

A framework towards the implementation of freedom of information legislation in South Africa

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Abstract

Purpose – The purpose of this study was to investigate a framework for the implementation of freedom of information (FOI) legislation in South Africa, against Article 19's nine principles of FOI legislation.

Design/methodology/approach – This qualitative study used semi-structured interviews to collect data from six experts selected by means of the snowball sampling technique and content analysis. The study used a modified Delphi design consisting of two rounds of interviews.

Findings – The results showed that little effort is made by government officials to demonstrate commitment to the implementation of FOI legislation.

Practical implications – The passing of FOI is expected to reduce corruption, increase public participation, reduce the level of secrecy and increase transparency and openness. This is not the case as the implementation of this socioeconomic right in South Africa is faced by numerous challenges, such as a lack of political will, secrecy laws providing for the opposite of what the FOI legislation seeks to achieve, poor legislative interpretation and a lack of clear policies. The study proposes a framework aimed at addressing these challenges.

Originality/value – The study provides a framework for the implementation of FOI legislation. The framework was developed under the guidance of Article 19 principles of freedom of information legislation.

Keywords Freedom of information, South Africa, Article 19 principles, Democracy, Public participation, Openness

Paper type Research paper

Introduction

The importance of freedom of information (FOI) in realising democracy and public participation cannot be overemphasised. One cannot discuss the gains of democracy and public participation without highlighting the need for transparency and accountability. As Ezema (2023) stated, open government is fundamental to the functioning of a healthy democracy. FOI provides mechanisms that members of the public can use to hold those in public office accountable (Mabillard and Keuffer, 2022; Nkwe and Ngoepe, 2021). Democracy can only function when citizens are fully informed about the decisions taken by the government, to allow proper scrutiny to take place (Nwoke, 2019). As Meyer-Resende (2011) would attest, ordinary members of the public must access sufficient information about transactions, and they must have wide public access to official records, to hold the authorities accountable. In short, democracy and public participation rely on the existence of informed citizenry (Mason *et al.*, 2018).

As many countries around the world adopt open government initiatives to enhance transparency, accountability and public participation, there are scholars (Oni *et al.*, 2022; Duncan *et al.*, 2023) who believe that FOI laws are instrumental in achieving the same goal. The Open Government Partnership (OGP) uses

FOI as one of the core eligibility criteria for countries to join the organisation [Open Government Partnership (OGP), 2021; Open Government Partnership (OGP), 2023]. According to Open Government Partnership (2021), countries such as Argentina and the USA leveraged FOI legislation to build a growing open data infrastructure. Like other countries in the world, South Africa has been developing information infrastructure to enhance connectivity, digital access and technology capabilities. Some of the initiatives aligned to the principles of National Information Infrastructure in South

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Africa include broadband connectivity, innovation hubs and e-government initiatives (Kekana, 2013).

Although the sharing of information has been practised for a very long time, the first FOI law was passed in Sweden in 1760 (Banisar, 2006). Sweden succeeded in laying the groundwork for the world's FOI, and other countries followed suit. For example, Finland's design of its legislation was influenced by its neighbour, Sweden. Lemov and Jones (2018) categorised the worldwide adoption of FOI into three waves: the early adopters (Sweden, Finland and the USA), the post-Cold War openness era (Hungary and Bulgaria) and, lastly, the openness revolution (India, Mexico and Tunisia). Today, more than 125 countries have adopted FOI legislation [United Nations Educational, Scientific and Cultural Organization (UNESCO), 2019]. In Africa, only 25 of 54 countries have passed laws that give citizens the right to access public information (Network of Freedom of Information Advocates, 2017).

In most countries, legislation on access to information is conceptualised by the constitution, which provides for the enactment of a specific law, outlining in detail how access to information can be promoted. For example, Sections 61 and 62 of the Zimbabwe Constitution of 2013 provide the people of Zimbabwe with the guarantee of access to public information. Section 62(4) of this Constitution further provides for the enactment of the legislation to give effect to the constitutional right of access to information. Nigeria followed a similar approach, and their FOI law is an expansion of section 39(1) of the country's constitution (Madubuike-Ekwe and Mbadugha, 2018). This has also been the case in South Africa, since the Promotion of Access to Information Act (Act No. 2 of 2000) (PAIA) was passed to give effect to section 32 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution). Although Khumalo *et al.* (2016) argued that there is a sharp contrast between the PAIA and the Constitution as PAIA includes restrictions whereas the Constitution does not.

