SIGNS OF HOPE?

Some government departments ramp up disclosure of environmental records under PAIA, while others remain closed

November 2015

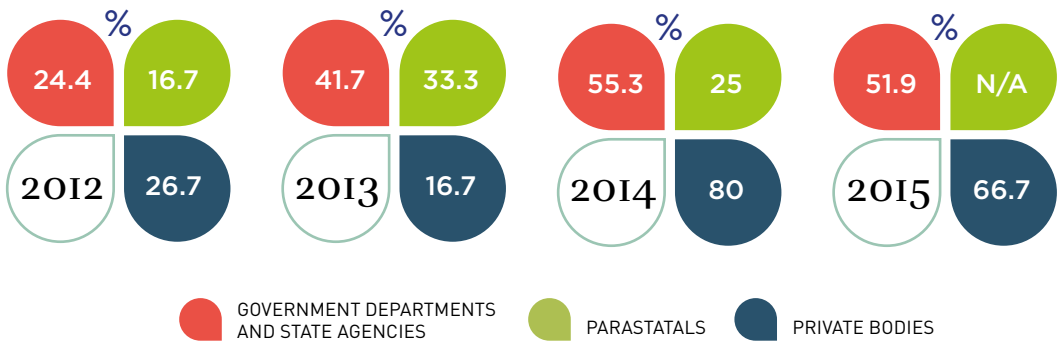
INTRODUCTION

Access to information is essential for the exercise of the right to an environment not harmful to health or well-being. Without access to – at the very least – environmental licences and compliance data, citizens and communities cannot exercise their environmental rights.

For five and a half years, the Centre for Environmental Rights (CER) has been using the Promotion of Access to Information Act (PAIA) on behalf of communities and civil society organisations to request access to environmental records held by government and companies,[1] and systematically recording the results.

While PAIA remains poorly implemented, the CER has witnessed a slow but encouraging trend towards greater reactive disclosure by both authorities and private companies, an increased awareness of the obligations imposed by PAIA, and improved investment in capacity to manage PAIA requests. The Department of Mineral Resources remains an outlier in this trend: in 2015, its rate of actual release of requested documents was a disappointing 12.5%. Considering the exceptionally high level of environmental degradation caused by the mining industry, this Department's performance in this regard remains unacceptable.

Percentage records actually released pursuant to PAIA requests by CER: 2012—September 2015



Despite years of campaigning by the CER and other civil society organisations, voluntary, proactive disclosure by all parties holding environmental records remains poor. However, in the past year the Department of Environmental Affairs has for the first time indicated its intention to make a wide range of environmental licences available online, thereby setting the standard for other departments holding environmental records. This bold step could mark the start of a new era of transparency in environmental governance.

[290]

NUMBER OF PAIA REQUESTS SUBMITTED BY **CER** BETWEEN **2010** AND **SEPTEMBER 2015**

REQUESTS SUBMITTED BETWEEN **2010** AND **SEPTEMBER 2015**

To all government departments **237**

To parastatals **14**

To private bodies **39**

Total numbers of PAIA requests by CER
(January 2010–September 2015)

Year	TOTAL	Government departments				Parastatals	Private bodies
		All government departments	National government bodies	Provincial government bodies	Municipalities or other local authorities		
2010–2011	90	79	58	15	6	1	10
2012	66	45	26	8	11	6	15
2013	57	48	28	8	12	3	6
2014	47	38	25	4	9	4	5
2015	**30**	**27**	**26**	**0**	**1**	**0**	**3**
TOTAL	290	237	163	35	39	14	39

TRENDS IN 2015

Fewer deemed refusals, but government needs more time

Deemed refusals (when government or companies fail to respond to access to information requests within the allocated timeframe) remained a problem in 2015, despite an overall decrease in deemed refusals from 2014 to 2015. However, government departments are making more frequent use of the option to extend the initial 30-day response period by another 30 days[2] (which may explain the decrease in deemed refusals). While waiting an additional 30 days is preferable to requests simply being ignored, the heavy reliance on the additional 30 days by government departments delays access to records for those who need them for the exercise of rights.

Protecting commercial information

As detailed comprehensively in our 2014 report, *Money Talks,* protection of commercial information of third parties continues to be a widely used ground for refusal of access to information requests by government departments. Government departments generally consider a wide range of information to be "confidential" or "commercially sensitive" without interrogating whether this is in fact the case – in other words, whether disclosure of the information will actually result in harm to the legitimate interests of the third party to whom the information relates.

