

FREEDOM OF INFORMATION LAW IN SOUTH AFRICA

A Country Study

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COUNTRY STUDY ON THE FREEDOM OF INFORMATION LAW in South Africa

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PART I: Background and History¹

Throughout the *apartheid* era, South Africa's increasingly paranoid white minority government suppressed access to information--on social, economic, and security matters--in an effort to stifle opposition to its policies of racial supremacy. Security operations were shrouded in secrecy. Government officials frequently responded to queries either with hostility or with misinformation. Press freedom was habitually compromised, either through prior censorship of stories or through the banning and confiscation of publications. Information became a crucial resource for the country's liberation forces and their allies in international solidarity movements as they sought to expose the brutality of the *apartheid* regime and hasten its collapse.

Consequently, opposition groups came to see unrestricted access to information as a cornerstone of transparent, participatory and accountable governance. Two major conferences in *apartheid*'s dying days explored the legal aspects of information freedom.² These consolidated the political will to make access to information a fundamental principle of a new democratic dispensation and helped to define the scope and content of the right.

This consensus was ultimately captured in South Africa's new constitution. A democratic parliament then gave further shape to the right of access to information by enacting enabling legislation – a process in which civil society organisations played an unusually influential role. This article traces the history of South Africa's new Promotion of Access to Information Act, 2000, assesses the strengths and weaknesses of the advocacy efforts of a key coalition of civil society organisations, and pinpoints some critical lessons that emerge from that coalition's experience.

1. Legislative history

In 1993, the South African government and extra-parliamentary political parties, including the previously banned African Nation Congress (ANC) led by Nelson Mandela, met to hammer out a new, democratic political order. These talks produced a constitution requiring the creation of open and accountable political institutions and the election of a new government on the basis of universal suffrage.³ The constitution was intended to serve as an interim instrument, until such time as a democratic government with a popular mandate could draft a final document.

¹ Part I of this paper draws heavily on a paper “In Pursuit of an Open Democracy: A South African Case Study” by Richard Calland & Doug Tilton, commissioned by the Commonwealth Human Rights Initiative for publication in their 2001 annual report.

² The Breakwater Conference on Administrative Law for a Future South Africa in early 1993 and Ensuring Government Accountability, Accessibility and Transparency in the New South Africa in early 1994.

³ Constitution of the Republic of South Africa, Act 200 of 1993 (the “Interim Constitution”).

1.1. Bill of Rights guarantees access to information

One of the most important aspects of the interim constitution was the introduction of a Bill of Rights designed to ensure equal protection of a broad range of human, socio-economic and civil rights, irrespective of race, gender, sexual orientation, disability, belief, and other factors.⁴ Among the rights upheld was that of access to publicly held information. Section 23 of the interim constitution stated: ‘Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights.’ By entrenching an independent right of access to information – rather than leaving it to be protected by the right to freedom of expression, as has generally been the case in international human rights instruments – the drafters underscored its significance in South Africa's constitutional order.⁵ Without this constitutional ‘anchor’ and the broad political consensus that underpinned it, the subsequent civil society campaign for freedom of information legislation would likely have been stillborn.

Following the historic first democratic general election of 1994, the interim constitution's broad right of access to information was expanded further. Section 32(1) of the final constitution, enacted by the National Assembly in 1996⁶, guarantees ‘everyone ... the right of access to 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.’ [Emphasis added.] Not only was the right of access to publicly-held information no longer qualified by the stipulation that the information be needed for the exercise or protection of a right, but a qualified right of access to information was also established with respect to private bodies and individuals.

Although the revised formulation of the right is more permissive in some respects than the interim right had been, the new wording indicated that early idealism was being tempered by the harsh reality of government and was to some extent already giving way to a more pragmatic or ‘hard-nosed’ attitude. This was evident in the final constitution's stipulation that the general right may be limited in two ways.

First, this right – and any of the rights identified in the Bill of Rights – may be restricted in terms of the constitution's generic limitations clause (sec. 36). As in the interim constitution, the limitations clause permits a right to be circumscribed only by legislation that applies generally to all – and then only if the limitation is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.’ In making the latter assessment, a number of factors must be taken into account, including

4 Section 8(2) of the interim constitution stated: ‘No person shall be unfairly discriminated against, directly or indirectly ... on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.’ The final constitution added pregnancy, marital status and birth to the list of grounds [section 9(3)].

5 Jonathan Klaaren, *Access to Information*, in *Constitutional Law of South Africa*, ed. Matthew Chaskalson (Pretoria: Juta & Co. Ltd., 1996), 24-1.

6 Constitution of the Republic of South Africa, Act 108 of 1996.

the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and whether there are less restrictive ways to achieve the purpose.

Second, the final constitution required that the right be fleshed out in terms of enabling legislation. The constitution that came into effect on 3 February 1997 gave Parliament three years to enact legislation to give effect to the right articulated in section 32(1) and to regulate its application.⁷ Significantly, the legislation was permitted to include ‘reasonable measures to alleviate the administrative and financial burden on the state’ – to balance, in other words, the state's potentially competing obligations to protect citizens' information rights and to provide fair, efficient, and cost-effective administration.

1.2. Enabling legislation gives effect to the right

Shortly after the democratic government took office in 1994, it appointed a five-member Task Group on Open Democracy headed by then-Deputy President Thabo Mbeki's legal advisor, Advocate Mojanku Gumbi, to draft appropriate enabling legislation.

The Task Group issued a preliminary report early in 1995 setting out in detail their legislative intentions and the principles underlying their approach to drafting. By August 1995, they had produced a draft bill, which had been based on consideration of the following international FOI legislation:

1. Federal: Freedom of Information Act 1982 (*Australia*)
2. Federal: Access to Information Act (1980) (*Canada*)
3. Freedom of Information and Protection of Privacy Act [Chapter F.31] (*Ontario, Canada*)
4. The Official Information Act 1982 (*New Zealand*)
5. Right to Know Bill [Bill 187 – a private members' Bill] (*United Kingdom*)
6. Freedom of Information legislation (*United States*)

⁷ Until the required enabling legislation was enacted, the general right of access to information contained in Section 32(1) of the new constitution was suspended, and the more limited right of access to publicly-held information found in the interim constitution applied. The interim constitution (sec. 71) required that the Constitutional Court review the final constitution to certify that it was in compliance with a set of fundamental principles (listed in Schedule 4 of the interim constitution). Constitutional Principle IX read: ‘Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.’ In its First Certification Judgement, *In re: Certification of the Constitution of the Republic of South Africa, 1996* [1996 (10) BCLR 1253 (CC)], the court ruled that although the interim right did not comply with the constitutional principles, the right of access to information was not a ‘universally accepted fundamental human right’. It therefore held that the temporary suspension of section 32(1) was reasonable if it was for the purposes of drafting and enacting legislation establishing ‘the practical requirements for the enforcement of the right and the definition of its limits’. However, the Justices clearly linked the concept of ‘reasonableness’ in this case to the temporary nature of the suspension. They ruled that, should the required enabling legislation not be passed within the designated three-year window, the interim right would fall away and the expanded right in section 32(1) would become operative.

By that stage Parliament had already set up an Ad Hoc Joint Committee on the Open Democracy Bill and during their deliberations the members considered the laws which had been used by the Task Group but also added following foreign legislation:

1. *Australia:*

New South Wales: Freedom of Information Act 1989

South Australia: Freedom of Information Act 1991

Western Australia: Freedom of Information Act 1992

2. Freedom of Information Act, 1997 (*Ireland*)

3. Freedom of Information Bill as introduced in the House of Lords on 10 December 1998 and that Bill as amended in Parliament during 1999 (*United Kingdom*)

It took nearly five more years – and revisions so extensive that not even the bill's original name survived⁸ – before the legislation was enacted. At a seminar on the eve of the draft's initial publication, participants were warned that ‘we must act fast because once the government gets used to doing things in secret ways their enthusiasm for access to information will drain away’. This was a prescient observation. Over the next two years, the executive arm of government chipped away at the draft proposals before releasing a much-altered bill.

2. *The Open Democracy Campaign Group*

Civil society played an extensive and influential role in helping Members of Parliament to craft the final Act. From the outset, civil society organisations took a keen interest in open democracy legislation, including its information access provisions. Despite the challenges of transition to democracy, which included diminishing foreign donor support, South Africa enjoys a large and thriving civil society sector, a substantial segment of which emerged from popular campaigns against *apartheid* and the socio-economic disparities it generated. Having worked for the realisation of a democratic vision, many of these groups saw Open Democracy legislation as a crucial mechanism for the consolidation of participatory democracy, grassroots advocacy, and accountable government in South Africa.

As early as July 1995, the Johannesburg-based Freedom of Expression Institute (FXI) convened at the invitation of Mbeki's Task Group an Open Democracy Advisory Forum (ODAF) of civil society groups to monitor the legislative drafting process, facilitate public debate on the bill, and interact with government departments. It was, in some respects, an impressive initiative. It ultimately foundered, however, as it had neither the coherence nor the resources to sustain it through the process that followed. In contrast to the smaller, more tightly-drawn Open Democracy Campaign Group that was to follow later, ODAF tried to involve too large and diverse a range of organisations, without the funding to underwrite their travel to Johannesburg for workshops and campaign

⁸ During the deliberations the Open Democracy Bill [B67-98] became the Promotion of Access to Information Bill and the Protected Disclosures Bill.

meetings. For many of the organisations, the issues involved were probably too far removed from their primary agendas – such as development or housing – to permit them to devote sufficient attention or resources to the protracted and complex process that subsequently unfolded. FXI went on to organise an important conference on the bill in January 1996, and continued to play a useful role in critiquing the bill and facilitating responses from civil society organisations based in and around Johannesburg, but ODAF soon vanished from the scene.

In Cape Town, the Parliamentary Information and Monitoring Service (PIMS) of the Institute for Democracy in South Africa (Idasa) launched a parallel initiative. In October 1996, PIMS hosted a workshop entitled ‘Making a Difference: The Challenge for Civil Society Advocacy in South Africa’ that brought together representatives of roughly thirty civil society organisations involved in social justice advocacy, as well as ten international delegates. The workshop participants identified access to information as one of the pivotal issues for effective advocacy in the democratic era. They acknowledged a need for timely information both about the content of policy debates – the policy options being considered by government officials and the data used to assess these options – and about the structures and processes used to decide policy. At the conclusion of the workshop, three organisations – the Human Rights Committee, the Black Sash, and Idasa's PIMS – were charged with investigating the status of the (then-stalled) Open Democracy Bill, analysing the contents of the most recent draft of the Bill, and designing a campaign to promote enactment of strong information access legislation. In addition, the group was asked to ‘find ways to test the new system in relation to government openness and freedom of information generally, given its importance to effective advocacy.’⁹

These three organisations formed the core of an Open Democracy Campaign Group which ultimately grew to include the Parliamentary Office of the Congress of South African Trade Unions (COSATU), the Legal Resources Centre, the National Association of Democratic Lawyers, the Public Policy Liaison Office of the South African Council of Churches, the Parliamentary Liaison Office of the Southern African Catholic Bishops' Conference, the South African NGO Coalition, and the Environmental Justice Networking Forum. The Campaign Group also benefited from the regular participation of the parliamentary monitor of the South African Human Rights Commission, one of a handful of constitutionally enshrined bodies responsible for promoting democracy.

