

In pursuit of Open Democracy and Freedom of Information

- A South African Campaign case study

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This Article³ traces the advocacy around the access to Information Act, 2000 and pinpoints some critical lessons that emerge from that coalition experience.

Legislative History:

In 1993, the South African government and extraparliamentary political parties including the African National Congress met to set out a new Democratic Political Order for South Africa. These talks produced a constitution that was to serve as an interim constitution till such time a democratic government with a popular mandate could draft a final document. The most important aspect of the interim constitution was the Bill of Rights; one among the rights upheld was the right of access to publicly held information⁴.

Enabling legislation:

Following the general elections in 1994 the final constitution was enacted in 1996, Section 32(1) of the Constitution guarantees “everyone..... the right of access to any information held by the state and any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights”. In addition, the final constitution provided for the right to be limited in terms of enabling legislation. The Constitution came into effect On February 3, 1997 and gave Parliament 3 years to give effect to the Right to information and regulate its application. After the democratic government came into power in 1994, a five member task group on Open Democracy headed by Advocate Mojuanku Gumbi was set up to draft the enabling legislation⁵. The first draft of the legislation was produced in August 1995. The legislation was enacted five years later after extensive alterations.

Executive concerns:

The executive arm of the government amended several draft proposals that were put before them before releasing a much altered Bill. Each department that reviewed the Bill contributed to a growing series of changes. The Bill was diluted in an obvious fashion – a chapter dealing with open meetings was removed; cabinet records excluded; the “necessity of harm over ride clause” was removed; as were provisions creating an open democracy commission and an Information Court. In subtle ways exemptions concerning third party confidentiality and commercial activity were tightened.

This process of review was not done in an open manner and it had become very difficult for civil society to elicit information about the process of revision and the specific contents of the same.

Eventually in October 1997, the Open Democracy Bill was published for comment before being introduced to Parliament in July 1998. The responsibility for the passage of the Bill

was with the National Assembly's Portfolio Committee on Justice, which took up the Bill in March 1999 and held public hearings on the same.

South Africa's second democratic elections were held in June 1999 and the new Parliament convened in August the same year. The deadline for the passage of the law was February 4, 2000. An ad hoc joint committee of both houses⁶ was created to deal solely with the legislation; the committee held a second round of consultations in October 1999 and worked to have the Bill ready for February 2000.

Open Democracy Campaign Group:

Civil Society organizations played an extensive and influential role in helping members of Parliament to craft the final Act. Since many of them were involved in the fight against apartheid they saw Open Democracy legislation as a crucial mechanism for the consolidation of participatory democracy, grass roots advocacy and accountable Government in South Africa. In early 1995 the Open Democracy Advisory Forum (ODAF) was convened by the Johannesburg based Freedom of Expression Institute (FXI). This group was convened at the invitation of the Task Force to monitor the legislative drafting process, facilitate public debate on the bill and to interact with government departments. For various reasons including the lack of funds and the large number of organisations that ODAF tried to involve, the venture failed. However FXI organised a very important conference on the Bill in January 1996 and continued to be involved in critiquing the Bill and facilitating responses from organisations from in and around Johannesburg.

In October 1996, Parliamentary Information and Monitoring Services (PIMS) of the Institute for Democracy in South Africa (IDASA) held a workshop titled "Making a Difference: The Challenge for Civil Society Advocacy in South Africa". The participants identified access to information as a pivotal issue for effective advocacy in a democratic era.

At the end of the workshop three organisations – The Human Rights Committee, the Black Sash and IDASA's PIMS were charged with investigating the status of the Bill, analysing the content of the most recent draft of the Bill and designing a campaign to promote enactment of strong access to information legislation. The Open Democracy Campaign Group (ODCG) was born. The members of the ODCG both collectively and individually made several submissions to the various parliamentary committees that considered the Bill and monitored the legislation's progress closely. This group continues to work together in tracking the implementation of the Act and has commented extensively on the proposed regulations that are associated with the legislation.