In many instances, government departments simply accept the claim by third parties that information is commercially confidential without conducting an independent review of whether this claim is accurate. This is aggravated by the fact that the default reaction of third parties to most access to information requests is that the information cannot be disclosed because it is "commercially confidential". There is barely any use of redaction (blacking out) of information within a document, which would enable the bulk of the record to be disclosed without putting any alleged commercially sensitive information at risk.[3]

Records cannot be found

A number of requests have also been refused on the grounds that the records do not exist or cannot be found. When records cannot be found or do not exist, PAIA requires that the information officer must, "by way of affidavit or affirmation", notify the requester that it is not possible to give access to that record. The affidavit or affirmation must "give a full account of all steps taken to find the record in question or to determine whether the record exist(s)". While in the past affidavits or affirmations to this effect were often not provided, we now receive more affidavits and affirmations that comply with PAIA.

We should note that, on at least one occasion in 2015, a government department alleged the non-existence of a record when the record does in fact exist (and should be readily available). This was picked up by the CER when we received the requested record from another source. This evidences both poor record-keeping and even dereliction of duty, and raises the extremely concerning possibility that information officers are affirming that information does not exist either dishonestly, or without conducting the proper checks to confirm the existence or otherwise of a particular record.

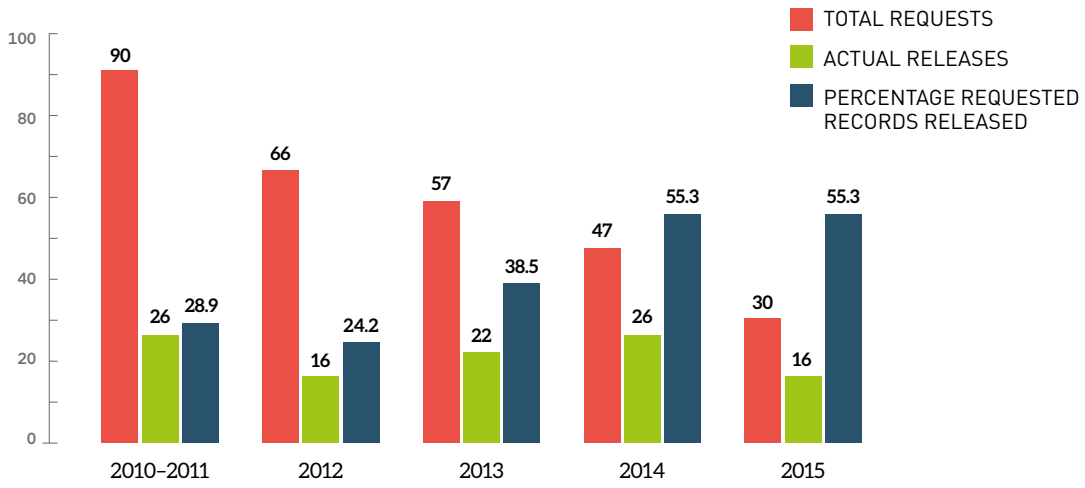
RECORDS ACTUALLY RELEASED PURSUANT TO PAIA REQUESTS BY CER IN 2015

The percentage of records actually released by government departments pursuant to PAIA requests dropped slightly from 55.3% in 2014 to 51.9% in 2015 (though one of the requests submitted during the 2015 reporting period was still pending as at 30 September 2015).

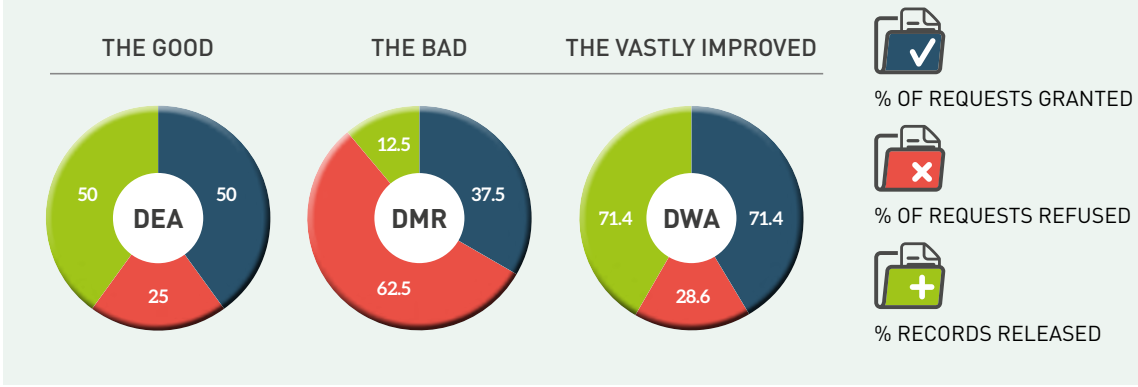
The percentage of records actually released by government departments was significantly better over the 2014-2015 period than it was over the 2010–2013 period.