Despite the passing of PAIA in South Africa, it was observed that there are still gaps relating to its implementation, resulting in the intention or general objectives for which the legislation was passed, not being met (Nkwe and Ngoepe, 2021). Makhura and Ngoepe (2006) and Mutula and Wamukoya (2009) identified the records management system as a contributor to the poor implementation of the FOI legislation. Neuman and Colland (2007) asserted that the implementation of FOI legislation is experiencing challenges such as changing people's mindsets, a lack of capacity for record-keeping, training incentive systems and assigning responsibility for oversight mechanism. Some of the challenges are explicitly explained by the South African Human Rights Commission (SAHRC) every year in their PAIA reports. For example, in the 2019/20 PAIA report, the SAHRC reported that a challenge affecting the full implementation of PAIA is a lack of compliance with the National Archives and Records Service of South Africa Act (Act No. 43 of 1996) (NARSSA Act). In terms of the NARSSA Act, public entities are required to undertake the following: use the approved records classification system, obtain authorisation for the disposal of records, appoint a records manager and conduct records inspections regularly.

According to the South African Human Rights Commission (SAHRC) (2020), some of the challenges regarding the implementation of, and compliance with, the legislation

included its interpretational issues, inadequate operational readiness to implement PAIA effectively and culture of secrecy. Relly (2011) postulated that scientific evidence suggests that secrecy is linked to corruption in Africa. In Sierra Leone, public officials are under oath not to divulge any information without the approval of the senior official (Svard, 2017).

The purpose of the study was to investigate a framework for the implementation of FOI legislation in South Africa against Article 19's nine principles of FOI legislation. Although the PAIA is regarded as the best FOI legislation in Africa (Khumalo *et al.*, 2016; Ngoepe and Mojapelo, 2022), against which other countries can benchmark their own legislation (Berliner, 2017; Peekhaus, 2014; Miriyoga, 2011), evidence suggests that the country is still struggling with its implementation as a result of the traditional legislation inherited from colonial masters aimed at depriving locals of the rights of access to information. Repressive laws such as the Protection of Information Act (Act No. 84 of 1982) (PIA) and the outdated Minimum Information Security Standards are still in use in the country, irrespective of the fact that they, arguably, advocate against what the FOI law seeks to achieve. This has also been observed in Nigeria through the use of the Official Secrets Act (Act No. 29 of 1962), which prohibits people from revealing official facts (Nwoke, 2019).

Brief background of freedom of information in South Africa

South Africa has a rich history on FOI in general. For one to understand the FOI in South Africa, it is necessary to take a closer look at its historical development. This section puts things into perspective by discussing the history of FOI in South Africa and the latest developments since the enactment of PAIA. South Africa arose from a government system that was founded on the division of the country based on racial groups. The apartheid system, which was declared by the United Nations (UN) as a crime against humanity, was spearheaded by the National Party (NP). Immediately after winning the 1948 elections, the NP introduced laws that sought to divide people according to their racial groups. Several pieces of legislation were adopted as an effort to systematically restrict access to government information. Some of the legislation passed by the NP to restrict the free flow of information included: the Suppression of Communism Act (Act No. 44 of 1950); the Internal Security Act (1950), the Public Safety Act (Act No. 3 of 1953), the Publications Act (Act No. 42 of 1974) and the PIA.

South Africa attained democracy in 1994 after the general elections that saw the African National Congress emerging victorious. The new democratic dispensation resulted in the widely celebrated Constitution. In its preamble, the 1996 Constitution gives the assurance that it remains the most critical tool to "lay the foundation for a democratic and open society in which government is based on the will of the people" (South Africa, 1996: 1). As part of the redress, the Constitution gave birth to the Bill of Rights, which enumerates all human rights that the state is expected to safeguard and promote, including the right of access to information. The Bill of Rights remains one of the most important and celebrated aspects of the Constitution, because it sought to ensure equal protection of all human, socioeconomic and civil rights, regardless of race, gender, sexual orientation, disability and other factors

previously used by the apartheid government to foster discrimination (Dimba and Calland, 2003). As indicated earlier, PAIA was passed to give effect to Section 32 of the Constitution.

To South Africans, PAIA is one of the most important tools to reverse secrecy and injustices of the past; however, its implementation is still limping (Marais *et al.*, 2017). Since PAIA was passed, some of the notable developments observed thus far include: the National Information Officers Forum conference and the Golden Key Awards; the establishment of the Information Regulator in terms of the Protection of Personal Information Act (POPIA); several court cases that continue to provide a clear interpretation of the Act; the hosting of the continent's first information conference of the International Conference of Information Commissioners from 10 to 14 March 2019 in South Africa under the theme "International cooperation to strengthen public access to information"; an online portal for the registration of information officers (IOs) and deputy information officers (DIOs); and other portals that form part of the open data initiatives such as online budgeting data, open data toolkit and environmental geographic information system (South Africa, 2020).

