



# HELENSUZMAN FOUNDATION

## Submission in response to the Promotion of Access to Information Amendment Draft Bill, 2019

30 August 2019

For attention: Mr Siyabamkela Mthonjeni  
Per email: [smthonjeni@parliament.gov.za](mailto:smthonjeni@parliament.gov.za)  
Portfolio Committee: Justice and Correctional Services

Below please find the written submission of the Helen Suzman Foundation on the Promotion of Access to Information Amendment Draft Bill, 2019

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## **Introduction**

The Helen Suzman Foundation ("HSF") welcomes the opportunity to make submissions to the Portfolio Committee on Justice and Correctional Services ("the Committee") on the Promotion of Access to Information Amendment Draft Bill, 2019 ("the Bill"). Should the opportunity arise, the HSF wishes to make oral presentations to the Committee.

The HSF is a non-governmental organisation whose main objective is to promote and defend the values of our constitutional democracy in South Africa, with a focus on the rule of law, transparency and accountability.

The work of this committee to bring the Promotion of Access to Information Act 2 of 2000 ("PAIA") in line with the judgment of the Constitutional Court in *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* (case CCT 249/17) [2018] ZACC 17 ("*My Vote Counts*") and the Political Party Funding Act No. 6 of 2018 ("Political Party Funding Act") is commendable.

However, the Bill must do more to create certainty around information requests in two ways:

- 1) By making explicit the duty on accounting officers of political parties to comply with requests for information made in terms of PAIA on the private funding of political parties and independent candidates, under the specified threshold, and
- 2) In order to allow for 1) above, create an explicit duty on accounting officers to record and preserve information on private funding of political parties and independent candidates - under the specified threshold.

This submission will aim to offer recommendations to assist the Committee in addressing these points above.

## **Purpose of the Bill**

We recognise that the impetus behind this Bill derives from the judgment in *My Vote Counts*. Our submissions will not attempt to traverse the detailed findings of the Court, except to highlight key findings in the judgment regarding the existing deficiencies in PAIA, and what the Committee can do to remedy these deficiencies.

Paragraph 1.3 of the Court's order finds PAIA invalid to the extent that it fails to provide for the recordal, preservation, and reasonable disclosure of information relating to party political funding. It is instructive that, when describing the deficiencies of PAIA, only the obligation to disclose information is qualified by *reasonableness*, whereas the duties of recordal and preservation are not qualified in this manner. We understand "reasonable" to mean "reasonably accessible" - that is, not subject to the "cumbersome" and "laborious" requirements in the form of the requests envisaged by sections 18 and 53 of PAIA.

Paragraph 1.3 of the Court's order should be read with paragraph 75 of the judgment which held:

*"How best to fulfil that obligation should be left to Parliament which bears the legislative authority of the Republic. No information on the private funding of political parties or independent candidates may be "unheld" or "unrecorded" or destroyed at the discretion of the holder and therefore undisclosable. This must however not be understood to be a definitive pronouncement on whether it would be justifiable for Parliament to include or exclude the recordal and disclosure of some information on say R10 contributions or the cleaning of offices or premises for free by one or more people."* (Emphasis added.)

This paragraph confirms that it is for Parliament to determine the precise contours of the obligation to disclose. However, the judgment in no way limits Parliament to only addressing the question of donations above the threshold. This is fully within the prerogative of Parliament, through the Committee, to determine. It is the view of the HSF that when it comes to determining duties for the accounting officers of political parties, the Committee should, in addition to pre-emptive disclosures, also cater for the scenario where information is requested using PAIA on donations below the threshold. This is to address the concerns raised by the Court itself. In following the logic of the Court in paragraph 75 of the decision, in order for an information request to be successful, the information must first, obviously, be recorded and held.

The HSF therefore proposes that the Bill be amended to remove the application of a threshold in relation to the recording and preservation of information relating to political party funding. The Committee has already, in effect, removed the risk of information not being recorded or held in the rest of section 52B (1) with the use of the word "any" when referring to donations in kind, thus imposing a clear duty on the accounting officer to keep records of all such transactions.