The percentage of records actually released by companies, although down from 80% in 2014 to 66.7% in 2015, shows significant improvement from 20% in 2010–2011, 26.7% in 2012 and 16.7% in 2013. These figures are also significantly higher than those for government departments.

Total number of requests submitted versus release of information



GOVERNMENT DEPARTMENTS IN 2015



Given the nature of our work, the bulk of the requests submitted by the CER in our own name or on behalf of our clients go to the Departments of Environmental Affairs, Mineral Resources, and Water and Sanitation, as well as to municipalities. We also submit PAIA requests to companies whose activities threaten or may threaten environmental rights.

Since 2010, we have seen a general decline in the number of deemed refusals of requests by government, and an increase in requests granted. The percentage of actual records released by government (records released versus requests submitted) has averaged at around 50% for the past few years (52% in 2015, 55% in 2014, and 42% in 2013). This is a significant increase from 24% in 2012 and 30% in 2010–2011. While a 50% success rate is an improvement, it is not acceptable that the requester under PAIA has only a 50% chance of actually receiving the records requested.

> While the improvement is encouraging, it is nevertheless unacceptable that a requester under PAIA has only a 50% chance of actually receiving the environmental records requested.

In general, government departments are still overly concerned with protecting the commercial information of third parties (PAIA's section 36: Mandatory protection of commercial information of third party). Requests are refused on this ground without the department properly interrogating the meaning of section 36, and without the department providing proper reasons for the refusal, other than to quote the wording of section 36.

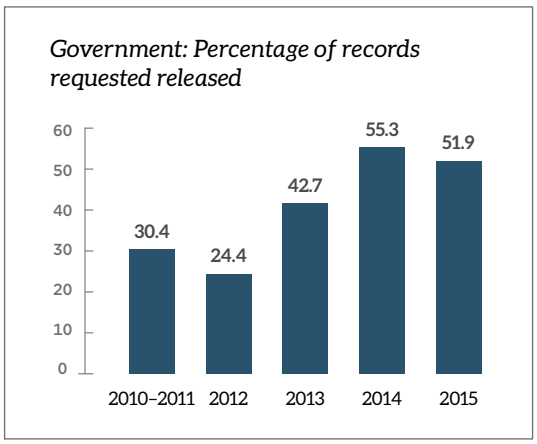
South Durban Community Environmental Alliance and Vaal Environmental Justice Alliance v eThekwini Metropolitan Municipality

VEJA and SDCEA, represented by the CER, launched legal proceedings in April 2015 in the KwaZulu-Natal High Court to compel the eThekwini Metropolitan Municipality to release the atmospheric emission licences and compliance reports of two south Durban refineries.

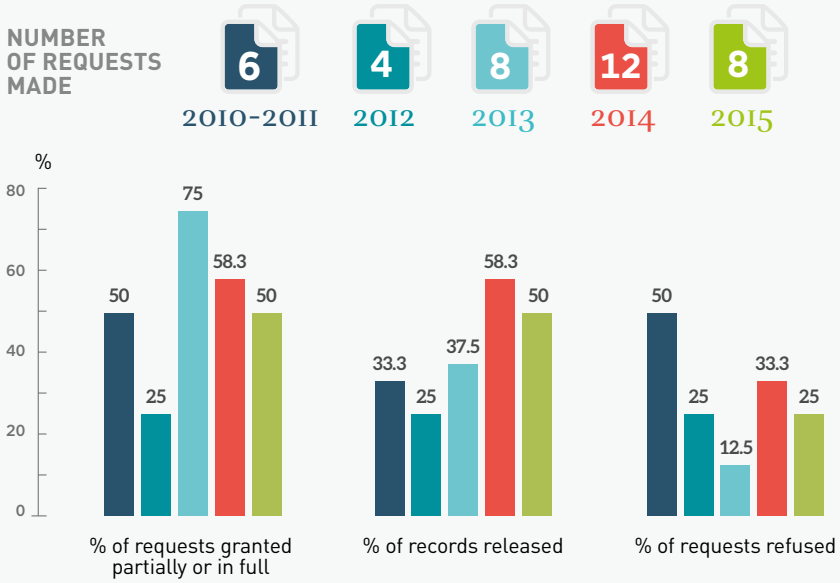
eThekwini had refused requests for these records for the Engen refinery and the Sapref refinery in south Durban in terms of PAIA, arguing that they constituted commercial information of the refineries. The Municipality claimed that the records contained trade secrets; or financial, commercial, scientific or technical information, which – if disclosed – would be likely to cause harm to the financial or commercial interests of Engen and Sapref; or that the information was supplied in confidence and its disclosure could put Engen and Sapref at a disadvantage or prejudice them in commercial competition. Internal appeals of these decisions were refused.