Conceptual framework

Adom *et al.* (2018) defined a conceptual framework as a researcher's explanation of how a research problem would be explored. A conceptual framework helps the researcher to visualise the display of how ideas through concepts in a study relate to one another within the theoretical framework (Grant and Osanloo, 2014) and how the relationship of concepts affects the investigated phenomenon (Ngulube *et al.*, 2015).

The Article 19 principles of FOI were used to inform the objectives of the study. In the context of the current study, these principles are referred to as the Article 19's principles. Article 19 is a leading international human rights non-governmental organisation (NGO) based in London, from where it advocated for freedom of expression. Article 19 (2016) confirmed that the principles were endorsed by the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression of the UN Commission on Human Rights. The principles were further endorsed by the Organization of American States' Special Rapporteur on Freedom of Expression in the 1999 Report, Volume 111 of the Report of the Inter-American Commission on Human Rights. Table 1 provides a summary of Article 19's nine principles of FOI legislation. A comprehensive description of these principles is provided in the Appendix Table A1.

Problem statement

The passing of FOI legislation symbolises a commitment to promote democracy and public participation. However, this is not the case in South Africa, as the enactment of PAIA has not translated into democracy and public participation because there is overwhelming evidence suggesting the poor implementation of the legislation. Most marginalised South Africans do not enjoy the right of access to information because of numerous factors such as a lack of awareness, interpretational issues, inadequate resources, a culture of secrecy, laws inherited from the apartheid government, poor record-keeping and a lack of political will

(Mutula, 2006; Odinkalu and Kadiri, 2014; OAsogwa and Ezema, 2017). These challenges are cited every year in the PAIA annual report produced by the SAHRC (and now the Information Regulator) with little hope for change. Whether the Information Regulator South Africa (IRSA) would be able to address these challenges is a matter still to be tested. Numerous national, regional and international interventions were made, including policy development to promote the implementation of the legislation, but little has changed. For example, the joining of the OGP, the establishment of IRSA (as mentioned earlier), the signing of The Global Principles on National Security and the Right to Information (The Tshwane Principles) and the development of Model Law on Access to Information for Africa have not brought any change. Even though South Africa was the first country to pass FOI legislation in Africa, discussions about the law's subpar implementation continue to rise even after more than 20 years since the legislation was first adopted (Marais *et al.*, 2017). This continuous poor implementation of the legislation translates into a lack of accountability, transparency and good governance, which are the critical components of democracy and public participation. The poor implementation of the PAIA negatively affects marginalised communities whose rights are violated every day.

Research purpose and objectives

The purpose of the current study was to investigate a framework for the implementation of FOI legislation in South Africa against Article 19's nine principles of FOI legislation. The specific research objectives for the study were to:

- analyse FOI legislation to determine its alignment with Article 19's nine principles;
- evaluate the policy instruments and processes that are considered to be key for the implementation of FOI legislation;
- describe the FOI legislation implementation model adopted by South Africa; and
- propose a framework to foster the implementation of FOI legislation.

Research methodology

This modern Delphi study used a qualitative research approach, which was selected because it allowed the researcher to study the phenomenon thoroughly from the "perspective of insiders". The data were collected through two rounds of interviews conducted with the six experts (participants) who were selected using the snowball sampling technique and also through the analysis of various documents such as legislation, strategic plans, reports, policies and procedures. As the Delphi study deals with multiple rounds of interviews until consensus is reached, the researcher only reports on general consensus which incorporates views from both rounds. To increase the study's validity, experts were selected from diverse fields of study such as legal industry, strategic management, library and information service and also archives and records management. Furthermore, the use of two rounds of interviews helped to increase the concurrent validity. A study by Ngwenya and Ngoepe (2022) used five experts who were chosen purposively to explore data trust in Consumer Internet of Things assemblages in the mobile and fixed telecommunication

Table 1 Article 19 principles of FOI legislation

No.	Name	Principle
1	Maximum disclosure	"Freedom of information should be guided by the principle of maximum disclosure"
2	Obligation to publish	"Public bodies should be under an obligation to publish key information"
3	Promotion of open government	"Public bodies must actively promote open government"
4	Limited scope of exception	"Exceptions to the right to access information should be clearly and narrowly drawn and subject to strict harm and public interest tests"
5	Process to facilitate access	"Request for information should be processed rapidly and fairly and an independent review of any refusal should be available"
6	Cost	"Individuals should be deterred from making requests for information by excessive costs"
7	Open meetings	"Meetings of public bodies should be open to the public"
8	Disclosure takes precedence	"Laws which are inconsistent with the principles of maximum disclosure should be amended or repealed"
9	Protection of whistle-blowers	"Individuals who release information on wrongdoing – whistle-blowers – must be protected"

Source: Table created by the author with the guidance of Article 19 Principles

operators in South Africa. [Saunders \(2009\)](#) used 13 information literacy experts to explore the future of information literacy in academic libraries.