## Legislative suggestions:

### 1. Reference to specific disclosure amount in the Draft Bill

Section 52B (1)(a)(i) makes specific mention of the threshold amount of R100 000 when referring to the duty on the accounting officer to create and keep records. The Political Party Funding Act, however, locates the amount in the Regulations to that Act – should those Regulations be amended to change the threshold amount, the PAIA Act will be read to be enforcing a threshold amount which no longer comports with the Political Party Funding Act and will thus require an amendment.

Suggested amendment:

52B. (1) The accounting officer of a political party must —

(a) create and keep records of—

(i) the identity of and the amounts of money paid by all persons or entities to the party concerned as defined in section 1 of the Political Party Funding Act, 2018 ~~who donate more than R100 000 per financial year, and which exceeds the threshold contemplated in section 9(1) of the Political Party Funding Act, 2018.~~

### 2. Duty on accounting officer to comply with information requests - insertion of new subsection 52B(2)

Paragraphs 45 to 47 of the *My Vote Counts* decision succinctly captures the necessity of information on party party funding being held. Information must both exist and be in the possession of the accounting officer in order to be disclosed following a request - but in order for this to happen, it must first be recorded and preserved. The dicta of the Court are instructive on what it means for information to be *held*, and the importance thereof.

At paragraph 45:

*"For this reason, information on private funding must be compulsorily "held". PAIA captures "record" in sufficiently broad terms to ensure that as much information as possible in the envisaged categories is "held"."*

At paragraph 46:

*"If it were not an implicit constitutional requirement for information relating to the proper exercise of certain constitutional rights to be "recorded" and "held", it is conceivable that "another person" could easily cave in to the temptation not to hold some sensitive and potentially revealing information, or having "held" it to destroy it, so that there would be nothing available to disclose."*

At paragraph 47:

*"The loophole or leeway "not to hold" or not to preserve information and the consequential non-disclosure of information relating to private funding or quantifiable support in kind, constitutes fertile ground for undermining or even subverting the real "will of the people" that is expressible through voting."*

Suggested amendment:

(2) Subject to section 23, the accounting officer of a political party must not refuse requests for disclosure of any information relating to party political funding made in terms of this Act.

### **3. Consolidation of disclosure requirements**

This suggestion must not be read as creating a new obligation on the accounting officer. Instead it seeks to create consistency between the original subsections (1)(b) and (2) of the Bill. In our suggested amendment the new subsection (3) will be read as creating one preemptive disclosure on a quarterly basis, and renders the other time-specific disclosures as being incidental to the occurrence of the described events in the subsections which follow.

Suggested amendment:

~~(b) subject to subsection (2), on a quarterly basis make the records available on the social media platforms of the political party concerned.~~

(3) The accounting officer of a political party must ensure that the records referred to in subsection (1) are updated and made available on the official communication channels including social media platforms of the political party concerned

(a) on a quarterly basis; and

~~(b)~~ (b) at least two months prior to —

(i) an election of the National Assembly or the provincial legislature as regulated in terms of the Electoral Act, 1998 (Act No. 73 of 1998);

~~(b)~~ (ii) municipal elections as regulated in terms of the Local Government: Municipal Electoral Act, 2000 (Act No. 27 of 2000); or

~~(c)~~-(iii) a referendum as regulated in terms of the Referendum Act, 1983 (Act No. 108 of 1983).

#### **4. Narrow reference to “social media”**

The Bill specifically mentions social media as a mandatory publication platform for political parties. This narrow inclusion is restrictive in so far as political parties may not utilise social media or may employ other significant means of relaying official party communications to the public.

Suggested amendment:

(3) The accounting officer of a political party must ensure that the records referred to in subsection (1) are updated and made available on the official communication channels including social media platforms of the political party concerned.

#### **Conclusion**

This submission draws a distinction between disclosures made in compliance with the Political Party Funding Act, and compliance with information requests made in terms of PAIA. Specific references to the threshold amount may have the unintended consequence of allowing accounting officers leeway to deliberately not record or hold information, or make claims about the existence of information when requests under PAIA come their way.

While we have opted for the middle-road in so far as creating mandatory duties on the accounting officer to record and preserve information relating to donations below the threshold, we are still deeply concerned about the perverse incentives the Bill potentially creates by not making this duty explicit. The Bill has tied the creation and keeping of records to the duty to pre-emptively disclose information – we urge the Committee to consider the effect of this.

We thank the committee for this opportunity to comment on this Bill.

This submission was prepared by legal researchers Cherese Thakur and Kimera Chetty