As at date of publication, this matter was still on its way to a court hearing.

Government departments also over-use the third party notification procedure, causing unnecessary delay in disclosure. While third parties to whom the record relates should be notified of the request when the record might be a record protected from disclosure (such as commercially sensitive information or confidential information), we see departments giving third party notices as a "knee-jerk" response – and even when the information requested is quite clearly not protected from disclosure in terms of PAIA. Moreover, we see departments take the view that they are obliged to refuse the request if the third party objects to the release of the records. This is an incorrect interpretation and application of PAIA, which requires the holder of the record to make an independent assessment.



Department of Environmental Affairs



The Department of Environmental Affairs (DEA) retains its good record in the implementation of PAIA. Aside from the fact that the DEA makes frequent use of the additional 30 days to process requests, its Chief Directorate: Legal Services appears to have enough staff and the skills to respond to requests, and there were accordingly no deemed refusals in the 2014–2015 period.

The CER received useful information from the DEA in 2015, including:

- The terms of reference for the Multi-Stakeholder Reference Group for the Highveld Priority Area, declared as a priority area to address the poor air quality on the Mpumalanga Highveld. Our clients, the Highveld Environmental Justice Network, have used this information to propose improvements to the functioning of this Group.
- A list of new proposed independently-owned coal-fired power stations for which environmental authorisations have been granted, or for which environmental authorisation applications are underway.

We have, for example, used this information in our submissions to Parliament on South Africa's climate change commitments.

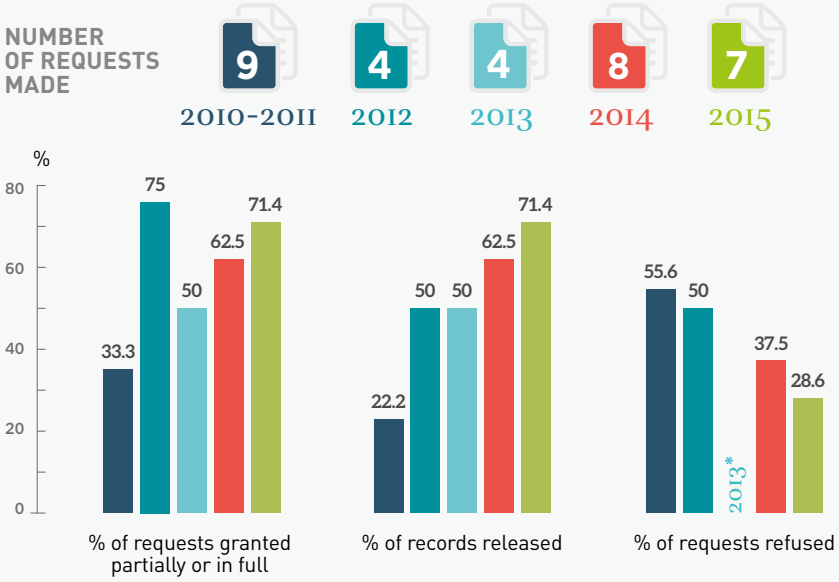
- The results of compliance monitoring undertaken by the DEA in respect of the environmental authorisation issued to the then Department of Water Affairs for immediate and short-term interventions and treatment of acid mine drainage in the western, central and eastern basins of the Witwatersrand gold fields. Our client, Federation for a Sustainable Environment, has used this information to raise public awareness of the ongoing pollution caused by the discharge of acid mine water only partially treated by authorities (Departments admit to acid water slip-up, *Mail & Guardian*, 28 August 2015[4]).

- Records confirming the identification of land at ArcelorMittal's Vanderbijlpark Works as an investigation area in terms of Part 8 of the National Environmental Management: Waste Act (Contaminated Land). This information is relevant to our client the Vaal Environmental Justice Alliance's ongoing campaign for environmental justice and improved environmental quality in the Vaal Triangle.