Document analysis is a detailed and systematic analysis of the documents of a particular organisation with the aim of identifying key areas, themes or the loopholes ([Morgan, 2022](#)). The researcher selected key documents to be analysed and performed the category construction based on the data's characteristics to highlight key themes pertinent to the study. Experts in the current study were selected in line with the following criteria: someone who has taken an active role locally, regionally or internationally in the area of FOI; published several peer-reviewed research papers in the area under investigation; presented several papers at national or international conferences; may be a human rights lawyer, social activist, academic, information professional or public representative or figure. To gather information from diverse disciplines, experts in the following fields were chosen: law, records management, library and information management, strategic development, media and journalism. Triangulation in this study helped to ensure that the researcher addressed all key concerns that would have been overlooked if only one method of data collection had been used. Semi-structured interviews were used, and the participants were selected through the snowball sampling technique. In terms of ethical considerations, the researcher obtained ethical clearance from the University of South Africa (UNISA). The researcher adhered to the ethical guidelines provided by UNISA's research ethics policy of 2013, which seeks to protect the rights of human participants.

Findings and discussions

The interview data was supplemented with data obtained from documents. The following documents were analysed: legislation; policies and procedures; reports; literature; and service charters.

Alignment with Article 19's nine principles

The first research objective dealt with the alignment of the FOI legislation to Article 19's principles. The researcher used document analysis to address the research objective. The study found that the FOI legislation in South Africa did not meet some of the basic requirements of the Article 19 principles. It is worth

mentioning that several scholars consider South Africa's PAIA to be a golden standard against which access to information law can be measured ([Khumalo et al., 2016](#); [Mojapelo, 2023](#)). With this being the case, it can be concluded that the legislation was inadequately drafted. Perhaps, South Africa can learn from countries such as Serbia in terms of how Article 19, through legal analysis, contributed to the development of FOI legislation. Serbia's FOI legislation is now regarded as the strongest in the world ([Berliner, 2016](#)). The study discovered that while some areas or sections of the legislation are commendable, it also discovered that there is a need for legislative review to close the identified loopholes. Although the legislation does not need to be identical to the principles ([Berliner, 2016](#)), some fundamental elements proposed by the principles must be included in the legislation to meet international standards. Noteworthy, some of the elements proposed by the principles are covered by other legislation and not necessarily by the FOI legislation. For example, issues concerning whistle-blower protection, as proposed by Article 19 principles, are addressed by Protected Disclosures Act (Act No. 26 of 2000), and not by PAIA.

There is overwhelming evidence that failure regarding the implementation of the FOI legislation is sometimes caused by legislative loopholes. For example, the study found that, after realising that POPIA and PAIA were poorly implemented in South Africa, civil society organisations (CSOs) made several recommendations on how FOI can be strengthened. One of the proposals was to include the establishment of the IRSA in the POPIA. A similar case was found in Uganda, where there is an outcry among citizens about the implementation gap in the FOI legislation ([Adu, 2018](#)).

On a positive note, it has been discovered that several sections of the PAIA are commendable. For example, the PAIA provides for both the public and private sectors, which is applaudable, because the legislation recognises that information that is in the custody of the private sector can also be necessary to protect someone's rights. Compared to other FOI legislation, PAIA is described as the "regional gold standard" ([Berliner, 2017](#); [Peekhaus, 2014](#); [Miriyyoga, 2011](#)). However, because of a lack of education and awareness about the legislation, its implementation remains a challenge. In the year 2022/23, EDUCOM conducted the survey on the level of awareness regarding FOI and the study found that only 19% of the sampled population is not aware of this fundamental human right. The

IRSA may need to up its game and mobilise more resources to educate people about their rights of access to information so the legislation can be tested. Article 19's (2016) principle of maximum disclosure requires extensive training for people to be aware of the existence of legislation under which they can protect their human rights.