Building a Campaign:

The participants of the group were Cape Town based but represented organizations that operated nationwide. The group was diverse and was engaged in work in multiple issues and therefore saw open and accountable government as a central thread linking many of their concerns. Diversity came with its own issues, the coalition needed to manage and accommodate the differing priorities, political perspectives and organisational cultures of its members. Due to the sluggish pace of the drafting process the group had the time to work through their difficulties. The benefit of diversity was that it enables division of labour – only one or two members focused on specific aspects of the Bill. The legislation being long and complex each member developed expertise in one aspect of the Bill eg:- one member

would concentrate on appeals and enforcement mechanism, one would concentrate on horizontal application of right to information to private bodies, so on and so forth. The Group ensured there was no duplication of research and analysis undertaken by their colleagues.

Key issues in the Legislation:

By the end of 1997, ODCG had produced a detailed analysis of the content of the draft Open Democracy Bill, seven key issues crystallised namely : ensuring that the legislation gave full effect to the 'horizontal right to access privately-held information; ensuring that the enforcement mechanism established by the new law would be accessible, inexpensive and speedy; promoting a 'right to know' approach to government held information, in order to change government attitudes about disclosure of state records and to maximize the amount of information released without review by government officials; reconceptualising and redrafting in separate legislation provisions intended to protect whistleblowers; narrowing the scope of the disclosure exemptions; contesting the blanket exemptions of all cabinet records; reinstating an early chapter promoting open meetings in the public sector. Each of the key issues were adopted by one or more members of the group, who then took the lead in coordinating the research, the formulation of policy proposals and lobbying around the particular topic. ODCG organized workshops of academics and other professional experts to inform their discussions and strategic planning, and also sought legal opinion to support their arguments.

Advocacy Strategies : Twelve Days of Christmas

ODCG designed their written and oral submissions to be interlocking with each witness endorsing the positions advanced by other coalition members, then devoting the bulk of her or his time to elaborating a further theme. The tactic was dubbed the Twelve Days of Christmas approach. Each individual making submissions would quickly run through the head line of the submission made by the previous person before making her or his own detailed submission. The purpose was to hammer the key points to the MP's.

Building Trust with Legislators:

Once the Bill was tabled before Parliament there was suddenly a great urgency to meet the constitutional deadline of February 4, 2000. The ad hoc committee welcomed the expertise of the campaign group. As a campaign group we had to find a balance in our submissions between the ideal and the realistic by: Keeping submissions short and offering longer and more detailed versions to MP's that wanted them; Offering constructive alternatives to provisions that were not acceptable by suggesting alternative legislative language; Providing drafting assistance to the Committee which was short of resources; Ensuring our presence at all the deliberations of the Committee, thereby building a rapport with the members.

Media:

As the legislative debate on the Bill progressed many journalists began to look to the members of the ODCG for comment, background and analysis. Comments to media were focused on the issue rather than politics and personalities. Using the media for a campaign is a specialist task, the diversity of the ODCG group provided people who understood the media.

Over a period of time the mutual dependency grew, sometimes the journalist needs an expert quote to complete a story; other times the campaigner will want the journalist to cover a particular issue. Media coverage can complement and enhance a campaign.

Key Lessons:

1. Legislative lobbying requires expertise and knowledge especially in the case of access to information legislation, which is complex and intricate. There is an advantage in building a coalition of some sort;
2. Establish a stable coalition of forces from various disciplines;
3. Communication is essential, it keeps the group together;
4. Share tasks and use the specialization available in house;
5. Identify and Utilise outside expertise;
6. Cultivate contacts in government;
7. Don't just criticize, offer solutions even if not perfect;
8. Prepare for the long haul, the struggle is not over once the legislation is enacted – it is necessary to monitor and comment on implementation, regulations, etc;
9. Identify and use unique advantages – the political and institutional fluidity in South Africa created an open atmosphere, which encouraged and accepted civil society input;
10. Lastly Political will – this existed in South Africa, the political momentum was captured in the Country's constitution.