The CER is impressed by the quality of the affidavits provided by the DEA in 2015 in instances where information could not be found or did not exist. The affidavits received were sufficiently detailed and properly commissioned.

The DEA published an updated PAIA Manual in September 2015, which is available on the department's website at: https://www.environment.gov.za/sites/default/files/docs/accessinformation_promotionact_manual.pdf.

Department of Water and Sanitation



NOTE: **Although this column reflects 0% refusal, it should be noted that one request, which was pending at the end of 2013, was only deemed to have been refused in 2014.*

The Department of Water and Sanitation (DWS) has shown significant improvement in the processing of PAIA requests in 2015. Capacity in the department's Legal Services Directorate appears to have improved, and several officials appear to be jointly working to process requests. This is a vast improvement from the situation reported on in our 2014 report, *Money Talks*, where we criticised the DWS for their poor record-keeping and the severely constrained capacity in their Legal Services Directorate.

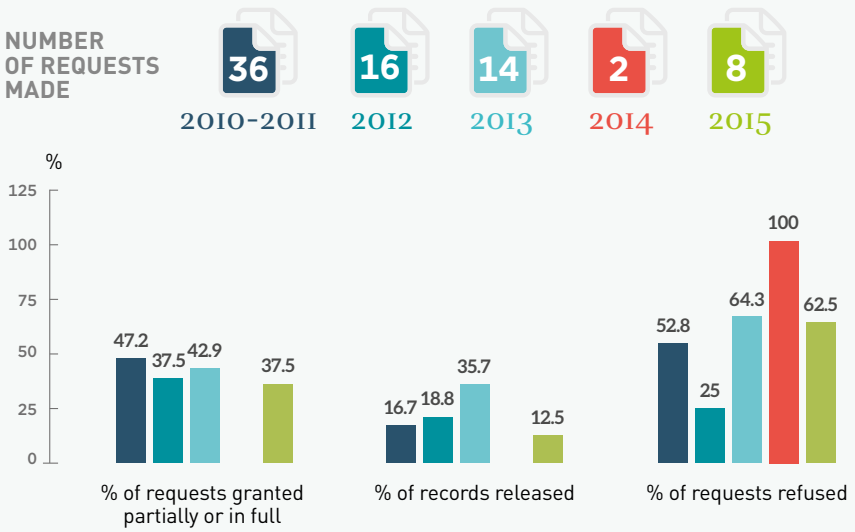
The CER has obtained valuable information from the DWS in 2015, including:

- A list of staff employed by the DWS who have received specialised training in compliance monitoring, administrative enforcement and/or criminal enforcement of the National Water Act (NWA), and a list of staff issued with a certificate of appointment as an "authorised person" under section 124 of the NWA. This information is critical in understanding the capacity of the DWS, and in campaigning for improved compliance monitoring and enforcement.
- Information regarding facilities inspected for compliance with the NWA, to whom notices and directives were issued and in respect of which criminal dockets have been opened by the DWS. This information assisted the CER to prepare our 2015 report *Full Disclosure: the truth about corporate environmental compliance in South Africa.*[5] *Full Disclosure* assesses the extent of compliance with environmental laws by 20 listed South African companies with significant environmental impacts, between 2008 and 2014, as well as the extent to which non-compliance with environmental laws was disclosed by these companies to their shareholders. The information obtained from the DWS through PAIA was crucial for *Full Disclosure*, since the DWS does not yet annually publish a report similar to the Department of Environmental Affairs' National Environmental Compliance and Enforcement Reports (NECERs), which reports on inspections conducted by Environmental Management Inspectors and enforcement action taken against companies found to be in non-compliance with environmental laws.

The DWS published an updated PAIA manual on 27 October 2015 (available at: www.gov.za/sites/www.gov.za/files/39330.pdf). This manual continues to list water use licences issued under the NWA as "automatically available" (in other words, without a PAIA request), but makes this availability subject to third party notification in terms of section 47 of PAIA. This is at odds with section 15 of PAIA.

The CER wrote to the DWS on two occasions recommending that this third party notification requirement be removed in the next version of the DWS' PAIA manual so as to ensure compliance of the DWS' PAIA manual with the provisions of PAIA. We did not receive any response from the DWS, and it is now clear that this recommendation has been ignored. However, three other recommendations were made in our June 2015 representations to the DWS, and these have been accepted. In line with our recommendations, the DWS PAIA manual now provides for the automatic availability of water use licence applications, audit and compliance reports submitted to the DWS by licence holders, and copies of delegations of power.