In contrast to ODAF, the Campaign Group endured and thrived. Over time, the coalition developed a high level of cohesiveness and trust which allowed it to overlook minor differences and focus on core issues. The group also developed a collective expertise that made it an asset to member organisations, the media, and parliamentarians alike. Its members made numerous submissions – both individually and collectively – to the various parliamentary committees that considered the bill and monitored the legislation's progress closely. It continued to track the implementation of the final Act and commented extensively on proposed regulations associated with the legislation.

⁹[Open Democracy Campaign Group], ‘The Open Democracy Bill: A Critical Review,’ December 1997, p.8.

2.1. Executive concerns narrow the legislation's scope

The reaction to the early drafts of the bill of one minister, Kader Asmal, probably mirrored that of most of his colleagues in the Cabinet. Asmal spoke with particular authority on matters of transparency and accountability given his position as Chair of the Parliamentary Ad Hoc Committee on Ethics, and his own history as Professor of Human Rights Law at Trinity College, Dublin. According to Cabinet sources, during the Cabinet's first review of the draft bill, Asmal argued for the blanket exemption of Cabinet records and warned of the dangers of unrestricted access to information. He articulated his position in a more public setting a year later:

On the one hand, people must not feel powerless at the hands of those who temporarily or permanently control their destinies. On the other, the duly elected democratic government must not be rendered powerless in carrying out its mandate. Lord Acton, as we all know, said that power corrupts. It is necessary to adapt Acton and to point out that powerlessness is equally corrupting, for individuals and for the state. The former leads to individual frustration and helplessness. The latter causes governmental drift leading to chaos – with the state unable to perform the functions expected of it.¹⁰

It must be remembered that these words were delivered at a crucial juncture in the history of the new government. Having delivered a peaceful transition and an internationally-admired constitution, the government was now struggling to reform an inherited public service that was in places obstructing its efforts to transform South Africa's economy and society. There was growing frustration with the apparent inability to implement good policy. Issues such as access to information were increasingly seen as 'unnecessary luxuries' or, worse, as further impediments to rapid progress. Ministers such as Asmal were especially mindful of such considerations. They would have been familiar with the Canadian experience, for example, where there is an ongoing debate about the way in which its bill of rights has been hijacked by conservative forces to constrain progressive law and policy.

As a consequence, each government department that reviewed the bill contributed to a growing series of changes. The bill was diluted in very obvious fashion – the removal of the whole chapter dealing with open meetings, the blanket exclusion of all Cabinet records, the removal of a 'necessity of harm' over-ride clause, the excision of provisions creating an Open Democracy Commission and an Information Court – and in more subtle ways, such as the tightening of exemptions concerning third party confidentiality and commercial activity.

The acute irony of this process was that, in essence, it went underground. It became harder and harder to elicit information about both the process of revision and the specific content changes made by the Executive.

¹⁰ Asmal, K. "A View from Within", in *Administrative Justice in Southern Africa*. Corder H. & Maluwa T. (eds). University of Cape Town. 1997.

2.2. Developing the Campaign; Building Trust within the Legislature

Once the bill was finally tabled in parliament, after years of slow progress, there was suddenly a great urgency to meet the constitutional deadline of 4 February 2000. As a Campaign Group, the information and knowledge we had accumulated served us well in our lobbying; under pressure, the committee welcomed our expertise and came to see it as a resource. We also had to build trust, however. The chairperson of the Justice Committee is a prominent advocate and a formidable parliamentarian. He is not easily persuaded and does not suffer fools gladly. If we failed to win his respect, our efforts would have come to naught.

Hence, we were careful to find a balance in our submissions between the “ideal” (as we saw it) and the “realistic” (as they were likely to see it). To pitch a submission too far in one direction would be to risk losing respect for being ‘unrealistic’ (and therefore unreasonable); to lean too far in the other direction would be to concede too much ground. In preparing submissions we tried also to be as ‘professional’ as possible, in terms of presentation and style, aiming to make the submissions clear and accessible. In this, we had to guard against the danger that our combined knowledge would overflow into over-long submissions. We decided to keep submissions short and offer longer, more detailed versions to those MPs that wanted them.

It was a hard rule to keep; where we breached it, we would often prepare a short two or three page document summarising our main points, with headlines and key ‘sound bites’. The reality is that most MPs face a losing battle against a paper mountain. Advocacy groups add to the mountain at their peril. Short, sharp, concise submissions are a relief to most MPs. If they want more detail then they will ask for it – during the presentation, in questions or afterward.

One particular lesson we learnt the hard way was (to borrow the language of the 1992 Clinton US Presidential Campaign) the need for ‘instant rebuttal’. During the committee hearings, a number of public officials gave evidence. One witness was the then Director-General of Land Affairs, Geoff Budlender, a man with an impeccable human rights reputation and credibility. He told the committee that he feared that the version of the bill then under consideration would paralyse his department and make it impossible for them to do their work. He did so on the mistaken basis that requests for information could constitute, in effect, requests for ‘research to be done’. In other words, Budlender interpreted the bill to grant a right not only to *access* records but also to compel departments to construct or *compile* records. The effect of Budlender's evidence was profound, less in relation to the specifics of how the bill defined a record – it was already clear that it did not extend as far as Budlender's interpretation – but more in intensifying committee concerns about the bill's capacity to impede ‘delivery’ by government.

Our response should have been immediate: a short, clear letter to the chair of the committee, copied to the committee members politely pointing out the error of the interpretation. This could have been supported, perhaps, by a gentle rebuke in the media.

Later, it was difficult to dispel the perception that the bill had the potential to paralyse government. When similar incidents occurred we learned to respond more quickly – hence the importance of having members of the campaign group present to monitor proceedings.

The most important aspect of our strategy was our determination to offer constructive alternatives where we had complaints. There is little that is more irritating to a lawmaker than to be faced by a moaning lobbyist who is unwilling or unprepared to offer a better way of doing things. Hence, when presenting our primary concerns, we not only offered policy options, but also alternative legislative language to achieve our proposal.

Although the South African committee system has come a long way, it is still very short of resources. There are no lawyers to assist the committees, who have to rely on the expertise – and the bona fides – of the executive's lawyers. Hence, the need to help the committee with its work by offering actual drafting. We did this in a number of cases: with the drafting of the whole chapter on the horizontal application, the 'right to know' provisions and, in the case of whistle-blowing, the drafting of a whole new bill, once the committee agreed to excise it and totally re-conceptualise the legislative approach.

One or two other further factors helped us to gain the trust of the lawmakers. Firstly, we stuck doggedly to our task and demonstrated that we were there for the long haul. Secondly, our presence at the committee enabled us to build up good personal relations with many of the MPs. Although the chairperson of the Portfolio Committee on Justice is a charismatic and influential politician and our relationship with him was, therefore, pivotal, we did not neglect the other members of the committee both in the ruling party and in the main opposition parties. The ANC enjoys a very substantial majority in the South African parliament and so clearly our main task was to persuade the ANC members of the Committee. However, we sought to build strategic relations with one or two members of the opposition. This requires that a different sort of trust be built. It is advisable only to deal with opposition members who understand and respect the fact that it may damage a Campaign to have an opposition party member recite, parrot fashion, your arguments. Fortunately, the South African parliament is an exceptionally open one, where tea is shared at the breaks by MPs, lobbyists and media all together. Such breaks provided us with opportunities to raise points, respond to issues before the committee and promote our views quietly.

Finally, the media can play a pivotal role in any legislative campaign. Not all media coverage of a campaign will be good and it needs to be handled with care. For example, coverage in a newspaper which has lost the respect of the ruling party carries the same health warning associated with clumsy support by an opposition party member. Our comments to the media therefore focussed on the issues, rather than the politics and the personalities. While it was hard to get the mainstream media to take up the access to information issue and we had to work hard to think of 'real life' examples to help journalists bring the issue to life, we were fortunate that a small group of very dedicated journalists decided to follow the story the whole way through. Accordingly, we sought out and built good relations with them.

Using the media to support a campaign is as specialist a task as, for example, preparing alternative clauses to the draft law. Division of labour is, once again, a useful thing for a campaign group, we discovered. Fortunately, the diversity of our campaign group gave us one or two individuals who had a good understanding of how media operate, what they need and demand, and how to build a good relationship with a journalist. Over a period of time a mutual dependency can grow. Sometimes the journalist needs an ‘expert’ quote to complete the story; other times the campaigner will want the journalist to cover a particular issue in order for the campaign groups' line to acquire greater credibility, or to put more pressure on lawmakers. If handled carefully, media coverage can complement and enhance the other components of an effective campaign.

3. Key Lessons

Many of the lessons identified here are applicable to any legislative lobbying, while some are of particular relevance to access to information campaigns.

First of all, all legislative lobbying requires expertise and knowledge. This is especially so in the case of access to information legislation, which tends to be complex and intricate. There are, therefore, many advantages in building a coalition of some sort. There is no substitute for convincing, well-researched and -reasoned arguments; and, in the case of access to information, there is a huge and growing quantity of comparative research. The South African committee was especially interested in models from the different Australian States – so the Campaign Group helped persuade the Australian government to finance a study trip by four members of the parliamentary committee.

Second, work together – establish a broad coalition of forces, across both disciplines and regions. We benefited from having legal, good governance, religious, labour, environmental, and human and civil rights groups all working together. At the same time it was valuable to have a fairly stable core group.

Third, communicate. This helps to keep the coalition together. Trans-regional communication was especially important for us. Although there was some exchange between the Johannesburg and Cape Town groups, this could have been more extensive and fruitful. Regrettably, we did not have the resources to develop good networks in other important regions like KwaZulu-Natal or the Eastern Cape.

Fourth, share tasks. Consider whether specialisation makes sense; it worked well for us.

Fifth, identify and utilise outside expertise. Sympathetic lawyers can make especially valuable contributions to analysis and debate, provided they are not given undue deference or allowed to hijack the coalition. Lawyers often adopt a cautious, even conservative approach to legislative issues, and this should be

factored into any planning informed by their advice. One way of retaining strategic control of the campaign is to bring lawyers in as consultants on specific issues by commissioning legal opinions.

Sixth, cultivate contacts in government. These can be important for getting documents or other intelligence on the government's plans. For us in South Africa – where we enjoy a relatively strong and independent legislature – cordial ties with parliamentary leaders who recognised the value of civil society input were particularly important for allowing our voice to be heard and getting our proposals before legislators.

Seventh, be prepared to offer solutions, even if they aren't perfect. The Campaign Group provided basic language to fill several gaps in the legislation. This was often adapted – sometimes beyond recognition – by legislators, but it helped to frame the issues and provided legislators with a starting point, thereby reducing resistance to exploring new themes.

