



HELENSUZMAN FOUNDATION

Submission in response to the Promotion of Access to Information
Amendment Bill, 2019 [B20-2019]

22 November 2019

For attention: Mr Gurshwyn Dixon

Per email: gdixon@parliament.gov.za

NCOP Select Committee: Security and Justice

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

Should you have any queries, kindly contact kimera@hsf.org.za or cherese@hsf.org.za

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1. Introduction

The Helen Suzman Foundation (“HSF”) welcomes the opportunity to make submissions to the Select Committee on Justice and Security (“the Select Committee”) on the Promotion of Access to Information Amendment Bill, 2019 (“the Bill”).

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.

2. Background to this submission

The HSF has previously commented on this Bill, having submitted our written comments on 30 August 2019. We have also participated in the public hearings held on 18 September 2019 at the Portfolio Committee stage.

The HSF also prepared a second submission which was sent to the Portfolio Committee to clarify certain points of our earlier comments. It is that second submission which forms the basis of our representations to this Select Committee.

While we are encouraged that the Portfolio Committee engaged with the submissions made, and have produced an alternative Bill to the first iteration which opened for comment, it is our position that the amended version of the Bill introduces new considerations which the Select Committee will want to evaluate.

3. The current iteration of the Bill

The version of the Bill before the Select Committee incorporates two suggestions which emanated from the Information Regulator’s submissions to the Portfolio Committee. The first was that the definition of “head” should be amended to include the head of a political party and independent candidates, and the second was that the definition of “private body” be amended to include political parties. Both recommendations were supported by the Department.

3.1 The new definition of “head”

The effect of this new definition is that it imposes specific duties on the heads of political parties to create, keep and make available party funding information. The definition of “head” allows for someone who is duly authorised to take on these responsibilities, and we anticipate that this will almost always be the case as the leaders of political parties are unlikely to engage themselves with administrative functions. We understand the rationale for PAIA, as a whole, to read in an internally consistent manner. However, the Select Committee must not lose sight of the imperative from the Constitutional Court for this amendment to align, first and foremost, with the Political Party Funding Act. We believe that such alignment can be achieved by delegating this function to a named accounting or information officer and that this will create more certainty for political parties in fulfilling their duties in terms of PAIA.

3.2 The new definition of “private body”

We caution the Select Committee against including political parties as a private body in the definition section of PAIA. Recognising that political parties are voluntary associations, bound by the contracts of their own Constitution, may indeed make them a private body – but as elucidated in the Constitutional Court decisions of *SARFU*¹ and *AllPay*² – a private body which performs certain public or quasi-public functions opens itself up to public scrutiny. Our argument is simply that in order to legislate specific functions for political parties to record, preserve, and disclose (pre-emptively or in terms of PAIA) to align with the Constitutional Court’s directive in the *My Vote Counts*³ decision, or to align these duties with the Political Party Funding Act does not require an existential declaration of the nature of a political party. Moreover, the consequence of this amendment in so far it affects the application of PAIA more generally may have unforeseen spill over effects with respect to requests for information beyond party funding.

4. How to read this submission

This submission offers recommendations on the first iteration of the Bill which opened for public comment. Our recommendations and the good work of the Portfolio Committee in seeking to comply with the *My Vote Counts* judgment can still be read together despite the new iteration of the Bill should it choose to accept the HSF’s suggestions that the Bill need not include the new definitions of “head”, and “private body”. Should this be the case, we offer a version of how the Bill could be redrafted – this version can serve as guide for the responsible drafters, and is not intended to be prescriptive.

We are resubmitting our comments in the hope the Select Committee will evaluate the Bill against what we believe should be the core focus: to make the following three duties on accounting officers of political parties explicit, clear and unambiguous:

4.1 Recording and preservation of information

The Political Party Funding Act, 2018 creates specific expectations of the information that accounting officers are meant to hold in order to comply with that Act. However, PAIA is silent on how or what information should be recorded and preserved. The Bill must explicitly create a positive duty on accounting officers to record and preserve all information which relates to the private funding of

¹ President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) [1999] ZACC 11

² AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) [2014] ZACC 12

³ My Vote Counts NPC v Minister of Justice and Correctional Services and Another (CCT249/17) [2018] ZACC 17

political parties – this inclusion is necessary in aligning and harmonising the Bill with the obligations stipulated in the Political Party Funding Act, 2018.

4.2 Disclosures arising from the Political Party Funding Act, 2018:

This is a new duty explicitly created by the Bill which, we understand, arises from an obligation to disclose to the Electoral Commission information above the specified threshold. The Bill creates a dual-publishing duty so that the public can access this information directly from political party communication channels. The HSF supports the creation of this duty in the interests of curbing corruption and facilitating the development of an informed electorate.