Department of Mineral Resources



The Department of Mineral Resources (DMR) continues to be a poor implementer of PAIA. Deemed refusals (where the DMR fails to respond) appear to be on the rise again, with no response to five out of the eight PAIA requests submitted to the DMR in 2015, and no response to one of the two requests submitted in 2014 (the other was refused). Previously, deemed refusals had come down from 44.4% in 2010–2011 to 14.3% in 2013.

The one internal appeal submitted by the CER to the Minister of Mineral Resources in 2015 under PAIA has also been met with no response. The majority of our internal appeals under PAIA submitted to the DMR in the 2013–2014 period also remain unanswered.

Of the three requests in 2015 which were not ignored, two were granted, and one was partially granted and partially refused. The CER has only received the information from one request granted, and continues to follow up in respect of the other grant and partial grant. This outstanding information is housed by the Mpumalanga regional office of the DMR, which appears to have been paralysed by an office relocation. An official at the Mpumulanga regional office told a CER attorney that all their files were in sealed boxes at their new premises, while the regional office staff were still at the old premises awaiting instructions to move to the new premises. This had been the situation for four months (end May to September 2015). Towards the end of October 2015 we received correspondence suggesting that this situation had changed, but as at the date of publication of this report we still await the receipt of the outstanding information. We have been unable to engage with the relevant officials telephonically, and our recent follow-up emails have also gone unanswered.

The DMR released an updated PAIA manual in 2014, which is available on its website at: http://www.dmr.gov.za/public-access-to-information-act/summary/204-paia/950-english-promotion-of-access-to-information-act-paia-manual-2014.html.

Conservation South Africa v Director General: Department of Mineral Resources and five others

Conservation South Africa (CSA), represented by CER, launched an application to compel the DMR to produce documents (including amendments to financial provision) in relation to the transfer of mining rights by De Beers Consolidated Mines (De Beers) to a subsidiary of TransHex Limited. The mining rights are in respect of the Namaqualand mines in the Northern Cape Province. The DMR refused the PAIA request on the grounds that the information sought was commercial information of a third party (section 36 of PAIA).

After a two and a half year-long battle fought primarily by De Beers, the Western Cape High Court confirmed on 16 September 2015, in an order by agreement, that the Minister of Mineral Resources and the DMR must provide those records requested to CSA. The order included the High Court setting aside the DMR's refusal of CSA's requests for access to information in terms of PAIA and setting aside the Minister of Mineral Resources' deemed refusal of the internal appeals lodged against the DMR's refusals. It also included the High Court ordering the Minister, the DMR and De Beers to pay CSA's legal costs.

The documents in question are expected to provide insight into information provided to the DMR by De Beers in substantiation of the reduction of the amount of financial provision funding for environmental rehabilitation at Namaqualand Mines prior to the sale to a TransHex subsidiary – a reduction that is reportedly as much as 70%.

The requested documents include the record of decision by the Minister of Mineral Resources consenting to the transfer of the relevant mining and prospecting rights to TransHex. This ministerial decision should have been, but was not, subject to public participation by interested and affected parties.

The South African Human Rights Commission's Annual PAIA Report for 2013–2014 (SAHRC Report) indicates that the DMR submitted its required report on PAIA to the SAHRC within the requisite time period. According to the DMR, it received a total of 686 PAIA requests in the 2013–2014 cycle (in comparison to 510 in the 2012–2013 cycle). Of the 686, only 71 were refused in full (in comparison to 325 out of the