Eighth, be prepared for the long haul. The struggle is not over when the legislation is enacted. One needs to monitor and comment on implementation, regulations, and request procedures and systems.

Ninth, identify unique advantages. In addition to our strong constitutional grounding, the political and institutional fluidity of the transitional state created an openness to input, in part because new MPs often had limited access to research and a propensity to take on board civil society proposals. Other countries may not have these specific characteristics, but may have other advantages unique to their situations.

Finally – and perhaps most important – there must be political will. In our case, the political momentum was captured in the country's constitution, which lent both moral and legal authority to the campaign even if the political will of some individual public officials began to flag.

This secrecy and foot-dragging was a cause of increasingly frustration to civil society organisations monitoring the bill's progress. They began to plead desperately for the bill to be tabled in Parliament, due largely to their confidence in the South African parliament's capacity to address the bill in an open and consultative manner. Eventually, the much-revised draft legislation – known as the Open Democracy Bill¹¹ – was

¹¹ Although the Open Democracy Bill was primarily intended to give effect to section 32(1) of the constitution, it had been conceived from the outset as a broader bill. Section 195 of the constitution sets out a number of basic principles and values that are meant to govern public administration. These include the encouragement of public participation in policy-making, the accountability of public administration, and the promotion of transparency through the provision of 'timely, accessible and

published for comment in October 1997 before being introduced in Parliament in July 1998.

Responsibility for the passage of the bill lay with the National Assembly's Portfolio Committee on Justice, one of Parliament's most dynamic committees with a reputation for legislative competence and careful attention to public submissions. The Portfolio Committee eventually took up the bill in March 1999 when it held two days of public hearings. This process was interrupted by South Africa's second democratic general election in June. When the new Parliament reconvened in August, the 4 February 2000 deadline for adoption of the enabling legislation was looming. To expedite the parliamentary process, an *ad hoc* joint committee of both Houses was created solely to deal with the legislation.¹² This held a second round of public hearings in October 1999, then worked well into the December-January holiday recess to ready a bill for final passage at the beginning of the new parliamentary session in February 2000.

3.1. Building a Campaign: Fostering a strong coalition

Although the Campaign Group was not as disparate a grouping as ODAF had been, it enjoyed substantial diversity. With representation from labour, churches, human rights groups and the legal community, the coalition brought together prominent organisations from several key sectors of civil society. Participants were exclusively Cape Town-based (although FXI was present at a couple of the coalition's workshops), but most represented organisations that operate nationwide. Most of the groups involved were engaged in work on multiple issues and therefore saw open and accountable government as a central thread linking many of their concerns. The Campaign Group's breadth enriched its perspective and enabled it to speak with a great deal of moral authority.

This diversity was not free of pitfalls, however. The coalition needed to manage and accommodate the differing priorities, political perspectives, and organisational cultures of its members. Large organisations, such as COSATU, South Africa's giant labour federation, often required much more time to secure formal endorsement for specific policy proposals than smaller groups. In some instances, certain members felt that they needed to put their own 'stamp' on coalition submissions through the inclusion of a particular motivating argument or formulation of a policy proposal.

accurate information'. National legislation was also required to 'ensure the promotion' of these values. The Open Democracy Bill initially sought also to respond to this mandate. Advocate Justine White, who was involved in early efforts to develop a Freedom of Information Act, has written that the original draft of the Open Democracy Bill 'performed the work of four separate pieces of legislation, namely, a Freedom of Information Act, a Privacy Act, and Open Meetings Act and a Whistleblower Protection Act.' [Justine White, 'Open Democracy: Has the Window of Opportunity Closed?' *South African Journal on Human Rights* 14 (1998), 69.] By the time the bill was approved by Parliament, it had been stripped of these other components and renamed accordingly: the Promotion of Access to Information Act.

¹² The Ad Hoc Committee on the Open Democracy Bill included most of the members of the Portfolio Committee on Justice and was co-chaired by the Portfolio Committee Chair, Advocate Johnny de Lange, and the chair of the NCOP Select Committee on Security and Justice, J. Mahlangu.

Fortunately, the Campaign Group had sufficient time to work through any difficulties. While the sluggish pace of the drafting process was a disadvantage insofar as it made room for the erosion of the government's enthusiasm for the bill, it was a boon to the cohesiveness and expertise of the Campaign Group. The coalition met regularly for four years with a fairly stable group of personnel. During that period, some organisational representatives moved on to other positions, but their successors were typically well-briefed and rapidly integrated into the group. This regular contact helped to dissipate the early doubts that some organisational representatives had about the political motivations of their counterparts from other agencies. Continuity bred familiarity and trust and helped to promote consensus. Over time, we also developed a shared base of information, which contributed to a certain convergence of perspective on the legislation and the key issues arising out of it; as the group became more expert, so its confidence but also its cohesiveness grew.

This is not to say that there were no disagreements among members. To the contrary, there were often protracted and even heated debates both inside and outside of coalition meetings. But the mutual trust and respect which Campaign Group members developed for one another had two important consequences. First, coalition members were generally willing to overlook petty differences and reserve their passion for more central concerns. Second, conflicts never generated lasting tensions that might otherwise have jeopardised the coalition's survival.

The Campaign Group's diversity had an additional benefit in that it enabled a division of labour. Various members of the group brought different skills, interests and expertise to the coalition. This allowed for specialisation, as one or two members focussed on particular aspects of the bill: the appeal and enforcement mechanisms, the horizontal application of the right to information held by private bodies, the introduction of a 'right to know' approach to handling state records, the exemption clauses, and so on.

This complementarity meant that the Campaign Group became greater than the sum of its parts. It also made the coalition a valuable resource to member organisations with limited staff, time and research capacity. Members recognised that the bill was long, complex and difficult. Individually, they were unlikely to be able to juggle all of the issues raised by the legislation. The Campaign Group offered assurance that all of their organisation's primary concerns would be addressed without having to duplicate the research and analysis undertaken by their colleagues.

The value of this approach was particularly evident in the coalition's advocacy strategy. Campaign Group members 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. We dubbed this tactic the 'Twelve Days of Christmas' approach; where time allowed, each individual making a submission would quickly run through the 'headline' points of the previous submissions made by the Campaign Group members before making her or his own, detailed submission. The purpose of this was to hammer home the key points to the MPs.

On several occasions, the group also prepared joint submissions, with each member contributing a section on her or his area of expertise.¹³ During the protracted committee deliberations, the group made an effort to ensure that the relevant ‘expert’ was on hand to monitor the discussion of provisions of particular concern to the coalition.

The legislation's stately pace not only allowed time for the coalition to gel, it also provided invaluable opportunities for research. By the end of 1997, the Campaign Group had produced a detailed analysis of the content of the draft Open Democracy Bill, including information on the ways in which central problems had been resolved in other countries. Eventually, seven key issue areas crystallised:

- ❑ Ensuring that the legislation gave full effect to the 'horizontal' right to access privately-held information¹⁴;
- ❑ Ensuring that the enforcement mechanisms 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 the disclosure of state records and to maximise the amount of information released without prior review by government officials;
- ❑ Reconceptualising and redrafting in separate legislation provisions intended to protect whistle-blowers;
- ❑ Narrowing the scope of the disclosure exemptions
- ❑ Contesting the blanket exemption of all cabinet records
- ❑ Reinstating an early chapter promoting Open Meetings in the public sector.

Each one of these key issue areas was adopted by one or more members of the group, who then took the lead in co-ordinating the research, the formulation of policy proposals, and the lobbying around the particular topic. The Campaign Group organised one-day workshops at important junctures, drawing in academics and other professional experts to inform the group's discussion and strategic planning. On two occasions, it also commissioned legal opinions from counsel to support or ventilate various arguments.

Consequently, the Campaign Group developed a collective expertise, which became an asset to its members, to parliamentarians, and to the media. As the legislative debate on the bill progressed, a number of journalists began to look to members of the coalition for

¹³ All joint and individual submissions of Campaign Group members are available electronically on the Parliamentary Monitoring Group website, www.pmg.org.za.

¹⁴ The freedom of information clause included in the final constitution is unique in that it not only guarantees access to information in the possession of the state, but it also provides limited access to information held by “private persons” (whether individuals or organisations) to the extent that such information is required for the protection or exercise of any right. To the best of our knowledge, South Africa is the only country that has attempted to establish such a comprehensive right of access to information.

The Open Democracy Bill, as introduced, failed to address fully the right of access to privately-held information. It required only that individuals be permitted to review and correct personal information (such as contact details, etc.) about themselves recorded in any “personal information bank” from which data could be retrieved using a name or other unique personal identifier. This was a much narrower right than envisaged in the constitutional provision.

The enormous gap between the constitutional and the legislative language was due in part to the fact that the original task team had completed its initial draft before the freedom of information clause was finalised. The interim constitution made no mention of privately-held information. However, no effort was made to capture the intent of the new constitutional clause before the draft bill was published in October 1997 or before a final bill was introduced in July 1998.

comment, analysis and background. On the eve of the first parliamentary committee hearing, *Business Day*, one of South Africa's most respected daily newspapers, ran a front-page story saying that the Campaign Group was going to alert the Committee to the dangers of failing to flesh out the 'horizontal' part of the constitutional right. The piece not only recited the main issues of concern to the group, but also referred to the Campaign Group as the 'ten organisation Open Democracy Campaign Group'. At the meeting the next day, one MP referred to the Campaign Group as 'the Group of Ten' and it stuck; from then on, generally that was how the committee referred to us. It gave us a sense of presence and persona, of cohesion and achievement. Campaign Group participants also received positive feedback and encouragement from within their own organisations in the wake of these media reports. This enhanced members' commitment to the campaign and gave it further momentum.

Members of the Campaign Group were all busy people who had many other areas of work on matters of governance, human rights and academia. They also relied on each other to research areas of concern, and develop positions in relation to those areas. Given the size of the group, and the time available, the decision was made to focus on certain key areas.

This was useful in that it gave clarity and purpose to submissions, and created expertise and confidence in the group. However, a number of more technical issues fell to the wayside. These included, for example, the exemption clauses, and particularly, an exemption relating to records which are part of a deliberative process. This exemption was widely drafted, and became a cause for concern after the Bill was passed. Had we allowed fatally wide drafting to escape our scrutiny? Had the drafters simply ended up, in the press of getting the law out, simply made an error? We hoped that any interpretation of the clause would narrow the exemption. However this minor omission has been by many users of the access to information law as being so wide that – as one academic put it – “that it will potentially subsume the right”¹⁵. Professor Govender further wrote that, an “absurd situation would arise in terms of which the exception to the right of access to information would completely negate the operation of the right itself.”¹⁶

¹⁵ Govender, K. “*An Assessment of Limitation to Information in the Promotion of Access to Information Act and the Danger that Disclosure Will Become the Exception Rather than the Norm*” in the Seminar Report, Konrad Adenauer Stiftung, Johannesburg, 2001

¹⁶ Govender, K. Devenish, G. Hulme, D. Administrative Law and Justice in South Africa, Butterworths, Durban.

