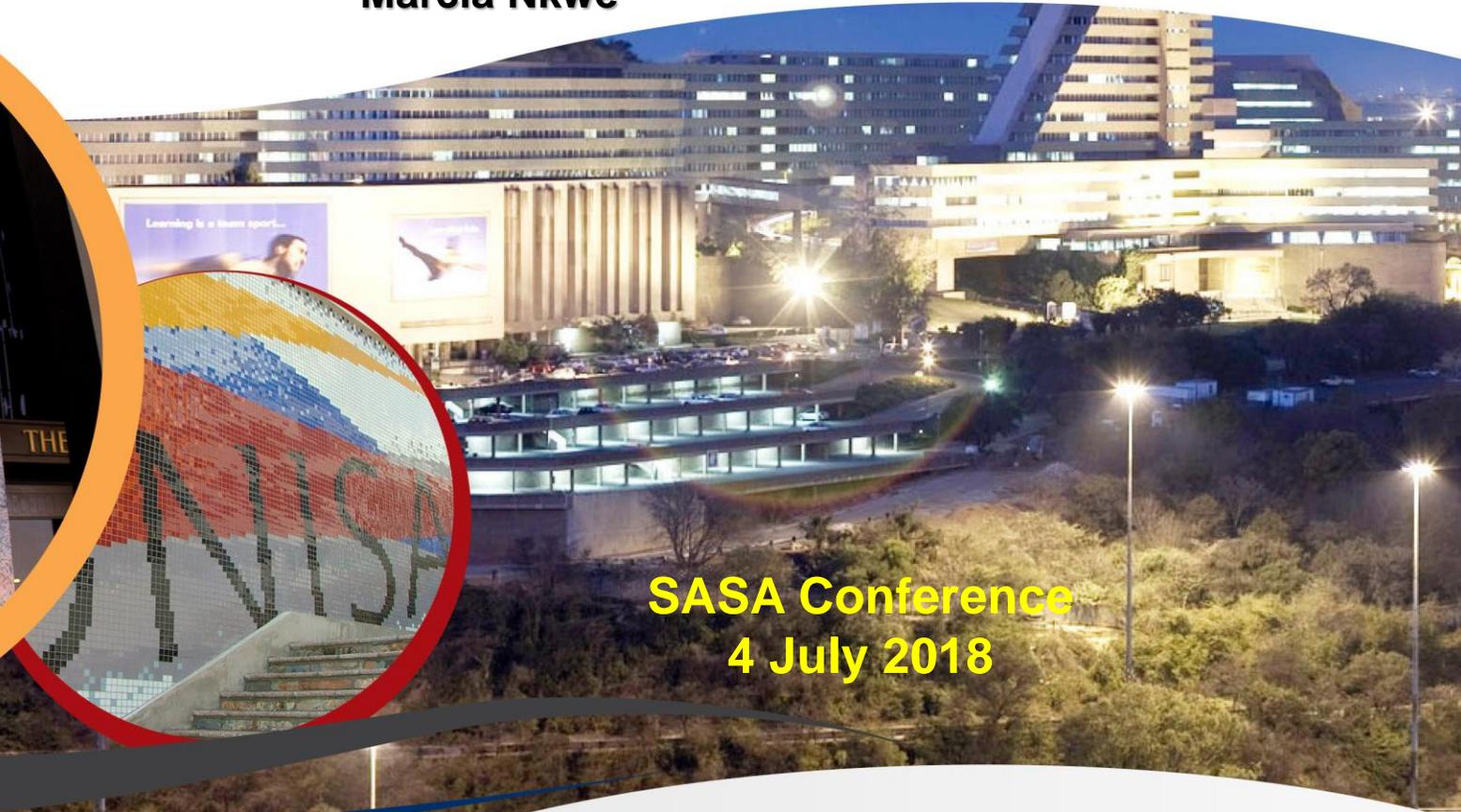


# Assessing compliance with freedom of information legislation in the digital era in South Africa

Marcia Nkwe



**SASA Conference**  
**4 July 2018**

**Define tomorrow.**

**UNISA** |   
university of south africa

# Roadmap

- ATI/FOI background
- PAIA
- Problem statement
- Purpose and objectives
- Methodology
- Results
- Conclusion

## ATI Background

- The successful implementation RTI laws, also called Freedom of Information or Access to Information Laws or Sunshine laws in some contexts, is dependent upon governments' ability to create and maintain and ultimately make available records (Lemieux 2016).
  - Access to information was the exclusive purview of sovereigns or rulers
  - During enlightenment access was for historical scholars (1685-1815)
  - Sweden sets the trends of access through the freedom of press in 1766
  - French revolution (1789-1799)
  - Most nations including SA have since adopted FOI law
    - Canada, Britain, US, Uganda, Zimbabwe, Sato mention a few
  - Section 32 of the Constitution
    - Everyone has got a right of access to information
    - PAIA
      - SAHRC but now Information Regulator

## PAIA purpose

- The purpose of the Act is to promote transparency, accountability and effective governance by empowering and educating the public.
  - to understand and exercise their rights;
  - to understand the functions and operation of public bodies; and
  - to effectively scrutinize, and participate in, decision-making by public bodies that affects their rights.

