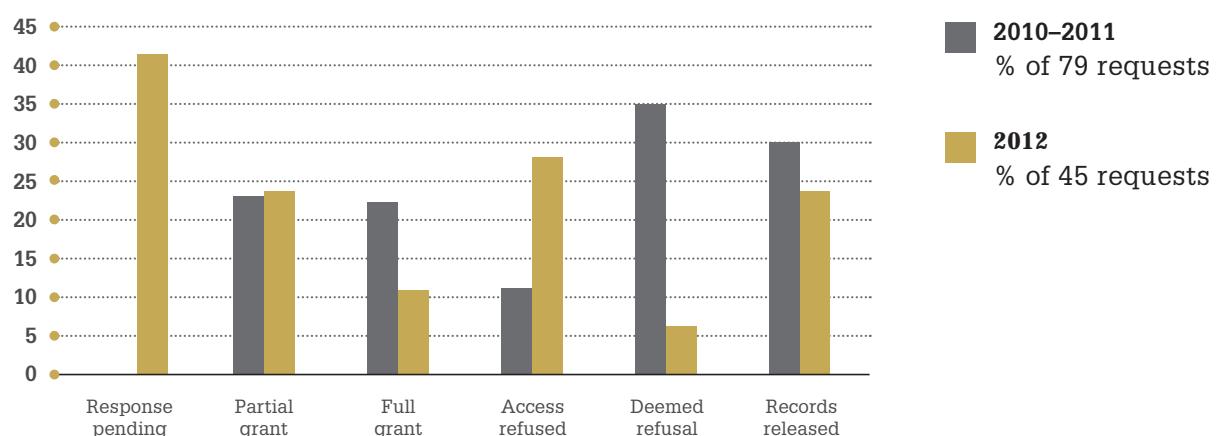
In 2012, the CER continued with its work, submitting 66 formal requests for environmental information using the Promotion of Access to Information Act, 2000 (PAIA): 45 requests to public bodies, 6 to parastatals and 15 to private bodies. See a full list at the end of this document. Fewer requests were submitted in 2012 than in 2010–11.

This report provides comparative information for 2012, showing some shifting trends in disclosure of environmental information. Generally, we have started to see some acknowledgement by public bodies of their obligations under PAIA, but a decrease in actual disclosure of records. At the same time, the stance of private companies to releasing environmental information has hardened to the extent of opposing legal proceedings brought to compel disclosure.

...THE STANCE OF PRIVATE COMPANIES TO RELEASING ENVIRONMENTAL INFORMATION HAS HARDENED TO THE EXTENT OF OPPOSING LEGAL PROCEEDINGS BROUGHT TO COMPEL DISCLOSURE

General findings and trends: public bodies

Figure 1: Responses to requests for access to information to government departments 2010–11 and 2012



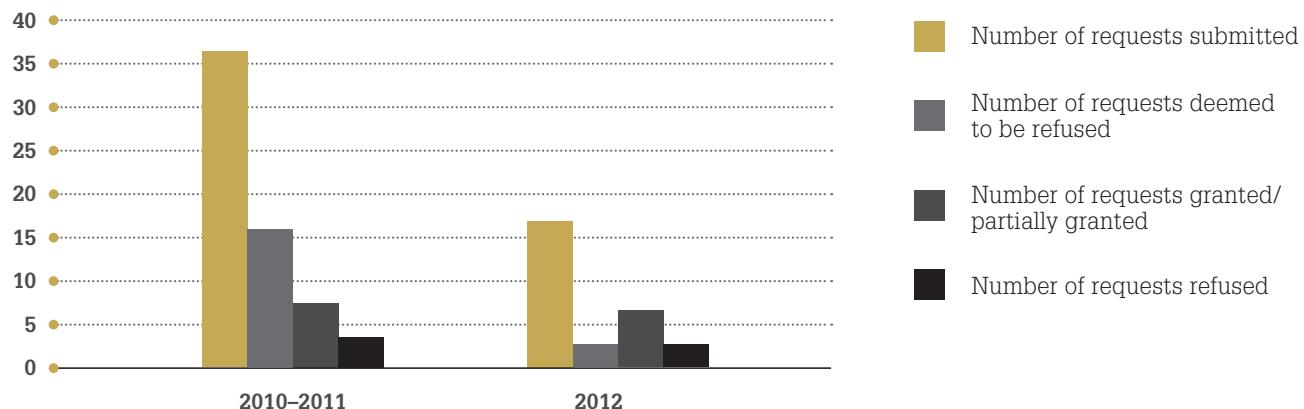
However, active refusal of requests increased from 11% to 29%, full grants of requests dropped from 23% to 11%, and the instances in which access to records was partially granted remained essentially the same. The percentage of records released after a grant dropped even further from 30% to 24%.