PART II: IMPLEMENTATION

“I can remember in February 1990 watching Nelson Mandela being released from Pollsmoor Prison down the road from here. I would have been truly amazed if somebody had said to me then that, 12 years from now I will have visited a democratic South Africa eight to ten times, that I will be at my second annual meeting of the Open Democracy Advice Centre and that a racial dictatorship that was a disgrace around the world and was an international pariah would have become, in my opinion, the gold standard of constitutional development in terms of its constitutional reforms, its bill of rights, its access to information act, its protection to whistle blowers and the whole elaboration of rights that has taken place the last few years in this country.”

- Andrew Puddephatt¹⁷

Speaking at the 2nd Open Democracy Review conference, Puddephatt warned South Africa against allowing herself to falter on the rock of implementation. Recent developments in the access to information regime in South Africa have created anxiety about the state of compliance with and implementation of the law.

4. Results of the 2002 ODAC Survey:

Key areas of concern were investigated and articulated in a survey conducted by the Open Democracy Advice Centre (ODAC) in 2002. The survey was conducted to track the progress of the POATIA’s implementation in the public and private sector one year after it was passed, and to establish the obstacles to its implementation.

In their research report Tilley & Meyer 18 (2002) stated that: “the initial results of the survey indicated that on the whole the POATIA had not been properly or consistently implemented, not only because of the newness of the act, but because of low levels of awareness and information of the requirements set out in the act. Where implementation has taken place it has been partial and inconsistent.”

In this survey the sample of public organisations represented national government departments, statutory bodies and commissions, government services, regulatory bodies, parastatals, provincial government departments and local government departments. The private bodies were drawn from a representative database of companies. A total of 56 private bodies were surveyed.

¹⁷ Puddephatt (Director: Article 19) is one of ODAC’s Senior International Associates. This is extracted from his opening address at the 2nd Annual Open Democracy Review Conference held in Cape Town, South Africa on 10–12 October 2002

¹⁸ Meyer, V, Tilley, A. “Access to Information Law and the Challenge of Effective Implementation: The South African Case” in *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice* by Richard Calland & Alison Tilley (eds.). Open Democracy Advice Centre, Cape Town, 2002

4.1. Awareness and implementation

Respondents of public bodies were asked if they were aware of the existence of the POATIA and if they were implementing the act. In all, 46% were aware of the legislation, while 54% were not. Of the 46% who are aware of the act, 65% are implementing it.

More than half the respondents have not even heard of the act, and therefore had taken no steps towards implementing the Act. This figure is significantly low as the public sector has far greater exposure to new legislation than the private sector.

When the results from the survey of the public sector were compared to the private sector, the public sector showed higher awareness and implementation. Only 11% of the respondents in the private sector sample were found to be implementing the POATIA. This represents only six respondents, a number that is insufficient for any conclusions to be drawn. Therefore most of the results and recommendations in the report address the status of implementation in the public sector.

Although 30% of respondents claimed to be implementing the POATIA, this statistic drops by about 25% when respondents were asked about basic details regarding implementation, such as the appointment of deputy information officers and the handling of requests, which indicates that very few proactive steps have in fact been taken.

4.2. Information officials

The POATIA is very clear on the designation of information officials in public bodies. Section 1 of the act says that the information officer of a public body must be the director general, the head, the executive director, the municipal manager or the chief executive officer. According to section 17, each public body has to appoint sufficient deputy information officers to make its records as accessible as possible, and in terms of section 75 of the act an internal appeal must be made through the information officer to the ‘designated authority’, usually the political head.

The report states that:

“When asked how many deputy information officers have been appointed and their ranks or positions, 23% of the total respondents confirmed that deputy information officers had been appointed in their organisation (reflecting 73% of those respondents who are implementing the POATIA). However, these responses are problematic in the context of the responses to the questions regarding the ranks and positions of these officials. Almost half the respondents identified ‘the deputy information officer’ as the statutorily deemed information officer, as set out in section 1 of the POATIA. It is not clear whether these responses indicated a misunderstanding of the different roles of information officers and deputy information officers, or whether no deputies have been appointed in these cases.

When asked who is responsible for dealing with internal appeals, 9% of the total respondents were able to answer, which represents 30% of those implementing the act. Half the respondents correctly identified the person responsible for internal appeals, while the balance identified legal, labour or human resource department personnel as being responsible.

The appointment of a deputy information officer in a public body would indicate the first step in the implementation process, as this officer would primarily be responsible for providing the statutorily required positive assistance to requesters. The statistics in this regard indicate that implementation is lean, patchy and inconsistent. The distinct lack of clarity regarding the identity of either the information officer or the deputy information officer, and around the necessity of appointing deputy information officers, indicates that even those bodies that are aware of the POATIA are unaware of their own obligations under the act.

Regarding the queries on internal appeals, the indication that these are handled by labour, legal or human resource staff suggests that the question may have been misunderstood as an internal grievance procedure appeal, rather than an internal appeal in terms of the POATIA. This may indicate a lack of knowledge of the procedures laid down by the law, but it also suggests there may simply not have been any internal appeals against refusals for access to records. In either event, this finding suggests that Departments having internal appeals procedures may not be appropriate.”

4.3. Reporting to the South African Human Rights Commission

South Africa’s POATIA mandates the South African Human Rights Commission (SAHRC) to be a monitoring agency for the implementation of the law. In terms of the Act the custodians of information have to prepare reports and submit these to the SAHRC. The reports are supposed to have the following information:

- the number of requests for access received;
- the number of requests for access granted in full;
- the number of requests for access granted in terms of section 46¹⁹;

¹⁹ **Section 46.** Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1). 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3). 43(1) or (2), 44(1) or (2) or 45, if—

- (a) the disclosure of the record would reveal evidence of—
 - (i) a substantial contravention of, or failure to comply with. the law; or 35
 - (ii) an imminent and serious public safety or environmental risk: and

- the number of requests for access refused in full and refused partially and
- the number of times each provision of this Act was relied on to refuse access in full or partly;
- the number of cases in which the periods stipulated in section 25(1) were extended
- the number of internal appeals lodged with the relevant authority and the number of cases in which, as a result of an internal appeal, access was given to a record
- the number of internal appeals which were lodged on the grounds that a request for access was regarded as having been refused ,
- the number of applications made to every court and the outcome, thereof
- and the number of decisions of every court appealed against and the outcome thereof

However in the two years since this section of the Act came into force, the SAHRC has not received any useful reports. Speaking at South Africa's second annual Open Democracy Review a representative of the SAHRC revealed that out of the 800 public institutions in South Africa, only 20 have submitted these reports. None of the 1,2 million registered private bodies in South Africa have sent reports to the SAHRC²⁰. This lack of compliance with the reporting requirements of the legislation has made it quite difficult for the SAHRC to even estimate the number of requests.

This seems to be consistent with the results of the survey conducted by the Open Democracy Advice Centre²¹ where the researchers found that because most of the institutions that were sampled for the survey did not run an effective computer-based recording system requests and that the information regarding requests was kept inconsistently, this indicated non-compliance with the section requiring reporting to the SAHRC.

When the researchers asked the question, "*How many requests have you received?*", the answers showed that there is currently no differentiation between requests for information which is automatically available and that which is requested in terms of POATIA nor is there any differentiation on requests where information may be sensitive, and therefore, require the application of the mind of a deputy information officer.

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

²⁰ When the SAHRC was approached for more information on the 20 reports that they have received, the author was told that the reports do not contain any information which might be useful to the research.

²¹ Open Democracy Advice Centre, "*Promotion of Access to Information Act: Implementation 2002*" (2002) pg. 20-21

4.4. Manual and automatic access

In terms of the law, public bodies were obliged to publish a manual by September 2002 to provide, amongst other things, their contact details, the records they holds and how to access these records. In addition, public bodies must report annually to the SAHRC regarding the categories of records that it makes automatically available, and how to access these records.

The survey showed only 9% of respondents had prepared, or even begun to prepare, the required manuals. When asked why work on the manual had not begun, most gave lack of time as the reason. Three respondents said the reason was insufficient staff and one gave the reason as lack of resources. Significantly, two respondents said they were 'unaware that it had to be done'.

When asked if they have made records automatically available, and how they are accessed, half the respondents who are implementing the POATIA confirmed that certain of their records were automatically available, while 10% were in the process of making records automatically available.

Some of the methods described by the respondents that can be used to access their automatically available records included websites, annual reports, brochures and the public library. The steps taken towards complying with the POATIA in respect of automatically available information appear to be more concrete than those regarding actual requests for information in terms of the act. Although there appears to be very little compliance with section 15 (submitting a description of automatically available records to the Minister of Justice), it was found that each body seemed to have some kind of system in place for the distribution of this type of information.

4.5. Difficulties in implementation

Of the respondents who indicated that they were implementing the POATIA, 90% answered the questions on difficulties in implementation, with approximately half of those indicating that they had experienced difficulties. Some of the difficulties they encountered were time and financial constraints, problems with centralising information, and poor filing systems.

A total of 17% of the total number of respondents had received training on the POATIA and its implementation, most from the Department of Justice. Others were trained by the Institute of Local Government, the offices of the provincial premier or the director-general, the Justice College, the Law Society, private consultants or universities. However, more than three-quarters of those who had received training indicated that it was not sufficient to implement the POATIA, and all respondents implementing the POATIA indicated that they required additional information and training in this regard.

4.6. Key Recommendations

The researchers recommend the following in terms of implementation:

- The Government Communication and Information Service (GCIS) is responsible for publishing details regarding information officers of all public bodies in the telephone directory (section 16 of the act). In addition, the GCIS should consider whether it could do more to create awareness around the act among public bodies.
- Training public bodies on the necessity and process for developing the manuals should take place. Further training initiatives need to draw the distinction between the normal process of making information available in the course of business (right to know) and mechanisms that deal with requests for information in terms of the act.
- A more thorough assessment needs to be conducted of who the actual information and deputy information officers are, and a database of these appointments should be maintained. These individuals should be targeted for specific training and information programmes to provide assistance with establishing the necessary infrastructure for implementing the POATIA. In addition, these appointments should be monitored and significant cases of failure to appoint deputy information officers could be referred to the Public Protector on the basis of maladministration.
- Existing structures which facilitate access to information need to be strengthened, particularly the SAHRC.

4.7. Recommendations on private sector information

The researchers felt that a range of training and information initiatives were urgently needed to address the low levels of awareness in the private sector, and that consideration needed to be given to bringing a high-profile test case against a private body for information. This can be used to raise awareness of the issue in the private sector, expedite compliance with the act, create a sense of urgency and become an issue around which training can take place.

5. *Requests and Prominent Cases*

Compliance and implementation problems commented on in the previous section have made it quite difficult to try and gauge the extent to which the Access to Information law is being used in South Africa.