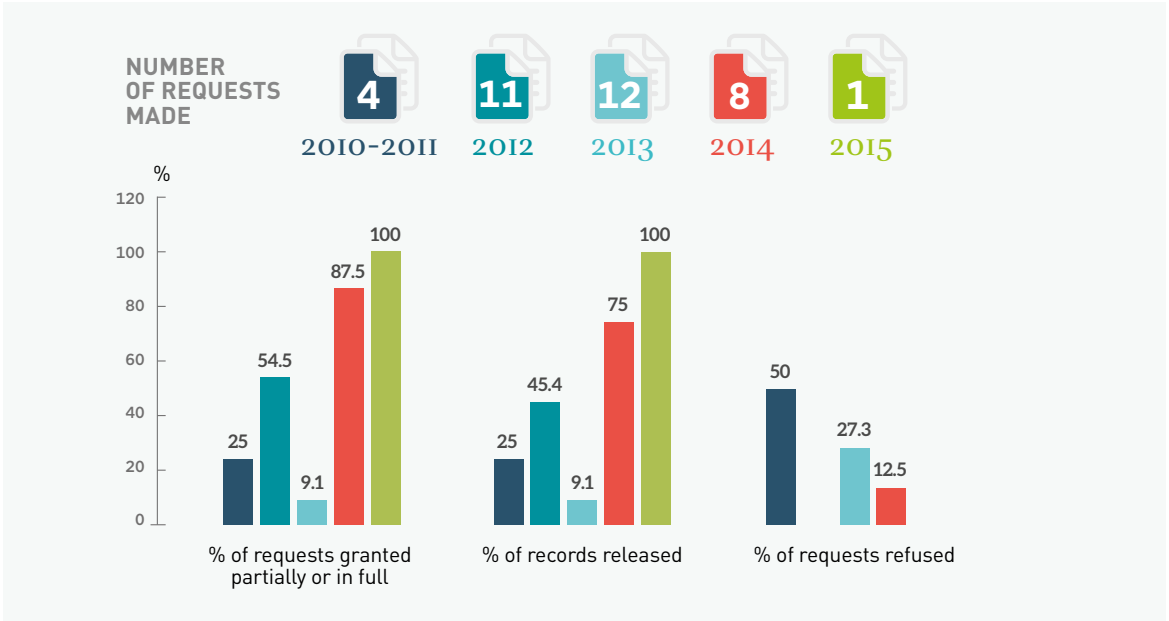
510 in the 2012–2013 cycle). 509 out of the 686 were apparently granted in full (in comparison to 152 out of the 510 in the 2012–2013 cycle). The DMR reports that there were no instances where an extension of time in terms of section 26(1) of PAIA was required. According to the DMR, only six internal appeals were received, no documents were granted as a result of these appeals (one of which remained pending), and only one application to court against the DMR was instituted.

There are serious discrepancies between our own records and the figures provided to the SAHRC by the DMR. For example:

- The CER submitted 12 internal appeals to the DMR during 2013–2014. The DMR however, reports that only six were submitted in total for the 2013–2014 period.
- While it may be correct that the DMR does not often request extensions of time, the reason for this is not that requests are being processed within the 30-day time period prescribed by PAIA, but rather that they are simply being ignored altogether.
- The DMR's seemingly high number of requests "granted in full" is also at odds with the CER's experience. The DMR continues to "grant" access to documents requested without an understanding of whether or not the documents actually exist or can be found. Access to documents housed in a regional office will be "granted" by the national office, whereafter the requester will be told to follow up with the regional department for the "production of the records". Actually receiving the documents then becomes another challenge: this can take months, or never happen at all.

Much of the DMR's failure to implement PAIA could be remedied by a more strategic approach to proactive disclosure of records that should in any event be in the public domain. The CER and many other civil society and community organisations have long called for the DMR to make all records evidencing rights granted, as well as environmental management programmes and social and labour plans authorised by the DMR, available in a public online register.

Municipalities

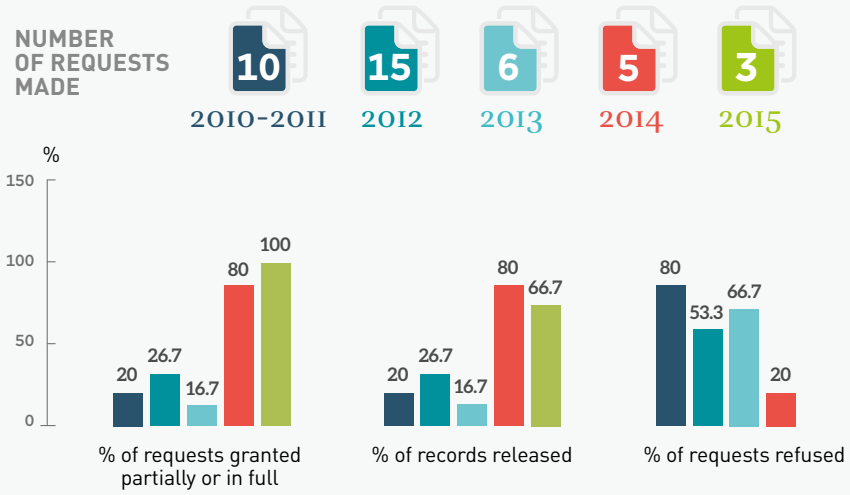


The performance of municipalities in response to requests for access to information varies considerably. While some municipalities take their PAIA performance seriously and are well capacitated to handle

requests, most notably the City of Cape Town and the Ekurhuleni Metropolitan Municipality (in the CER's experience), other municipalities are completely at a loss when it comes to processing requests.