Policy instruments and processes for the implementation of freedom of information legislation

Participants were asked whether they know of any policies that could help with the implementation of FOI legislation. Some of the participants indicated that PAIA was sufficient and that it did not require additional policy, whereas other participants held that there was a need for additional policies to supplement PAIA. For example, participant SA1 highlighted that "there should be pulse rating of the PAIA requests, with the assistance of information technology". Moreover, SA3 concurred that the problem with the PAIA implementation was the fact that public officials just ignore information request for no reason, which had nothing to do with the adoption of a specific policy. [McKinley \(2021\)](#) concurred that 64% of the appeals submitted by the Access to Information Network were ignored by the government bodies concerned. Participants SA3 and SA5 agreed that "Batho Pele" principles can also make a meaningful contribution to the realisation of FOI. "Batho Pele", which is regarded as a service charter in South Africa, makes provision for the promotion of access to information. Perhaps that could be the reason why Participants SA3 and SA5 felt that the principles could make a meaningful contribution. However, a great concern raised by SA3 was that "Batho Pele principles are not necessarily a binding document". According to [Mnandi \(2020\)](#), the "Batho Pele" principle is just a white paper and not the legislation. SA4 and SA6 listed legislation such as the POPIA, the Public Finance Management Act (Act No. 1 of 1999) and the Municipal Finance Management Act (Act No. 56 of 2003) as pieces of legislation that could assist with the implementation of PAIA.

Based on the findings from the interviews, it is clear that South Africa lacks adequate policies and processes for the implementation of FOI legislation. In a study to investigate the implementation of access to information act in the Department of Sports, Arts and Culture in Limpopo, [Kaka \(2016\)](#) found that the department had weak or non-existent internal PAIA policies, which might be the reason why PAIA delivery was done haphazardly. The scholars emphasised the importance of policies to support the implementation of FOI legislation. It was stated that the successful implementation of FOI requires constructive policies that provide clear guidelines for role players in the information cycle. [Article 19 \(2016\)](#) also emphasises a need to develop policies to demonstrate government's commitment to publish information. South Africa can learn from Zimbabwe. Zimbabwe's Freedom of Information Act (FIA) (Act No. 1 of 2020) provides for an information disclosure policy. According to section 5 of the FIA, every public entity or information holder must have a written information disclosure policy to demonstrate a commitment to promote openness ([Zimbabwe, 2020](#)). Policies can also address victimisation issues, that have been identified

as a significant barrier to free information disclosure. According to the findings of the study, government entities rely on Section 14 manuals, whereas private entities rely on Section 51 manuals to provide access to information. Section 14 and 15 manuals cannot be as authoritative as the policy.

PAIA Section 10 guide provides a clear guideline on what public officials must do to handle information requests and to assist requestors throughout the request until a final decision is made; however, there is a need for policy at organisational level for further interpretation. The absence of policies at organisational level has a detrimental effect to the society in general because it disempowers citizens and has the potential to discourage active citizenship. Clear policies would empower citizens to demand accountability and allow them to participate in decision-making processes that will have a positive impact on the quality of the public service. Furthermore, enacting organisational policies sends a strong and clear message that the organisation is committed to disclosing information and that anyone who discloses information by following all necessary procedures will be protected and will not face any form of sanction or victimisation for legally disclosing any information. A study by [Kabata and Garaba \(2019\)](#) confirmed that the lack of FOI policies and regulations in Kenya has impacted the effective implementation of legislation.

Freedom of information legislation implementation model

The participants were asked about the institutions responsible for the implementation of FOI legislation. All participants mentioned that the Department of Justice and Correctional Services was in charge of the implementation. All the participants agreed that the IRSA was available to play an oversight role, but its powers in terms of implementation were limited. The PAIA and the PAIA guide (2021) entrust the IRSA with the responsibility of monitoring the implementation of the legislation. According to the participants, the Minister of Justice and Correctional Services is responsible for developing regulations for the legislation and ensuring its implementation. Provisions such as fees, any notice required by the Act, uniform criteria to be applied by governmental bodies when making decisions or any administrative or procedural matter may be included in the regulations ([South Africa, 2000](#)). These legislative arrangements disempower the IRSA, unlike in Zimbabwe where the Zimbabwe Media Commission has powers to develop regulations ([Zimbabwe, 2020](#)).

[Article 19 \(2016\)](#) provides that the best practice to deal with appeals is to establish an independent information commission. As stated by [Iyer \(2001\)](#), the presence of an independent and impartial commissioner to resolve disputes is one way to safeguard against administrative lethargy and ignoring of information requests. Participants were asked about their views on the independence of the IRSA. All participants agreed that the SAHRC had already laid the groundwork for IRSA. For example, SA2 indicated that "IRSA has the advantage of not starting from scratch". However, SA4 and SA6 were of the view that it was still too early to judge as the IRSA is still new. From the legal point of view, IRSA commissioners are appointed by the President in consultation with Parliament. According to [Gibaldi and Maggetti \(2010\)](#) and [Mojapelo \(2023\)](#), the

appointment of the information commissioners is another measure of independence. As observed, the appointment process is transparent, as the interviews are broadcast on national television.