However some information has been obtained through questions asked in parliament by Mr. Kent Durr MP²² to government ministers. Answers to Mr. Durr's questions

²² Member of Parliament representing the African Christian Democratic Party in the National Council of Provinces (South Africa's second chamber, similar to the Senate in the US)

demonstrate a certain extent to which requests for information have been made in terms of the Act. The table below summarises answers given by various government ministers:

5.1. Request Statistics as presented to Parliament

| DEPARTMENT/MINISTRY | # OF REQUESTS RECEIVED IN TERMS OF POATIA | MAJOR SOURCE OF REQUESTS | AVERAGE TIME OF COMPLIANCE WITH REQUESTS |
|------------------------------------------|--------------------------------------------------|--------------------------------------------------|-------------------------------------------------|
| 1. Water Affairs & Forestry | 13 | Members of the public | 1 day – 3 months |
| 2. Social Development | 0 | N/A | N/A |
| 3. Safety & Security | 228 | NGOs, Students, Members of the Public | 30 days |
| 4. Sport & Recreation | 0 | N/A | N/A |
| 5. Public Service & Administration | 1 | Unsuccessful applicant for a vacancy | 30 days |
| 6. Health | 8 | Public Interest Law Clinics | Varied |
| 7. Home Affairs | 8 | Individual persons | 6 days |
| 8. Housing | 0 | N/A | N/A |
| 1. Intelligence Services | | | |
| (a) South African Secret Service | 1 | Biographers | 15 minutes |
| (b) National Intelligence Agency | 6 | Students | 60 days |
| 10. Justice & Constitutional Development | 35 | Researchers on Truth & Reconciliation Commission | 30 days |
| 11. Labour | 3 | Employees & their legal representatives | Immediately |

| | | | |
|------------------------------------------|-------------------------|---------------------------------------------------------------|-----------------------------|
| 12. Provincial & Local Government | 2 | A Local Municipality | 30 days |
| 13. Public Enterprises | | | |
| (a) The Department & 4 other parastatals | 0 | N/A | N/A |
| (b) Eskom ²³ | 4 | Individual members of the public | As per prescription |
| (c) Transnet LTD ²⁴ | 2 | Legal representatives of persons injured in operational areas | 21 days |
| (d) South African Ports Operations | 1 | Tenderer who did not win a contract | As per prescription |
| (e) Transnet Group Tendering & Policy | 3 | Unsuccessful tenderer | Still pending |
| (f) South African Airways | “Receive many requests” | Members of the public and entrepreneurs | “No delays”, Immediately |
| 14. Agriculture & Land Affairs | | | |
| (a) Department of Land Affairs | 11 | Landowners | 30 days |
| (b) Department of Agriculture | 8 | Private persons and institutions | 30 days |
| 15. Arts, Culture, Science & Technology | 14 | South African History Archive | 6 months |
| 16. National Treasury | 8 | Unsuccessful tenderers | 1 – 2 weeks |

²³ State-owned electricity utility

²⁴ State-owned transport utility

5.2. Prominent Cases

Despite the fact that South Africa didn't experience the Hong Kong deluge - where more than 5000 requests were made within one week of Information Disclosure Act coming into force - there has been a few high profile cases on access to Information. The nature of the requests has been varied from pro-poor groups who have made requests for information to help poor communities "progressively realise their socio-economic rights" to unsuccessful tenderers who are aggrieved by decisions of government in awarding contracts to researchers who have sought to use the Act to uncover the truth about the operations of the erstwhile Apartheid governments. Here below are some of the high profile cases on access to information:

5.2.1. *THE KHULUMANI VICTIMS OF TORTURE SUPPORT GROUP*

The Khulumani Support Group consists of people who were victims of torture and other related crimes at the hands of the Apartheid-government security agencies. Members of the support group made submissions to South Africa's Truth and Reconciliation Commission and spoke about what had happened to them. In terms of the Truth & Reconciliation Act the people who had made disclosures to the TRC and had been victims of torture or had even lost their loved ones at the hands of the Apartheid government were to be given some form of reparation.

After the TRC hearings were concluded some payments were made to the victims and a promise of more substantial reparations at later stage was made. Having not received any information from the TRC, or the Department of Justice, on the next round of payments, the support group approached the Open Democracy Advice Centre to assist them in trying to get a copy of the government's reparations policy. This policy document spells out the reparations which the Ministry of Justice, and presumably the President, will support, based on the findings of the Committee dealing with Reparations for the Truth and Reconciliation Commission (TRC). Khulumani, whose members in many cases are people who are completely without income, made an application for a copy of the policy in terms the Promotion of Access to Information Act. After the 90-day period had lapsed and there was still no response from the government, this was deemed as a refusal in terms of the Act.

The Group appealed this deemed refusal, but still could not get any information out of the Department of Justice. As a last resort the group finally took a decision to approach the Cape Division of the South African High Court to get the Department of Justice and the Presidency to release the document.

5.2.2. *THE PRESIDENTIAL PARDONS*

In May 2002 the President of South Africa granted a controversial presidential pardon to 33 prisoners from the Eastern Cape Province. A number of these prisoners had tried to get amnesty through the Truth & Reconciliation Commission process claiming that the

crimes they had been convicted for were politically motivated. However, the TRC denied them amnesty.

Premier of the Eastern Cape province, Makhenkesi Stofile, then lobbied the national government since 1995 to pardon 32 Eastern Cape political prisoners. Justice Minister Penuell Maduna recommended the pardons to President Thabo Mbeki, who signed them on May 6 2002²⁵.

There was widespread outrage at the presidential pardons as most opposition parties believed that common-law criminals had been let loose on the community. Matters came to a head when one of the prisoners who had received a pardon was then re-arrested on suspicion of a murder which it was alleged he committed within a month of having being released through the presidential pardons²⁶.

The Democratic Alliance, which is the main opposition party in South Africa, then made a request in terms of POATIA for all documents related to the presidential pardons. The DA sent the requests to all Ministries and Departments involved, including Justice, Correctional Services, the Office of the Premier of the Eastern Cape and the Presidency.

Again the prescribed periods for responding to a request were not complied with. It was only when the DA called a press conference where it was expected to announce its intention use POATIA appeal's mechanisms for the release of such documents were they told the that the first batch of documents would be delivered the following day²⁷.

The DA believed that the process of granting these pardons was flawed with irregularities. They say that the documents which were released to them confirm that there was indeed such irregularities including the failure by the President to follow the guidelines of the Ministry of Justice on pardons (Fagan, 2002).

The DA has tabled a private members bill on the procedures for pardons²⁸. If this bill gets to be passed by parliament, it will foster more transparency in future presidential pardons processes.

²⁵ Fagan, L. *Pardons poorly handled*, the Daily Dispatch, October 2002

²⁶ Dumisani Ncamazana, the accused, was later to be found guilty on the murder charge and he received a life sentence which was handed down by Judge Chris Jansen of the East London High Court on 12 December 2002.

²⁷ Maynier, D. (Personal interview)

²⁸ The Pardon Investigation Procedure Bill will be tabled to the Justice Committee in Parliament on 08 November 2002

5.2.3. THE ARMS PROCUREMENT DEAL

In 1999 the cabinet approved the purchase strategic defense armaments. The Department of Defense (DoD) had presented cabinet and parliament with a force design option which showed that the South African Defense Force needed to acquire:

| SANDF FORCE DESIGN | |
|----------------------------|----|
| SA Air Force | |
| Fighters | |
| Light Fighters | 16 |
| Medium Fighters | 32 |
| Helicopters | |
| Combat Support Helicopters | 12 |
| Maritime Helicopters | 5 |
| Transport Helicopters | 96 |
| SA Navy | |
| Submarines | 4 |
| Corvettes | 4 |

During the selection process, certain foreign countries approached the Department of Defence, formally and informally with various offers to enter into agreements to procure military equipment. These offers entailed packages consisting of Naval, Air Force and Army equipment. This resulted in the DoD adopting a “package” approach to the acquisition process as opposed to the individual purchasing of equipment types. These offers became known as the Strategic Defence Packages (SDP)²⁹.

²⁹ Auditor-General, Public Protector & National Director of Public Prosecutions, *Report on the Joint Investigation on Strategic Defence Packages*, (2001) pg. 5

The cabinet then took a decision to acquire:

| EQUIPMENT | UNITS | CONTRACTOR & COUNTRY OF ORIGIN |
|--------------------------------|--------------|-------------------------------------------|
| Type 209 German submarines | 3 | German Submarine Consortium |
| Meko A200 Corvettes | 4 | German Submarine Consortium |
| Agusta A109 helicopters | 30 | Agusta – Italy |
| JAS 39 Gripen assault aircraft | 9 | Bae/SAAB - UK/Sweden |
| Hawk 100 assault aircraft | 12 | Bae/SAAB - UK/Sweden |
| (Optional) Hawk aircraft | 12 | |
| (Optional) Gripen aircraft | 19 | |

At the conclusion of the deal the Strategic Defence Package was to cost the South African government R 29,9 billion (US\$2,99 billion)³⁰.

It was after these contracts were awarded that allegations of malpractice and corruption in the arms procurement process started to crop up. Chief among the critics of the process was Dr. Richard Young whose company, Communications Computer Intelligence Integration Systems (C²I²) - a Cape Town based defence information technology company, was unsuccessful in getting the contract they had tendered for. C²I² alleged that:

- there were irregularities in the award of a tender for information management systems used in the four Corvette ships
- the company had been unfairly dealt with during the selection process, and
- one of the companies which were awarded a tender had a director and shareholder whose brother was Chief of Acquisitions in the DoD, thus demonstrating a conflict of interest.

An MP also alleged that various senior MP and members of the ruling party had accepted bribes for arms manufacturers. These allegations and the political outrage led to parliament's Standing Committee on Public Accounts (SCOPA) to recommend that a joint investigation be into the arms procurement process be conducted by the Auditor-General, the Public Protector and the National Director of Public Prosecutions.

The investigators exonerated government (Ministers & President) from any wrongdoing and stated that the procurements process was not flawed. They did however, state that

³⁰ This cost dramatically increased to R 52,7 billion (US\$5,27 billion) as at the end of February 2002 (US\$ 2.28 billion or 76.2% increase) due to the depreciation of the rand.

there improprieties and irregularities on the part of certain officials in government departments.

Dr. Young was dissatisfied with the final joint report. So he used POATIA to request the following:

- documents related to arms probe.
- access to audit reports,
- correspondence and source documents on which the investigation was based,
- a copy of the investigation team's draft report.

His request for these documents was refused by the Auditor-General who had the co-ordinating role for the investigation. In his refusal letter, the Auditor-General claimed the following exemptions:

- Volume of records request to the request.

The Auditor-General claimed that “the number of documents is too vast” and that his office did “not have the resources or capacity to go through the contents of each and every document and evaluate the information contained therein.” This, implied to the Auditor-General that “processing your request would substantially and unreasonably divert our resources from our core business.” The request was therefore refused in terms of Section 45(b) of the Act.