## Key elements of PAIA

- Right of individual, organisation or legal entity to demand information, e.g. personal requests
  - Complete Form A;
  - Pay request fee at R35.00
  - Submit to the information officer by hand, fax, e-mail or post
- A duty of relevant body to respond and provide information
  - S. 25: Time frames (30 days); granting or refusal to grant access
  - S. 20: Transfer of request to body with record; for which record was created or which received it first (within 14 days)
- Internal and appeal mechanisms, e.g. relevant authority and courts

## Key elements of PAIA . . .

- Exemption to allow withholding of certain category of information
  - S33-45 (s62-69)
  - Divided into two parts
    - Mandatory Grounds: Access **MUST** be refused
    - Discretionary Grounds: Access **MAY** be refused
- Obligations for governmental bodies
  - S. 14 Compilation of a manual (s51)
  - S. 17 Designation of deputy information officers
  - S. 32 Report on the number of requests and the outcome thereof

## Summary of literature: Weaknesses in implementing ATI

- Several studies such as Lemieux (2016), Mojapelo (2017), Mojapelo and Ngoepe (2017), Harris (2007), Sebina (2007), Makhura and Ngoepe (2006) reveal that governments are unable to deal with the requests successfully due to a number of reasons:
  - Poor records management
    - Records not created in the first place, or submerged in chaos, lost or destroyed without authorisation
  - responsibility not clear with regard to who should provide the information
    - Records managers not designated as deputy information officers
    - Confusion on placement of PAIA units, mainly placed under legal departments.
    - Lack of implementation capacities
  - not knowing where to find the information; obtaining
  - lack of control of records as there are no file plans or file plans are not implemented.
  - no internal controls for access to information, e.g. PAIA manual
  - Public sector characterised by culture of secrecy