Participants were asked about turnaround time. According to SA2, the waiting period might *appear* to be 30 days, but is, in fact, 60 days, because there is a provision for extension. SA3 stated that in her experience working with PAIA, public officials rarely met the 30-day deadline and would always request an extension. Timely access to information allows citizens whose rights are violated to seek recourse. The study concludes that seven days is a reasonable amount of time to wait because there should be a sense of urgency in handling requests, especially because members of the public request information for a variety of reasons. Countries such as Sweden have a 2-h waiting period. A lengthy waiting period impedes transparency and accountability.

DIOs are critical in ensuring the full implementation of FOI legislation; however, evidence suggests that the government has not prioritised DIOs delegation. Individual departments or entities make their own decisions about who can be delegated to a DIO position. DIOs are not able to perform their duties because of the following: the incumbents are not only dealing with FOI issues; a lack of resources to execute their responsibilities and DIOs are sometimes appointed at low salary levels, which limits their influence within the organisation. According to SA1, SA2 and SA4, DIOs play an important role in promoting the implementation of FOI legislation. SA3 also stated that FOI legislation is sometimes used by people who are considered “illiterate”, and that these people would require assistance to realise their rights. SA4 indicated that the critical role of DIOs is very clear, especially as prescribed by law. SA4 mentions that IOs and DIOs are important because they understand the law and can assist requestors. Furthermore, SA4 believes that public officials (particularly IOs and DIOs) would empower PAIA users to understand the law by facilitating workshops and trainings.

Courts of law are a critical component of FOI, as they hear cases that could not be resolved through appeal mechanisms (Mojapelo, 2023). The Article 19 principles provide for three levels of appeals, which are: internal, through information commissioners and in court. However, judges and magistrates have been criticised for their handling of FOI cases. For example, in a recent case in the High Court in a matter between South African History Archives (SAHA) and South African Reserve Bank, the court issued a cost award against SAHA without providing reasons (Chamberlain, 2019). This judgement did not sit well with proponents of FOI, who stated that it would discourage impoverished people from testing the legislation. According to Birkinshaw (2010), the case law of the European Union courts has been supportive of transparency and openness. Participants were asked whether they thought judges or magistrates had received adequate training to handle FOI requests. According to SA3,

There was an attempt in the past for PAIA cases to be heard at magistrate’s courts, and the SAHRC was tasked with the responsibility of training judges on the handling of PAIA cases.

According to SA3, judges in South Africa have done an excellent job in handling PAIA court cases. SA4 stated that he participated in the development of curriculum for the training

of magistrates in the year 2000, and observed that the State was doing well in training judges. On the contrary, SA5 and SA6 indicated that judges are human beings, and they are subject to errors and legal mistakes, but this does not warrant specialised PAIA training. McKinley (2003) postulated that failure of judges and magistrates to capacitate themselves through FOI training may be blamed for the poor implementation of FOI legislation because judges and magistrates are relied on to interpret and adjudicate legal appeals. According to McKinley (2003), there will always be challenges regarding the enforcement of legislation in the absence of an informed and capacitated judiciary. On the contrary, SA6 stated that it was difficult to answer the question because in South Africa, some judges are more informed than others. According to SA6, it is a matter of wanting to learn more about FOI legislation rather than receiving formal training because law school provided them with all the necessary skills to handle all types of cases.

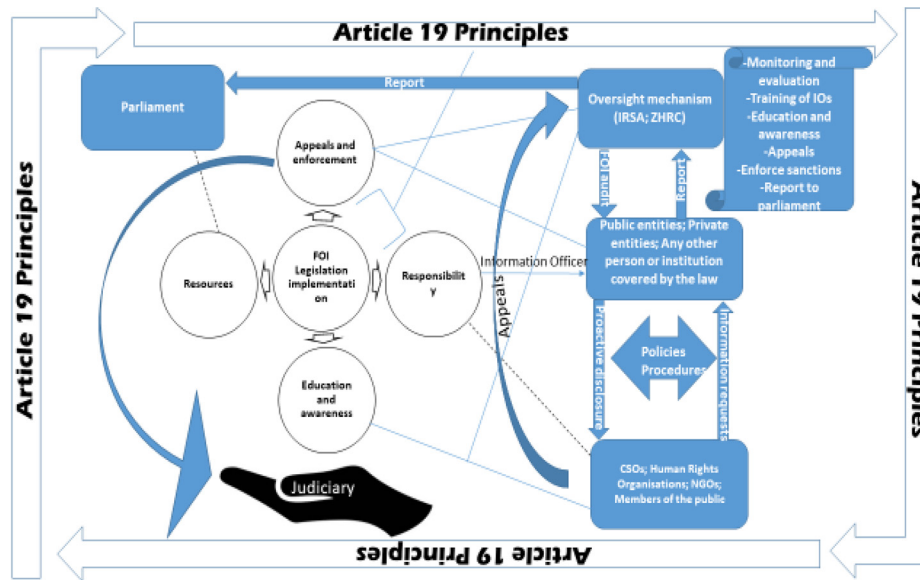
Framework to foster the implementation of freedom of information