- Confidentiality of third parties.

The Auditor-General also claimed that “bulk of the information and documentation was supplied after their confidentiality was agreed” and he stated his intention not “to breach” their “understanding” [with the sources]. He further claimed that the disclosure of information supplied in confidence might jeopardise their “need to obtain information from various sources to enable us to carry out our function in the public interest”. The request was refused in terms of Section 37 of the Act.

- Information relating defence & security needs of the Republic

According to the Auditor-General the release of the requested document might have prejudiced “the position of the Republic” in matters of safety and security. He relied on Section 41(a) of the Act for this refusal.

Dr. Young approached the Pretoria Division of the High Court of South Africa for an order compelling the arms deal joint investigation team to furnish him with the documents. The Open Democracy Advice Centre acted as *amicus curiae* (“friend of the court”) in this case.

The matter was heard on 07 November 2002 and on the 14th November, Judge W. Hartzenberg delivered what has been hailed as South Africa's first major judgement on the Access to information Law when he ordered the Auditor-General to release many of the documents requested by C²I². In his judgement Justice Hartzenberg said:

“In my view and because of the onus created in section 81 it will be necessary for the information officer to identify documents which he wants to withhold. A description of his entitlement to protection is to be given, one would imagine, as in the case of a discovery affidavit in which privilege is claimed in respect of some documents. The question of severability may come into play. Paragraphs may be blocked out or annexures or portions may be detached. The provisions of section 82 of the Act read with section 80 cover the case where there is a dispute about the question if a document or only a portion thereof is to be disclosed and the decision of the court is required to rule if a document is protected in whole or in part.

The approach of the respondents, even in respect of the reduced, record makes it impossible to evaluate if the respondents justifiably claim privilege in respect of documents and if portions thereof are not to be given access to. In the result I agree with Mr Rogers that the only objection which has in fact been raised is the volume objection. If regard is had to the media coverage which this matter enjoyed and the prominence of the members of the joint commission this is certainly a case where maximum access is necessary to dispel any suspicion of a cover-up. It is not good enough to hide behind generalities. If it means that the first respondent has to employ extra staff it must be done. The applicant alludes to conflicts of interest and political pressure. If at all feasible such suspicions must be put to rest.”

And:

“Although I am satisfied that the first respondent is obliged to provide the relevant documents to the applicant I have come to the conclusion that it may cause prejudice to the Defence Force and the Government to order it to produce the whole reduced record. Mr Rogers (acting for Dr. Young and C²I²) suggested that in such a case a *via media* is to be followed i.e. to order the first respondent to make available those records to which no objection is raised, within a stated period of time, and in respect of the balance of the records of the reduced record, to identify them and state the reasons why access may or must be refused and in respect of which portion of the record it is to be refused. I agree with that submission. Forty court days or eight weeks seem to me to enough for it to do so.”

Judge Hartzenberg ordered, *inter alia*, that the Auditor-General provide Dr. Young and C²I², by no later than 40 court days from the date of the order with the following records:

1. All draft versions of the report submitted to Parliament by the joint investigating team regarding the so-called Strategic Defence Packages for the procurement of armaments for the South African National Defence Force,
2. All the documents and records in respect of which it has no objection in terms of chapter 4 or section 12 of Act 2 of 2000; and a list of all the documents and records in respect of which it objects in terms of the provisions of the aforesaid Act 2 of 2000, setting out clearly and concisely
 - (a) a description of the document or record,
 - (b) the basis for the objection,
 - (c) an indication if the objection relates to the whole document or only to portions thereof and if so,
 - (d) to which portions.

On 10 December 2002 the Auditor-General and others filed an application for leave to appeal Judge Hartzenberg's judgement and order.

5.2.4. THE IDASA CAMPAIGN FINANCE CHALLENGE

Since 1994, South Africa has worked hard to develop the institutional and policy framework necessary to combat corruption, an obvious and inevitable hangover from the lack of accountability of the apartheid era. Public institutions have been created, such as the Public Protector, and Codes of Conduct developed and implemented for elected representatives and senior public servants, requiring disclosure of private interests. However, a serious lacuna survives: the private funding of political parties, which remains entirely unregulated. Despite promises to commence reform, the political will to grasp this nettle is absent. To invigorate the public debate and to prompt reform, IDASA (the Institute for Democracy in South Africa³¹) is using the Promotion of Access to Information Act to apply pressure to both the political parties and big business that funds them secretly.

In October 2002, IDASA made formal requests under the Act for records of all donations made to the thirteen currently represented political parties since 1994. The requests were issued to the political parties and also to the thirteen companies listed highest in the Johannesburg Stock Exchange. The response of business has been surprisingly open. Three of the companies – Anglo Platinum, Gencor and Sappi – have revealed their donations; six have said they make no such donations; only one company (SABMiller) has refused to reveal its donations. The bigger political parties have declined to reveal their private sources of funding, contesting IDASA's right to the information on the basis that there is no right that requires exercise or protection (the pre-condition for access to private records). This matter will now be litigated, although the positive indications that have now been given by all the big parties that they accept the need for legislative regulation is encouraging and may obviate the need to test the matter in court.

³¹ See www.idasa.org.za

Either way, the access to information will continue to be a valuable tool in the campaign for greater openness and accountability in the relationship between money and politics in South Africa.

5.2.5. *THE SOUTH AFRICAN HISTORY ARCHIVE*

The South African History Archive (SAHA), an independent archive dedicated to documenting and supporting the struggles for justice in South Africa, has successfully used the Act to collect a body of documentation on the operations of the Apartheid security apparatus. Through the Act SAHA has collected the following documents:

1. South African National Defence Force (SANDF) reports, correspondence and policy documents on homosexuality in the SANDF.
2. List of files of apartheid-era military records in SANDF Archives
3. Lists of Military Intelligence files
4. Lists of files for the Defence Forces of the former *Bantustans*
5. Lists of files on ex-political prisoners, deaths-in-detention and political parties.
6. Correspondence on the transfer of TRC documents to the Ministry of Justice.

It is this correspondence on TRC documents which later created a stir in early 2002 when SAHA, researchers and other activists tried to access these documents using the POATIA. The copies of the letters by the Ministry of Justice show that the Minister confirmed that he was in possession of 34 and folders containing “sensitive” information collected during the TRC process.

However, when SAHA made requests in terms of POATIA for these documents, existence of these documents was initially denied. Persistence of SAHA later led to counter-claims by the National Intelligence Agency (NIA) that the Ministry of Justice had custody of the documents, and vice versa. This has led legal action being taken by SAHA to ask the High Court to compel the Department of Justice to disclose more details on these files.

5.2.6. *THE HOUT BAY FISHER-FOLK*

The Western Cape has a lot of fishing communities whose sole source of income to sustain their livelihoods is fishing. One of these communities is Imizamoyethu, an informal settlement in Hout Bay in the Cape Peninsula. The community of fisherfolk in Imizamoyethu is a very poor community and had been surviving on subsistence fishing for a number of years. However when the Department of Marine & Coastal Management abolished subsistence fishing licenses the fisherfolk were forced to join co-operatives and or set up fishing companies. This scheme led to abuse of license provisions by unscrupulous fishing companies which mushroomed almost overnight. A number of these companies preyed on communities like Imizamoyethu by inviting members of the community to become shareholders in these companies. The different groups all argued that they wanted to assist the community get fishing quotas. People were persuaded to pay money “for application for quotas”, their names were used in the applications with the fishing authorities and they received ‘share certificates’ in unregistered companies. It is alleged that when these companies were then awarded fishing quotas, they were never to be heard from again.

The community representatives then approached the ODAC litigation department to assist them with obtaining information about fishing quotas which they believe should have been allocated to them. ODAC obtained information and then used the information obtained to match the shareholdings in the companies implicated, against the fishing quotas granted. This was done to enable the community to either claim their rights from the companies, or establish that they have no claim, and that their names are not being used.

The investigation conducted by ODAC showed that instances of breach of the Company’s Act were rampant as shareholder meetings hardly ever took place, no financial reports were ever given to the so-called “shareholders”, not to mention the declaration or distribution of any dividends.

6. *Table: Availability of Records*³²

| RECORDS | AGENCY THAT KEEPS IT | IS IT AVAILABLE TO THE PUBLIC? | IS IT AVAILABLE ELSEWHERE |
|-----------------------------------------|--------------------------------------------------------------|----------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>SOCIO-ECENOMIC & LAWS</i> | | | |
| Macroeconomic data | National Treasury, Reserve Bank of South Africa | Depends on the nature and sensitivity of the data | Statistics South Africa |
| General social data | Department of Social Development, Department of Home Affairs | Yes | Statistics South Africa, Human Sciences Research Council |
| Population census data | Statistics South Africa | Yes | |
| Environmental data | Department of Environmental Affairs and Tourism | Yes. (Also, depends on the nature and sensitivity of the data) | Departments of Land Affairs & Agriculture, Trade & Industry, Water Affairs & Forestry, Minerals & Energy, Eskom, Companies in the petrochemicals industry, Parks Boards |
| Copies of laws | Government Printers, Government-Online Website | Yes | Legal Deposit Libraries, Public Libraries, Law Societies Libraries, <i>etc.</i> |
| Copies of gov't directives & circulars | Government Printers, Individual gov't agencies | Yes | Government-online Website |

³²This table is based on the table generated by PCIJ/SEAPA for their cross-country survey on access to information in South East Asia. See Coronel, S. (ed), *The Right to Know: Access to Information in Southeast Asia*, 2001, pg. 218-255.