	2010–2011	2012
% Requests refused	11%	29%
% Full grants	23%	11%
% Partial grants	24%	24%
% Records released after grant	30%	24%

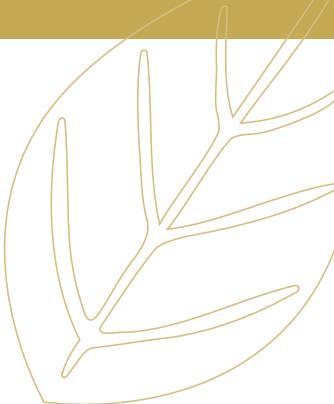
In *Unlock the Doors*, we described the Department of Mineral Resources (DMR)'s compliance with PAIA as 'consistently poor' – it was certainly the worst-performing department in our 2010-11 assessment. In 2012, our records show that the DMR was ignoring fewer requests for access to information, but instead refusing those requests outright.

As at the end of 2012, the DMR was still relying heavily on its standard letter of partial grant, which does not comply with the requirements of a decision under PAIA. It is still very difficult to access records, even where a decision has been made to grant access – that response rate remained level at 19%.

Figure 2: Requests submitted to the DMR



- * In 2010/11 the DMR generally either ignored requests for access to information, or sent out its standard letter partially granting access. That 'partial grant' only resulted in actual delivery of records in 7 instances out of 36 requests – a 19% success rate. That figure (actual delivery in cases of access granted) did not improve in 2012.
- * What has changed at the DMR is that, firstly, deemed refusals (where a request is regarded as refused because of lack of response) by the DMR have dropped significantly: from 44.4% in 2010-11 to 12.5% in 2012; secondly, the proportion of active refusals of requests for records have increased from 8.3% in 2010–11 to 12.5% in 2012.
- * The DMR's processing of appeals do not seem to have moved at all since 2010. As at the end of 2012, the DMR had not made a decision on one of the twenty appeals submitted against refusals under PAIA since 2010. (These are regarded as 'deemed dismissals' of appeals under PAIA.)



IN 2012, DEEMED REFUSALS BY PUBLIC BODIES – DEEMED FOR LACK OF RESPONSE – DROPPED SIGNIFICANTLY FROM 36% TO 7%. THIS SHOWS A MORE ACTIVE ENGAGEMENT WITH PAIA REQUESTS, AND POTENTIALLY THAT MORE RESOURCES ARE BEING MADE AVAILABLE IN PUBLIC BODIES TO PROCESS PAIA REQUESTS

Too many PAIA manuals not in order

More often than not, the PAIA Manuals of authorities that hold environmental information are not in order, as required by s.14 of PAIA. The South African Human Rights Commission (SAHRC) reported the following in its 2012 Annual PAIA Report (we have added our own experience, where relevant):

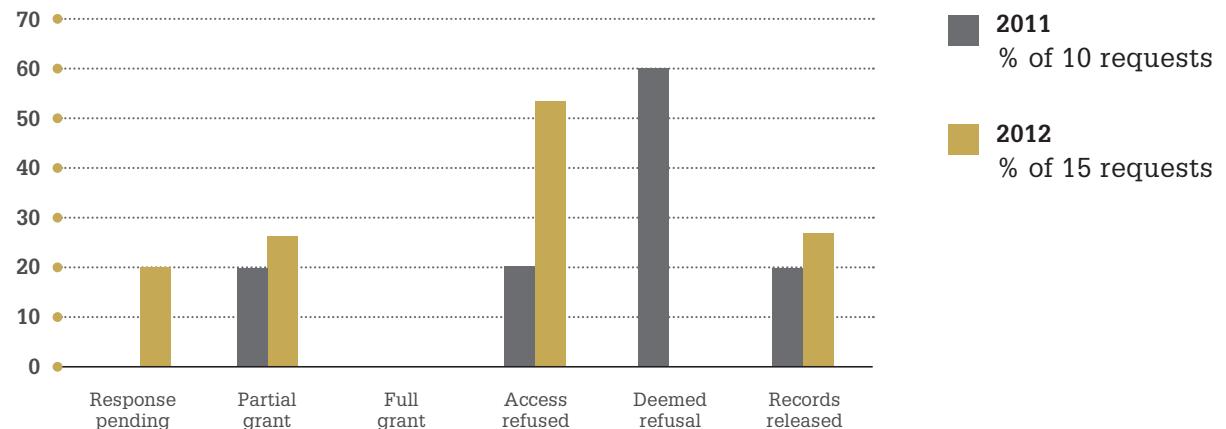
- Only the PAIA Manual of the Department of Environmental Affairs complied with the requirements of s.14 of PAIA and was easily accessible.
- The Department of Water Affairs' Manual complied with s.14, but was 'fairly difficult' to access. As at date hereof, the DWA still has the Manual of the Department of Water Affairs and Forestry (which ceased to exist under that name in 2009) on its website.
- The Department of Mineral Resources' Manual does not comply with s.14. As at date hereof, the DMR still has not published an update for its 2003 PAIA Manual (PAIA Manuals are supposed to be updated annually).
- Out of the nine provincial environment departments, Eastern Cape, Northwest, Mpumalanga and Kwa-Zulu Natal all failed in their compliance to s.14 of PAIA.
- Only 12% of municipalities have compliant PAIA Manuals.