4.3 Compliance with information requests made in terms of PAIA:

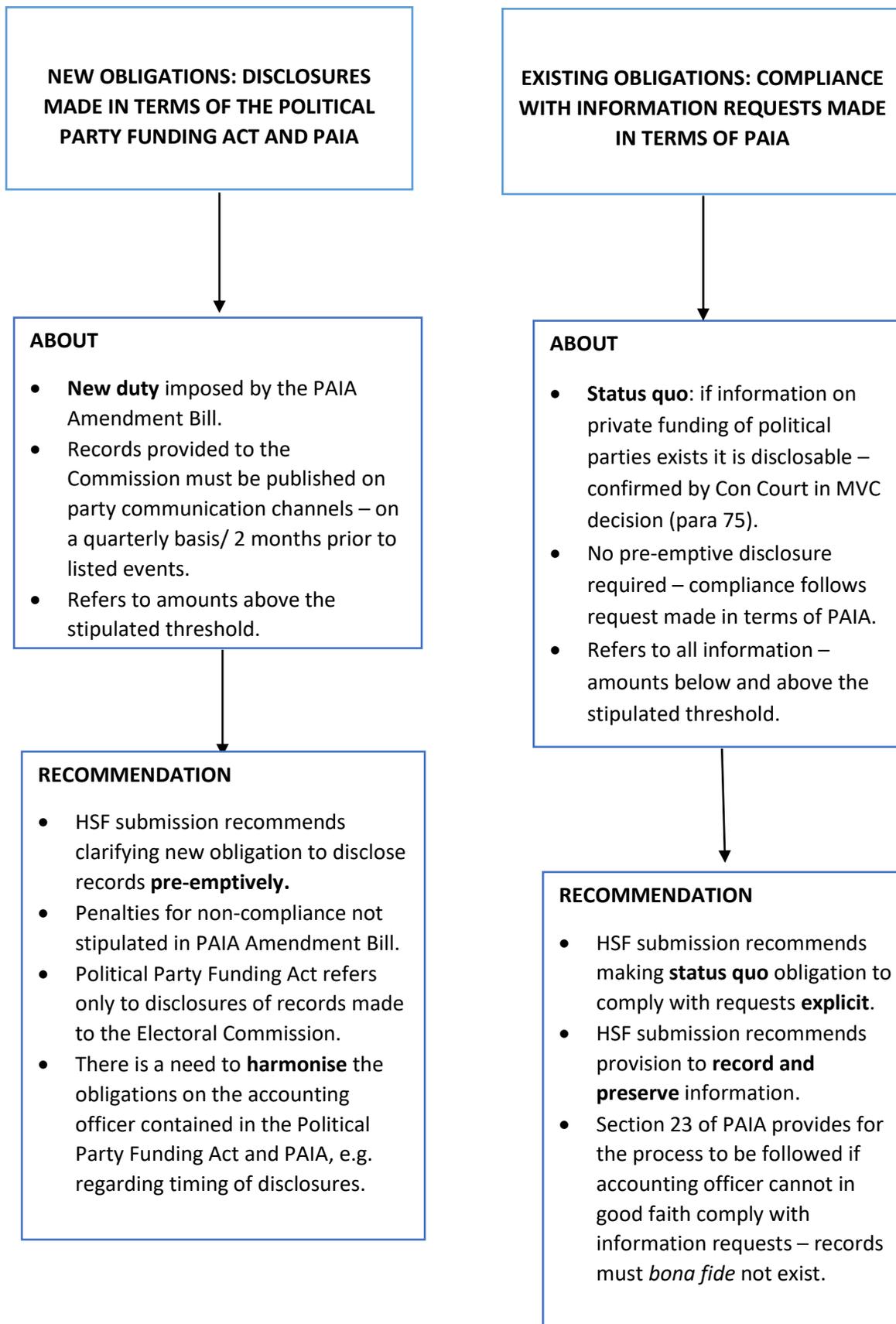
It must be understood that requiring accounting officers to comply with information requests made in terms of PAIA for any information which relates to the private funding of political parties (and specifically requests for information **below** the specified threshold) is not the creation of a new duty or obligation. Instead, the Bill must make explicit the position in law as it stands. If such information exists, it is disclosable.

We thank the Select Committee for the opportunity to make comment.

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**DUTIES OF ACCOUNTING OFFICERS:
INFORMATION ON PRIVATE FUNDING OF POLITICAL PARTIES**



Legislative suggestions for the redrafting of the PAIA Amendment Bill, 2019

Chapter 2A

DISCLOSURE AND INFORMATION REQUESTS OF CERTAIN RECORDS OF POLITICAL PARTIES

Definition

52A. In this Chapter, unless the context otherwise indicates—

'accounting officer' of, or in relation to, a political party means—

- (a) in the case of a party referred to in paragraph (a) or (b) of the definition of "political party" the person who has been appointed as such in terms of section 12(1)(c) of the Political Party Funding Act, 2018 (Act No. 18 of 2018); and
- (b) in the case of an independent candidate referred to in paragraph (c) of the definition of "political party" that candidate or a person duly authorised by the candidate concerned; and

'political party' means—

- (a) any entity that accepts donations principally to support or oppose any registered political party or its candidates, in an election as defined in section 1 of the Electoral Act, 1998 (Act No. 73 of 1998);
- (b) a party with representation in the national or provincial legislatures; and
- (c) an independent candidate;".

Recording and preservation of records on the private funding of political parties

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

- (a) subject to section 12(2) of the Political Party Funding Act, 2018 record and preserve all information relating to private funding of that political party; and
- (b) prepare a statement of all donations received which exceed the threshold contemplated in section 9(1)(a) of the Political Party Funding Act, 2018
 - (i) on a quarterly basis; and
 - (ii) at least two months prior to—

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

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

(cc) a referendum as regulated in terms of the Referendum Act, 1983 (Act No. 108 of 1983).

(2) For the purposes of section 52B(1), “private funding” includes a donation as defined in Section 1 of the Political Party Funding Act, 2018.

(3) The records referred to in subsection 52B(1)(a) and (b) must be preserved for a period of no less than five years following the date of creation of such records.

Disclosure and publication of certain records on the private funding of political parties

52(C) The accounting officer of a political party must publish the records contemplated in section 52B(1)(b)(i) and (ii)

(a) on the official communication channels of the political party concerned, and

(b) in accordance with the time periods described in 52B(1)(b).

Compliance with information requests made in terms of this Act

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