| BUDGETS & CONTRACTS | | | |
|------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------|----------------------------------------------------------------|
| National gov't budget | National Treasury, | Yes | Newspaper supplements, Government-Online Website |
| Local gov't budgets | National Treasury Municipal Councils Municipal Council Treasuries, Municipal Council Accounting Departments | Yes | |
| Military expenditure | Department of Defence | Yes | National Treasury |
| Gov't loans & contracts | National Treasury | Yes | Reserve Bank of South Africa |
| Military loans & contracts | National Treasury | Yes | |
| Official audit repots of gov't agencies | Office of the Auditor-General | Yes | Government-Online Website |
| MEETINGS AND INQUIRIES | | | |
| Records of legislative proceedings (a) Houses of Parliament (b) Committees of Parliament | Government Printers Parliamentary Monitoring Group (NGO) | Yes Yes | Parliament-Online |
| Records of Officials investigations | Office of the Auditor-General, National Prosecutions Authority, Office of the Public Protector, Ministry of Justice, Individual government agencies | Yes | Parliament, Government- Online Website |
| Police investigation reports | Local Police Stations | Depends on the nature and sensitivity of the information requested | |
| Military/police intelligence reports | Department of Defence | Requests can be made in terms of POATIA | National Intelligence Agency, South African Police Services |
| Credit investigations | Office of the Auditor-General | Yes | |

| | | | |
|--------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------|-------------------------------------------------|
| Court records | High Courts, Constitutional Court, other Courts | Yes | Butterworths Law Reports, Jutastat Publications |
| <i>PUBLIC OFFICIALS & EMPLOYEES</i> | | | |
| Resume of gov't officials | Department of Public Service & Administration | Yes: Senior Managers | |
| Bank records of gov't officials | Banking Institutions | No | |
| Election contributions & expenditure | Not collected | | |
| Registration of other forms of property of gov't officials | Department of Public Service & Administration. (For Parliamentarians - parliament's Ethics Committee) | Yes: Senior government officials & all parliamentarians | Public Service Commission |
| Financial disclosure reports that show assets & liabilities of gov't officials | Department of Public Service & Administration. (For Parliamentarians - parliament's Ethics Committee) | Yes: Senior government officials & all parliamentarians | Public Service Commission |
| Gov't service records | Individual Departments where officials are employed | No | Department of Public Service & Administration. |
| Military personnel records | South African National Defense Force | No | Department of Defense |
| Civil service exams & related information | Individual Departments where officials are employed | No (unless information has been statistically processed) | Department of Public Service and Administration |
| <i>CORPORATE & BUSINESS INFORMATION</i> | | | |
| Corporate registration records | Registrar of Companies | Yes | Government Printers |
| Financial statements of publicly listed companies | Individual Companies, Johannesburg Stock Exchange | Yes | Financial Newspapers |
| Financial statements of companies not listed on the stock exchange | Individual Companies | No, unless the requester can demonstrate personal/material interest in the information | |

| | | | |
|------------------------------------------------------|----------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------|
| Corporate tax records | Individual companies, | Yes for public (listed) companies. No for private (unlisted) companies, unless the requester can demonstrate personal/ material interest in the information | South African Receiver of Revenue |
| Business licenses and permits | Department of Trade & Industry, regulatory bodies for different industries | | |
| <i>PERSONAL DATA</i> | | | |
| Civil registry records | Department of Home Affairs | Yes | |
| Academic records | Department of Education | Yes | |
| Land registration | Department of Land Affairs | Yes | Deeds Office |
| Real Estate taxes | South African Revenue Service | Yes (for personal requesters) | |
| Licenses & permits (license to own & carry firearms) | Central Fire-arms Registry | Yes (for personal requesters). Can only be released to non-personal requesters if an investigation is underway and upon receipt of summons from a court of law) | Police Stations |
| Vehicle registration | Provincial Traffic Departments | | |
| Driver's license | Provincial Traffic Departments | No | |
| Voter registration records | Independent Electoral Commission | Yes | |
| Medical records | Public Health Institutions, Private Medical Institutions | No. (Consideration would be made for personal requesters) | Insurance Companies |
| Income tax returns | South Africa Receiver of Revenue | Yes (for personal requesters) | |

| | | | |
|-----------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|---------------------------------------------------------------------------------------|
| Industry or professional listings/directories | Telkom's Telephone Directory | Yes | Relevant Professional Societies like the Provincial Law Societies, SAMDA, <i>etc.</i> |
| National ID records | Department of Home Affairs | No | |
| Professional licensing records | (a) Provincial Law Societies (for the legal profession) (b) South African Medical & Dental Association (for the medical profession) (c) Public Accountants' & Auditors' Board (for Accountants) | Yes Yes Yes | South African Institute of Chartered Accountants |

7. CONCLUSION

South Africa is still a fledgling democracy, and because of the country's special history it seems that the maturity of this young democracy will materialise under the watchful eye of the rest of the world. High hopes rest on the shoulders of the country's government. Through civil society's campaign for a Freedom of Information law, South Africans have managed to secure for themselves the promise of an open democracy and an open society - a democracy where they have the right to scrutinise the actions of government and the private sector, and to demand more accountability from both and participate meaningfully in the decisions that affect everyday lives in a profound way.

The South African approach to freedom of information is both innovative and, in terms of its comprehensive coverage of private information, revolutionary. In these respects it represents an important case study, an experiment from which others will continue to learn a great deal. As the cases cited above illustrate, the process of transforming South African from being a closed and secretive police state to a people-centred open democracy is unfolding and it is still in its infancy. It becomes important, therefore, that these baby-steps be jealously guarded. The Open Democracy Advice Centre is part of South African civil society that is determined to ensure that the constitutional gains of the past eight years since the democratic transition are defended and enhanced. More specifically, ODAC aims to ensure that the potential of its freedom of information law is realised and that it does not fail on the rock of weak implementation. We are here to stay; this law is too important to fail. For us at ODAC, like for the South African people, the right to know is a key part of the right to live³³.

³³ See Calland R. & Tilley A., (eds) *The Right to Know, the Right to Live: Access to Information & socio-economic justice*, The Open Democracy Advice Centre, Cape Town, October 2002.

8. Biography of the Authors.

Richard Calland

Richard Calland is Head of the Governance Programme at the Institute for Democracy (IDASA) and became Executive Chair of ODAC in January 2001. Richard is a political analyst and consultant, with a varied academic background in law and politics. He has published numerous books and articles in the field of South African politics, and was joint editor of ODAC's book "The Right to Know, The Right to Live: Access to Information and socio-economic Justice", published in October 2002.

Mukelani Dimba

Mukelani Dimba is a Training Consultant at the ODAC. He has an academic background in management and labour law. He is part of the Training and Consultancy services unit, which provides advice to the public and the private sectors on best compliance strategies with regards to the Access to Information law. The training also provides services to Civil Society Organisations and members of the public on how to use the Access to Information law in South Africa.

9. ATTACHMENTS

A News on PAOATIA



Arms deal: Defence contractor goes to court

November 05, 2002, 05:53 PM

Defence contractor Richard Young, is to approach the Pretoria High Court on Thursday for an order compelling the arms deal joint investigation team to furnish him with documents related to their probe. Among other things, he is seeking access to audit reports, correspondence and source documents on which the investigation was based, Young said today. He also wants a copy of the team's draft report.

"I want to independently verify the veracity of the arms deal investigation, whether it was done properly, and see if there was any interference by the government in compiling the final report," said Young.

He said he lodged a formal application for the information with investigators a year ago, which was refused. His subsequent request for an appeal was also denied.

Young said his latest court application would be brought under the Promotion of Access to Information Act.

The respondents to the application were listed as Mosiuoa Lekota, the Defence Minister, as well as the investigators: Auditor-General Shauket Fakie, Selby Baqwa, former Public Protector, and Bulelani Ngcuka, the National Director of Public Prosecutions.

Young was the managing-director of Communications Computer Intelligence Integration Systems (CCII), a Cape Town-based defence information technology company. He contends that there were irregularities in the awarding of a tender for information management systems used in the four corvette ships bought under South Africa's multi-billion rand arms deal.

CCII was named the preferred supplier of these systems, Young claims. However, the tender was awarded to French company Detexis. Detexis is the sister company of African Defence Systems (ADS), of which former arms acquisition head Chippy Shaik's brother, Schabir, was a shareholder and director. The joint investigation found that Chippy Shaik had a conflict of interest in the arms procurement deal.

Young said the court proceedings would kick off on Thursday with an application by the Open Democracy Advice Centre (Odac) and the Institute for Democracy in South Africa

(Idasa) to appear as friends of the court. "Odac and Idasa wish to support that our application is in the public interest," he said. – Sapa



Judgment reserved in arms deal application

November 08, 2002, 10:39 AM

The Pretoria High Court reserved judgement today in an application by defence contractor Richard Young for an order compelling the arms deal joint investigation team to furnish him with documents on their probe.

During a day of argument yesterday, lawyers for Young claimed the team was deliberately withholding information about the arms deal investigation process and report.

The arms deal was mired in allegations of irregularities and kick-backs, but the multi-agency probe found no evidence of "improper or unlawful conduct" by the government and no grounds to suggest its contracting position was flawed.

Young, who was "unhappy" about the investigators' final report tabled in parliament, at first wanted the team to hand over all documents relating to the investigation.

However, after realising that this would comprise over 700 000 documents, he said he wanted the draft report and the reduced record. Young is one of the first people to launch proceedings under the new Access to Information Act.

The respondents were listed as Mosiuoa Lekota, the Defence Minister, and the investigators Auditor General Shauket Fakie, former Public Protector Selby Baqwa, and Bulelani Ngcuka, the National Director of Public Prosecutions .

Young said he wanted the documents to verify whether the probe was done properly, and whether there was government interference in compiling the final report. He was the managing director of Communications Computer Intelligence Integration Systems (CCII), a Cape Town based defence information technology company.

He contends there were irregularities in the awarding of a tender for information management systems used in the four Corvette ships bought under South Africa's multi-billion rand arms deal. - Sapa

Sunday, 17 November 2002

Information Act passes major test

The first major judgment involving the interpretation of the Promotion of Access to Information Act has been handed down in the Pretoria High Court.

Judge Hartzenberg ordered the Auditor-General to provide a private company CCII Systems (Pty) Ltd with a range of documents relating to the government's controversial Strategic Defence Packages for arms procurement.

The Auditor-General must furnish the documents within the next 40 days. The Open Democracy Advice Centre (ODAC), which applied to intervene as a friend of the court in the matter, hailed the judgment as useful step in the implementation of the Act.

"The Centre submitted that the exemption clauses in the Act should be narrowly interpreted, bearing in mind the purpose of the Act, which is to foster openness, transparency and accountability. The Centre placed foreign law before the court to assist it in making its decision," said Teboho Makhalemele, an attorney at the ODAC.

"Our research has shown that many government officials have not heard of this legislation, and have not begun to implement it," said Alison Tilley, manager of the ODAC.

"This judgment will make the public and private sector wake up and smell the coffee - this Act is here to stay, and it has a direct impact on how organisations manage their information, and requests for information. "

I-Net Bridge

Pardons poorly handled

In May, 33 Eastern Cape prisoners received a controversial presidential pardon. Last week the Democratic Alliance received the documents relating to the pardons, requested in terms of the Promotion of Access to Information Act. Louise Flanagan had a look at the documents.

THERE are less than 300 pages in the three bundles of documents from the Eastern Cape Premier's Office, the Ministry of Justice and Constitutional Development, and the Presidency. And what's in those pages is incomplete, insubstantial, badly organised and a poor reflection on the whole pardons process. Briefly, Premier Makhenkesi Stofile lobbied the national government since 1995 to pardon 32 Eastern Cape political prisoners. Justice Minister Penuell Maduna recommended the pardons to President Thabo Mbeki, who signed them on May 6 this year.

It was the ministry's job to investigate the cases and make a recommendation to the president, who would then consider granting the pardons.

So on what information did the ministry and the president base their decisions?

The answer is a list of the 32 applicants provided by Stofile (updated to 33 by the Justice Ministry), incomplete conviction details, desperate hand-written pleas from some of the applicants, a handful of amnesty decisions by the Truth and Reconciliation Commission (TRC), a few TRC amnesty database printouts, and skimpy one-page Correctional Services details on some of the prisoners.

There's little depth to the documents. Most of the information is easily publicly available. No context is given.