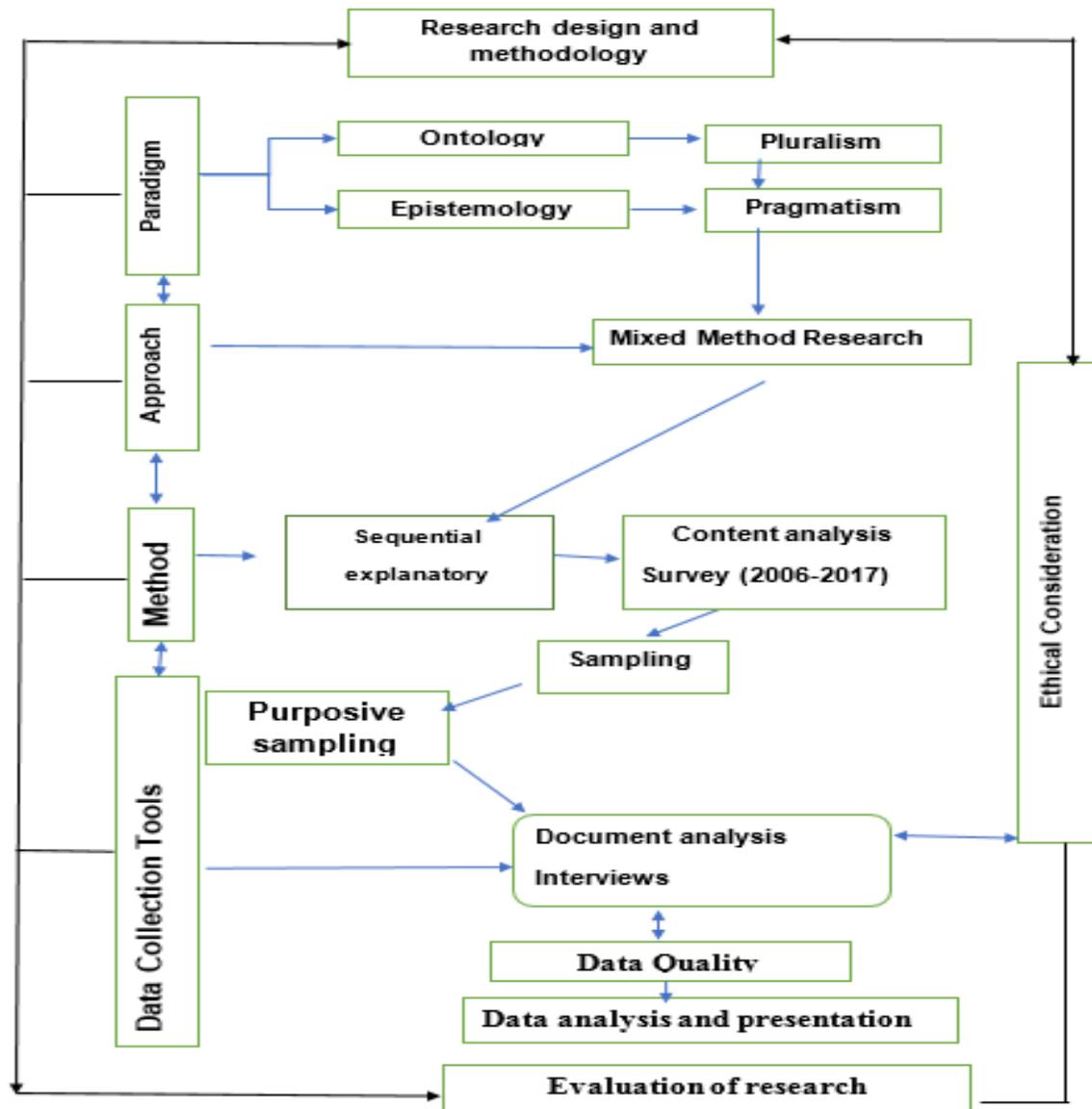
## The problem

- A major problem for efficient service delivery in South Africa is that relevant information is often not timeously available to enable government departments to make informed decisions, because records are not organised properly (Ngoepe 2014).
- Citizens need access to archives and records to understand the past, hold government to account in the present and plan for the future (Archival Platform 2015).
- Poor record-keeping undermines service-delivery, cripples accountability, and creates environments in which corruption thrives.
- It is widely assumed that reliable public information exists and can be made available if required.
- However, regular warnings about the poor state of public sector records from the press, auditors, researchers, records professionals in SA and elsewhere highlight the need to assess compliance with FoI legislation and the implications to open government.
- One may be so curious to and wonder if the state of records management may be one of the factors that hinders public bodies from complying with PAIA requirements.

## Purpose and objectives

- The purpose of this study is to assess compliance with the implementation of FoI legislation in South African public bodies with the view to ensure openness.
- Objectives of the study are to:
  - Identify complying and non complying public bodies;
    - Section 14 and 32
  - analyze publications to check availability of records in terms of access to information legislation (i.e., voluntary disclosure, manuals and telephone directory in terms of section 14 to 16 of the Act);

# Research methodology (bigger study)



## **Scope and research methodology (Current presentation)**

- **Scope**
  - 2006/09-2016/17 reports
  - Excludes private sector and parastatals
  - Focus was on section 14, 17 and 32.
- **Methodology**
  - Quantitative Study
  - Document analysis (reports)
- **Excel Spread Sheet (analysis)**



## Results: section 32 - provinces

YEAR	GP		FS		LP		MP		NC		EC		NW		WC		KZN	
	YES	NO																
2006/07	2	-	1	-	8	-	1	-	-	-	-	-	1	-	1	-	-	-
2007/08	2	-	-	-	9	-	-	-	-	-	-	-	-	-	1	-	1	-
2008/09	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
2009/10	5	7	1	11	12	0	0	11	0	12	0	13	0	11	3	9	2	9
2010/11	8	5	7	7	12	0	0	12	13	1	11	4	13	10	0	-	6	7



## Conclusion

- The country has a long way to go in terms of PAIA implementation.
- It has been 18 years since the Act was enacted but governmental bodies are not complying with basic requirements.
- Few governmental bodies have implemented section 14 of PAIA let alone submit section 32 reports.
  - Using the degree of comparison, the situation is bad in national departments, worse in provincial departments and worst in municipalities (bad, badder, baddest).
- PAIA manuals are not linked to file plans in governmental bodies.
- It is essential that government departments should implement and maintain proper records classification systems to manage records from their point of creation to their ultimate disposal.
- As well, a culture of good record-keeping across government should be inculcated.
- If records are not managed according to a classification system that complies with archivally-determined principles, and there is difficulty in locating information, PAIA will be a dead epistle. The constitutional rights it seeks to uphold will therefore not be guaranteed.