No reporting to the South African Human Rights Commission

- Both the Departments of Mineral Resources and Water Affairs are listed as being non-compliant with s.32 of PAIA, i.e. had not filed the required statutory reports with the SAHRC. The Department of Agriculture, Forestry and Fisheries had filed its report. The Department of Environmental Affairs had filed its report, but it is referred to as 'inaccurate' by the SAHRC.
- Amongst provincial environment departments, Eastern Cape, Mpumalanga, Northwest and Northern Cape had not filed the required reports with the SAHRC.

General findings and trends: Private bodies

Figure 3: Responses to requests for access to information to private bodies 2010–11 and 2012



In 2012, companies stopped ignoring requests for information submitted by the CER, and started to make use of PAIA – unfortunately actively to refuse access to information.

- In 2010/11, 60% of requests to private companies in 2010/2011 resulted in deemed refusals. In 2012, there were no deemed refusals by private companies, so PAIA requests are not being ignored as before.
- However, more than 50% of the requests for access to information were refused.

IN 2012, COMPANIES STOPPED IGNORING REQUESTS FOR INFORMATION SUBMITTED BY THE CER, AND STARTED TO MAKE USE OF PAIA – UNFORTUNATELY ACTIVELY TO REFUSE ACCESS TO INFORMATION

Anglo closes the door

In October 2012, Anglo Operations Limited provided our client VEJA with access to water quality monitoring reports for their New Vaal Colliery. Each and every figure was 'redacted', or blacked out, but the specific basis for such redaction was not provided. In December 2012, Anglo reversed their decision and refused VEJA's request on the basis that it had failed to establish that the requested documents were required for the exercise or protection of rights.



Surface Monitoring Points (Internal)							
Determinant	Freq.	Dam 3	Fingers Dam	Mac Dam	Minipit Dam	Plant Dam	Stockyard Dam
Date and time sample taken		09/05/2012			09/05/2012		09/05/2012
pH	Monthly						
EC (mS/m)	Monthly	■■■■■		■■■■■	■■■■■		■■■■■
TDS (mg/l)	Monthly	■■■■■		■■■■■	■■■■■		■■■■■
SS (mg/l)	Monthly			■■■■■	■■■■■		■■■■■
Ca (mg/l)	Monthly	■■■■■		■■■■■	■■■■■		■■■■■
Mn (mg/l)	Monthly	■■■■■		■■■■■	■■■■■		■■■■■
Na (mg/l)	Monthly	■■■■■		■■■■■	■■■■■		■■■■■
NO ₂ /NO ₃ as N (mg/l)	Monthly						
SO ₄ (mg/l)	Monthly	■■■■■		■■■■■	■■■■■		■■■■■
Cl (mg/l)	Monthly	■■■■■		■■■■■	■■■■■		■■■■■
NH ₄ as N (mg/l)	Monthly						
PO ₄ as P (mg/l)	Monthly	■■■■■		■■■■■	■■■■■		■■■■■
Mg (mg/l)	Monthly	■■■■■		■■■■■	■■■■■		■■■■■
E.coli (counts/100ML)	Monthly		■■■■■	■■■■■	■■■■■		■■■■■
Alkalinity (mg/l)	Monthly	■■■■■		■■■■■	■■■■■		■■■■■
B (mg/l)	Quarterly	■■■■■		■■■■■	■■■■■		■■■■■
Al (mg/l)	Quarterly	■■■■■		■■■■■	■■■■■		■■■■■
F (mg/l)	Quarterly	■■■■■		■■■■■	■■■■■		■■■■■
Cd (mg/l)	Quarterly						
Pb (mg/l)	Quarterly			■■■■■	■■■■■		■■■■■
Ni (mg/l)	Quarterly						
Cu (mg/l)	Quarterly						
Zn (mg/l)	Quarterly			■■■■■	■■■■■		■■■■■
Total Hardness	Quarterly						
Fe (mg/l)	Quarterly	■■■■■		■■■■■	■■■■■		■■■■■