In our experience, 2014 and 2015 were good years for transparency in environmental governance in municipalities. Of the nine requests submitted, the information requested was received in seven instances.

Private bodies: general trends



Private bodies generally demonstrate a better understanding of PAIA and have more resources and capacity available to ensure compliance with PAIA timeframes and provisions – particularly private bodies with dedicated legal departments.

2014 was our best year for transparency in the private sector, with information released pursuant to four out of the five PAIA requests submitted. 2015 has also been a relatively good year, with information released in two out of the three instances.

The one instance in which information was not released in 2015 was a somewhat complicated one. The CER requested a copy of Lonmin's atmospheric emission licence for Western Platinum Limited and copies of its annual emission reports. The request was granted and the CER was levied an access fee of R761,30. The CER had also requested the same information from the Ekurhuleni Metropolitan Municipality. The Municipality provided the information, levying an access fee of only R80. The CER discovered that two of the documents requested were not on the CD provided by the Municipality, and requested that Lonmin provide access to those missing documents only. Lonmin ignored this request, despite a number of follow-up attempts.

Notwithstanding the poor response from Lonmin in 2015, the 2014–2015 private entity PAIA results show a significant improvement from 2013, a year in which six PAIA requests were submitted to private bodies and information was only released in respect of one of these requests.

Vaal Environmental Justice Alliance v ArcelorMittal South Africa

The CER represented the Vaal Environmental Justice Alliance (VEJA) in a case against ArcelorMittal South Africa (AMSA). VEJA had been trying to access environmental records related to AMSA's Vanderbijlpark and Vereeniging plants for a number of years. VEJA submitted a number of PAIA requests for this information. These requests were refused by AMSA on the basis that VEJA does not require the records for the exercise or protection of any rights.

As reported in *Money Talks*, judgment was handed down in the South Gauteng High Court on 10 September 2013. AMSA's arguments were rejected and AMSA was ordered to deliver the records to VEJA. We reported that AMSA was granted leave to appeal the judgment and that the matter was headed for the Supreme Court of Appeal.

In a hard-hitting judgement handed down on 26 November 2014, the Supreme Court of Appeal ordered AMSA to release various environmental records to VEJA (including its so-called environmental master plan), and to pay the communities' legal costs. The SCA made a number of critical findings in relation to AMSA's lack of good faith in its engagement with VEJA and the discrepancies between AMSA's shareholder communications and its actual conduct. The SCA also emphasised the importance of corporate transparency in relation to environmental issues, stating that "Corporations operating within our borders... must be left in no doubt that, in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced".

This case marks the end of more than a decade of struggle for VEJA to access the infamous environmental master plan, which was handed over to VEJA on 17 December 2014. On 22 June 2015, the CER assisted VEJA to make copies of the master plan available to the public. Work continues on this matter.

ENDNOTES

1 January 2010 to September 2015.

2 Section 26 of PAIA allows public bodies to extend the period of 30 days once for a further period of not more than 30 days.

3 While redaction is a useful tool, and receiving a blacked-out record is much better than not receiving the record at all, information cannot simply be redacted without reason. PAIA requires that the basis for redaction must be explained and adequate reasons must be supplied to the requester.

4 http://mg.co.za/article/2015-08-27-departments-admit-to-acid-water-slip-up/

5 www.cer.org.za/full-disclosure

Other publications from the CER's Transparency programme:

- **Unlock the Doors:** How greater transparency by public and private bodies can improve the realisation of environmental rights (Centre for Environmental Rights, April 2012)
- **Barricading the Doors:** The latest on our work on transparency in environmental governance in South Africa (Centre for Environmental Rights, February 2013)
- **Turn on the Floodlights:** Trends in disclosure of environmental licences and compliance data (Centre for Environmental Rights, March 2013)
- **Money Talks:** Commercial interests and transparency in environmental governance (Centre for Environmental Rights, November 2014)
- "How increased transparency in the mining sector would facilitate the realisation of environmental rights" by the CER's Tracey Davies and Li-Fen Chien for *In Good Company? Conversations around transparency and accountability in South Africa's extractive sector* (Open Society Foundation for South Africa, 2015)

The CER is a member of the Promotion of Access to Information Civil Society Network, and we thank all our network partners for their collaboration and support.

The Centre for Environmental Rights is an environmental rights law clinic, and we assist communities to defend their right to a healthy environment, by advocating and litigating for transparency, accountability and compliance with environmental laws.

Supported by the Open Society Foundation for South Africa.

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