The last objective dealt with the framework to guide the implementation of FOI legislation in South Africa.

As shown in Figure 1, the implementation of FOI legislation necessitates several elements, such as resources, clearly articulated roles and responsibilities, education and awareness, monitoring and oversight and enforcement. When the aforementioned elements are taken into account, there would be smooth implementation of PAIA. Key role players are identified in the framework. The first issue to be dealt with on the framework is the resources. The successful implementation of FOI legislation necessitates a significant investment of resources. The implementing agencies require resources such as human resource capacity and financial resources to acquire proper information management systems that allow for efficient retrieval of information upon requests. Resources are necessary to enable implementing agencies to comply with the available policies and guidelines (Khumalo and Baloyi, 2019).

The significance of DIOs cannot be overstated. As illustrated in the framework, implementing agencies, such as government departments and private entities, appoint (rather than simply delegate) dedicated personnel to handle information requests, and this individual must be appointed at senior management level so that he or she can influence policy development within the organisation. DIOs play a critical role in ensuring that requests for FOI are processed in a timely manner. Records management has been identified as a barrier to the successful implementation of FOI legislation. To support the implementation of FOI legislation, government and private entities should establish proper records management systems. Furthermore, more resources should be invested in education and training to ensure that all responsible officials understand their roles and responsibilities. Parliament can also play a role in ensuring that resources for the implementation of FOI legislation are made available. As highlighted in the framework, Parliament will also monitor if resources are spent efficiently. The other critical element of the implementation of FOI is the PAIA audit undertaken by the regulatory body. The PAIA audit, as proposed in the framework, allows the regulatory body to determine whether the report submitted by the

Figure 1 Framework for the implementation of FOI legislation in South Africa



Note: Framework adopted from author’s doctoral thesis for enhanced clarity and applicability

implementing agency accurately reflects the reality on the ground. The regulatory body will report to Parliament after the audit. In turn, the Parliament will study the report and act on the regulatory body’s recommendations.

The second important element is the appeals. Appeals cannot be avoided because they are one mechanism used by information requestors to ensure that their requests are judged fairly. It is always in the interest of justice to have a new neutral person look at the request and likely endorse or overturn the previous verdict. Internal and external appeals are both required. Internal appeals occur in government and private organisations and should be handled by the most senior member of the organisation. External appeals are handled by the IRSA. If the requestors are still dissatisfied with the oversight body’s decision, they can have their case heard in court before a judge or magistrate (as shown in Figure 1), which is provided for by PAIA.

The third important element is the responsibilities. As stated in the framework, the implementation of FOI is a collective responsibility. The implementing agencies, such as government departments, state-owned entities and private entities, are only tasked with enforcing the legislation and encouraging information disclosure, but everyone is ultimately responsible for ensuring that the legislation is fully implemented. Implementing agencies (information holders) must sometimes be pressured to implement specific pieces of legislation. If other stakeholders are not happy with how requests are being handled, they may file a complaint with a regulatory body or a court of law. As a result, CSOs and NGOs are critical in putting pressure on the government to fully implement the legislation. CSOs may also participate in public-interest litigation. The regulatory body must also examine the reports submitted by the implementing agencies and conduct annual audits to verify the information contained in the reports.

The last important element is education and awareness. For the FOI legislation to be fully implemented, education and awareness about the legislation are required. Oversight and regulatory bodies must collaborate with relevant stakeholders to ensure that both information holders and information requestors are properly trained. As previously stated, education works both ways – meaning DIOs who are in charge of processing information requests need education and training, and on the other hand, the ordinary citizens who are filing information requests also need to be workshopped about their rights and how they can use the legislation to fully realise their rights. CSOs can assist in developing material and curriculum. Members of the public will not use the legislation if they are not aware of their rights as enclosed in the PAIA.