TWO SEPARATE JSE-LISTED COMPANIES HAVE REFUSED TO DISCLOSE WATER MONITORING DATA TO A COMMUNITY ORGANISATION ON THE BASIS THAT A NON-GOVERNMENT ORGANISATION HAS NO RIGHT UNDER PAIA TO SUCH INFORMATION FOR THE PURPOSE OF MONITORING THOSE COMPANIES' COMPLIANCE WITH ENVIRONMENTAL LEGISLATION

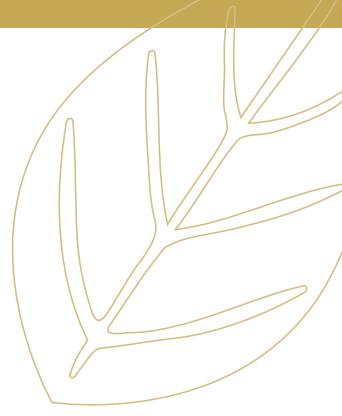
Access to environmental information in court

The Centre for Environmental Rights has, either in its own name or as attorneys of record, instituted a number of legal proceedings to compel compliance. Some of these cases include the following:

- *Centre for Environmental Rights v Director-General: Department of Mineral Resources: Deemed refusal of access to information about financial provision for rehabilitation under the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) (North Gauteng High Court, Case No. 67649/2011)*

In 2011, the CER launched a court application against the DMR pursuant to refused PAIA requests submitted by the CER for information relating to financial provisions provided by mining companies and the Minister's practices in regard to the auditing of those financial provisions. The DMR agreed to a court order against it, and undertook to provide the records in question within an agreed period. The DMR then failed to comply with this order. Since then, the DMR has agreed to provide the outstanding records, and the Minister has provided some of the information requested to Parliament.

- *Vaal Environmental Justice Alliance v Omnia Holdings Limited: Refusal of access to certain water quality monitoring reports, relying on s.64 and 68 of PAIA (South Gauteng High Court, Case No. 38166/12)*



In this case, the Centre is representing VEJA in court proceedings brought to compel Omnia to disclose water monitoring data which it was required to make available to the Department of Water Affairs in terms of its water use licence. Omnia refused VEJA's request to access this information on the basis that the monitoring data was commercial and confidential information of a third party. In its answering affidavit, Omnia also alleges that the records requested are not required for the exercise or protection of VEJA's rights.

- *Vaal Environmental Justice Alliance v ArcelorMittal South Africa: Refusal of access to the so-called Environmental Master Plan and various documents referred to in the National Environmental Compliance and Enforcement Report 2010-11, relying on s.50(1)(a) of PAIA (South Gauteng High Court, Case No. 39646/12)*

In this case, the Centre is representing VEJA in court proceedings brought to compel ArcelorMittal South Africa (AMSA) to disclose its Vanderbijlpark Environmental Master Plan and various documents relating to compliance and enforcement at its Vereeniging Dump Site. AMSA refused VEJA's request to access this information on the basis that VEJA had failed to establish that its reason for requesting the documents constituted a right which entitled it to access the documents. The matter will be heard in the South Gauteng High Court in May 2013.

Having regard to the reasons proffered by [VEJA] as to why it requires the requested records, it is evident that what the applicant seeks to protect is an assumed right to monitor and enforce AMSA's compliance with environmental laws and to hold AMSA accountable to the public for remedying and/or preventing any harmful pollution it may have caused. [VEJA] has no such right and accordingly it cannot seek access to information in terms of the PAIA to protect this assumed right."

— From AMSA's answering affidavit

Read more about our Transparency Project and download copies of key CER publications our work to promote access to environmental information at www.cer.org.za.

Award

In 2012, the CER was the proud recipient of the South African Human Rights Commission's Golden Key Award for Best User of the Promotion of Access to Information Act for 2012.



Acknowledgements

List of public bodies, parastatals and private bodies to whom requests were submitted in 2012:

- Department of Mineral Resources
- Department of Water Affairs
- Department of Environmental Affairs
- Department of Transport
- Gauteng Department of Agriculture and Rural Development
- Mpumalanga Department of Economic Development, Environment and Tourism
- Limpopo Department of Roads and Transport Road
- Maletswai Local Municipality
- uMhlathuze Municipality
- Msunduzi Municipality
- eThekwini Municipality
- City of Cape Town
- Greater Tzaneen Municipality
- Mopani Municipality
- Transnet Cape Town Ports Authority
- Transnet Richards Bay Ports Authority
- Transnet National Ports Authority
- South African National Roads Agency
- Trans-Caledon Tunnel Authority
- Cousins Coal Pty Ltd
- Arcelor Mittal South Africa
- Sasol
- Omnia Holdings
- NATREF
- Digby Wells and Associates
- Central Rand Gold
- FFS Refiners
- DRD Gold
- Anglo Operations Ltd

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