Conclusion and recommendations

As the implementation of FOI legislation in South Africa has stalled, immediate attention is required to avoid an increase in service delivery protests as has been observed in the past. Although South Africa’s FOI legislation is regarded by several scholars as being the “golden standard”, numerous areas of concern require attention, for members of the public to be able fully to enjoy the rights of access to information from both the public and the private sectors, as prescribed by the legislation. South Africa, being a country with a high level of inequality, human rights violations, unemployment and the abuse of state resources can take the advantage of PAIA for nation building. The National Development Plan, which is the country’s vision 2030, also sees FOI as an important tool towards open, responsive and accountable public service. Processing of information requests as prescribed by PAIA is too long, which goes against the spirit of open data. Imagine an impoverished villager who must wait for 60 days to use PAIA to obtain information on why they do not have access to water, shelter and food, let alone a journalist who would want to hold public officials

accountable. The current study proposed a framework that should be very useful for addressing issues related to the implementation of FOI legislation in South Africa. The researcher developed a framework for addressing various issues by means of drawing on the problems that already exist. The roles and responsibilities of the various role players were adequately explained by the framework. The researcher argued that the implementation of the FOI is the responsibility of all key stakeholders, including government entities, CSOs, members of the public, the judiciary and regulatory bodies. A lack of policy development at organisational level is likely to continue to have a detrimental effect on the successful implementation of the legislation concerned.

The study makes the following recommendations:

- Several aspects of the legislation must be reviewed, including maximum disclosure, the process to facilitate access, the appeal mechanism, costs, open meetings and the repealing of other legislation, which is inconsistent with the FOI legislation. Some sections must be added to the legislation, as they have been omitted up to now.
- There is a need to obtain a buy-in from the politicians, as they are the final decision-makers in the legislative process. This would mean that politicians would need to be educated about the existing legislative gaps, with the shared understanding that, once they are aware of the gaps, they will be able to provide political support for the legislation to be reviewed through a smooth parliamentary process.
- Government and private entities should work together to develop FOI policies and procedures. These policies and procedures will guide how IOs and DIOs handle information requests. The policies will also aid in the protection of individuals who may face victimisation as a result of information disclosure.
- As part of monitoring compliance with FOI legislation, the regulatory body must visit the affected public bodies on a regular basis to see if there are policies and procedures in place to guide FOI legislation implementation. Public entities that lack policies and procedures should be reported to the appropriate parliamentary committee for intervention and potential sanctions.
- PAIA must make it mandatory for both public and private entities to develop access to information policies. This will provide DIOs with clear guidelines on how to interpret and implement the legislation.
- There is a need for mass education to educate political leaders about the importance of FOI. Politicians must comprehend the relationship between FOI legislation and open government. South Africa is already an OGP member in good standing and committed in the 2020/22 National Action Plan to increase citizen awareness and capacity to use all avenues available to access government information, both individually and collaboratively.

Limitations and scope for future study

The current study was limited to the implementation of FOI at national level. Government departments and state-owned entities were not involved in the study. Nkwe and Ngoepe (2021) looked at the implementation at the organisational level. This study only

involved the regulatory authority and the implementation model adopted by the national government. Future research could involve specific government entities to see how they process requests and live up to the principle of maximum disclosure.

AQ1: Please check the correctness of the affiliation/s and amend as and if necessary. AQ2: You have used “data” in both plural and singular forms in the text and we have retained your intended meaning at each instance. However if you wish to imply its singular or plural context, in particular, revisions with respect to its associated verb usage will need to be made. Please revise if necessary.

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Appendix

Table A1 Principles guiding the study: Article 19's nine principles of FOI legislation

Principle	Description
Maximum disclosure	Freedom of information legislation should be guided by principle of maximum disclosure. This means everyone should enjoy the rights of access to information regardless of their nationality
Obligation to publish	Public bodies should be under an obligation to publish specific categories of information without waiting for formal request
Promotion of open government	Public bodies must actively promote open government by undertaking public education and tackle culture of secrecy
Limited scope of expectation	Exceptions should be clearly and narrowly drawn and subject to strict "harm" and "public interest" tests
Processes to facilitate access	Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available
Costs	Individual should not be deterred from making requests for information by excessive costs
Open meetings	Formal meetings of public bodies should be open to the public. Closed meetings can be held if there is a valid reason and should be in accordance with established procedure
Disclosure takes precedence	Laws which are inconsistent with the principles of maximum disclosure should be amended or repealed
Protection for whistle-blowers	Individuals who release information on wrongdoing – whistle-blowers – must be protected

Notes: According to the Article 19 (2015), the following principles, if adhered to, will result in the successful implementation of FOI legislation, as they are regarded as globally recognised good practice;

Source: Table created by the author with the guidance of Article 19 Principles

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