The TRC database printouts in both the Justice Ministry and the Presidency bundles were printed by the same person on October 10 -- five months after the pardons were granted but just in time to supply the DA with documents for its request. Presumably both the minister and the president read this information directly off the TRC computers in April.

There are no substantial reports indicating that any official gave serious consideration to a single case. Names are misspelt. One applicant was pardoned under his PAC pseudonym.

The impression from the documents is that most of the applicants would probably have got amnesty if they'd had good lawyers. Their letters and amnesty applications point to little education, some political awareness, abandonment by their political parties, and an inability to deal with the amnesty process.

By the time the pardons were signed, at least 11 had been released on amnesty or parole.

Another 15 would have been eligible for parole by 2006 at the latest and 12 of these had already each spent over a decade in jail.

The information is limited but hints at the need to look a bit more closely at the remaining seven -- Mxolisi Skoti, Siphiso Mpambani, Mxolisi Sokoyi, Zama Thutha, Monwabisi Khundulu and Pakamile Cishe, all convicted of murder and jailed for at least 20 years; and Dumisani Ncamazana.

Ncamazana now faces new charges of murder and armed robbery relating to incidents after his release. It's his case which is the most interesting, because the documents raise the most questions about him.

His only conviction and sentence is listed as 10 years for robbery, but his earliest release date is recorded as July 2033. This omits his amnesty convictions, which is reasonable, but also omits his jail escape in 1999, which is not.

The robbery sentence was handed down in December 1997, a clear hint that the robbery was after the 1994 elections (it was). The fact that this and the escape took place after the elections points to criminal rather than political motivation.

The documents indicate that Ncamazana spent the least time in jail, serving just four years. His pardon and some of the others contradict the Justice Ministry's own guidelines on pardons. These state that as the applicant's version is often the only information available and because the pardon process is not regarded as a judicial review of the conviction and sentence, the department looks at the sentence.

"The sentence imposed is viewed as a good indicator of the seriousness of the particular offence as determined by the court," states the policy. Applicants are usually expected to have served at least 10 years. Their age at the time of the offence, the circumstances around it and the interests of the state and the community are considered.

"Once the amnesty process is over a more inflexible approach will be appropriate. It may indeed now be the moment to start with such an approach, specifically keeping in mind government's policy regarding strong measures against crime," notes the policy.

"The fact that applications for pardon have increased drastically over the last couple of years, and the fact that such applications involved officials of the Department of Justice, the Minister of Justice, the Deputy President and the President, it is suggested that applications for pardon be considered on the more strict approach as set out above in the future."

Many of the 33 may have deserved pardons. But in those three bundles of documents there is little indication that it was a carefully considered decision.

Flow of information follows rocky path

Lynda Loxton

October 14 2002 at 08:14AM

That quaintly phrased clarion call of the ANC government - for more transparency in public and private bodies after years of secrecy under apartheid - might yet turn into a multiheaded hydra it will wish it hadn't unleashed.

Underpinning that call is the Promotion of Access to Information Act 2000, which gives citizens the right to obtain information they think is crucial to the maintenance of order, justice, equality, human rights and dignity.

The problem, according to a study released last week, is that most civil servants are unaware of the act. And even if they are aware, few are keen to help implement it.

Released by the Open Democracy Advice Centre, the survey found that few private sector organisations or individuals had heard of or implemented the act.

Andrew Puddephatt, the director of Article 19, an international organisation focusing on freedom of expression and access to information, says in the survey: "The South African legislation is the gold standard against which we measure other laws: we would be very disappointed were it to fall at the hurdle of implementation."

The survey found that out of more than 800 public agencies, only 20 had prepared reports on how they handled requests for information.

In response, a group of civil society organisations, including representatives of the SA Human Rights Commission, the public service commission and the public protector, met in Cape Town last week under the umbrella of the Open Democracy Advice Centre to review the situation.

They

deplored the government's failure to appoint deputy information officers to deal with requests for information, and the general failure to meet the time limits for the completion and submission of manuals to the Human Rights Commission on how this would be handled.

They were concerned about the apparent weakness and inconsistency of both electronic and paper-based record-keeping in state agencies, and the absence of any serious response to the act by the private sector.

They recommended that parliament's portfolio committee on justice review the options for the establishment of a new independent review mechanism, by comparing different

models for an access to information commissioner.

They recommended the model of the Hungarian freedom of information commissioner, which provides a more accessible remedy for citizens and a less expensive and time-consuming enforcement mechanism for the government than the current need to go the high court to appeal against a request for information that has been turned down.

They said the secretariat of the New Partnership for Africa's Development and members of the African Union should comply with the act as well.

The Institute for Democracy in SA (Idasa) took this call one step further last week when it called for the reform of the laws covering the private funding of political parties. It sent letters to all 13 political parties represented in parliament, urging them to come clean about their funding sources.

Political parties receive public funding according to the size of their support base, but they are also free to receive financial support from members and other sources.

According to Idasa, the ANC, for example, received about R60 million from various sources - about which there was much wild speculation - during the run-up to the elections in 1999/2000.

Idasa justified its stand by saying that the fact that political parties received public funding made them accountable to taxpayers for all the funding they received.

Disclosure of this information would reduce the distrust of ordinary South Africans towards their elected representatives and either eliminate or prove the sneaky suspicion that wealthy people could buy influence through their donations, creating a completely unequal political playing field.

Parliamentarians head back to Cape Town this week for their final session of the year, during which much has to be done.

The two finance committees must wrap up the detailed and exacting Municipal Finance Management Bill, which will replicate in local governments what is already in place in provincial and national governments through the Public Finance Management Act.

The aim is to ensure good financial management, build capacity in newer and weaker municipalities and metros, and generally ensure accountability.

I can't help but wonder if officials tasked with managing our public finances have also been briefed about the Access to Information Act and their resultant extra responsibilities over and above the need to manage their funds properly.

I somehow doubt it.

Idasa request sets the cat among pigeons

Institute says it is investigating the way in which money influences politics and democracy

Parliamentary Editor

THE Institute for Democracy in SA (Idasa) has ruffled some feathers in both the political and business worlds with its requests, under the Promotion of Access to Information Act, for details of private donations to parties represented in Parliament.

While a few businesses have responded with details of their donations, most top companies remain tight-lipped, saying such information is confidential.

Anglo Platinum has become only the second major company, after Gencor, to disclose details of its donations. Anglo Platinum covered all its bases by giving money to the top five parties, roughly in proportion to their size.

None of the 13 political parties represented in Parliament have obliged the Idasa requests.

There are legal arguments both for and against such disclosure, but the move has at the very least broadened debate on regulation of party political funding, and forced discussion of the possibilities opened up by the Access to Information Act.

Idasa's Governance Unit Manager Judith February says the group has two goals. First, it aims to promote public awareness of the Access to Information Act. The act has been on the statute books for about two years and there have been few applications to either state departments or private sector entities for information.

Indeed, according to one study by the Open Democracy Advice Centre, the number of companies aware of the act and the responsibilities it imposes on them is statistically negligible.

February says by making the requests to the 13 represented political parties and the 13 top companies listed on the JSE Securities Exchange (SA), Idasa seeks to promote the growth of a culture of openness for parties and companies.

The second issue, says February, has to do with Idasa's push for legislation to regulate private party political funding.

Today, all represented parties get money from state coffers in proportion to the representation they were accorded by voters in the past general election, but there is no law governing disclosure.

"There is absolute secrecy around who gives money to political parties and this leads to cynicism in the broader electorate as well as a feeling that its voice does not matter that much," February explains.

She says where parties cite their right to privacy in terms of the law, Idasa replies that a compromise position could be that details of donations received and their size could be supplied without the details of who made the donation.

Letters to this effect have been sent to the African National Congress (ANC) and the New National Party. "We are not trying to be antagonistic, but believe that the whole issue is in the public interest because we are looking at the way in which money influences the political process and democracy in the country."

From most other parties, including the Democratic Alliance, there has been complete silence.

A senior ANC source says political parties are private entities and therefore for Idasa's requests to be legally enforceable they have to demonstrate the information required is directly connected to the exercise or protection of a specific right in the constitution.

While two top companies, Gencor and AngloPlatinum, have responded, some of the others ask exactly what constitutional right Idasa is seeking to exercise or protect.

Attorneys acting for SABMiller say in a letter the right Idasa is seeking to exercise or protect has not been established.

They claim the rights of citizens to freedom of choice or political equality are not contained in the constitution.

But, they say, a company's right to associate with whomever it pleases is in the constitution. SABMiller declined the request for information, but said it had provided funding to a spread of political parties since 1994.

Anglo American, now listed in the UK, argues that in Britain there is a law forcing disclosure of donations. It says there have been no donations.

Impala Platinum says it has made no donations, while Gold Fields says Idasa has no right to the information but it too has made no donations.

Old Mutual says it sponsored a hole at an ANC golf day and that the money was paid to the organisers.

Idasa's work shows that the Promotion of Access to Information Act if used is an instrument that can work for ordinary people and SA's democracy.

Nov 22 2002 12:00:00:000AM Wyndham Hartley Business Day 1st Edition

Big business starts getting its house in order

Aug 13 2002 12:00:00:000AM Sanchia Temkin Business Day 1st Edition

But state officials still cannot say whether printers will be able to cope with the number of documents in the queue

BIG business in SA has started getting its house in order by preparing manuals that contain information relating to companies' operations. A few hundred manuals are expected to make their way to the government printers this Thursday for publication.

But government officials still cannot say whether printers will be able to cope with the number of manuals sitting in the queue to be printed.

A section of the Promotion of Access to Information Act, which comes into effect on Thursday, compels all government departments and private companies, including registered close corporations, to compile company manuals of various records.

The information required to be disclosed includes a company's incorporation documents, shareholder agreements, documents relating to their taxation, employee contracts, share option schemes, banking details and pension and provident funds.

The manuals are also required to be published in the Government Gazette on the same day.

An unnamed official at the government printers was unable to say whether printers would be able to cope with the work load within deadline.

The official said it would cost companies a "flat fee of R200" to have a manual printed.

Hofmeyr Herbstein Gihwala partner Clifton Hinds said that the firm had already prepared in excess of ten manuals for "major players in industry".

The manuals had been submitted to the government printers for publication.

Hinds said the firm had also prepared generic manuals for businesses in certain industries.

These manuals could be used as a standard form in that particular industry "they were accessible " he said.

Martin Rabe, a director at Stanlib Wealth, said the organisation had already compiled its manual. He said that the organisation's manual was similar to Liberty's one. "However, the manual was customised to suit our business," Rabe said.

He said the company started working on the manual a month ago after being aware of the imminent legislative requirements in a Government Gazette. He said they had been informed by the government printers that the manual would be published on Thursday, as required.

Rinate Smit, head of compliance at Stanlib Wealth, said the organisation's manual consisted of two pages. The organisation had "decided to put the minimum (details) in the manual".

However, the company had trained its staff on the request to information procedure.

A copy of the manual was also available in the reception area and on the company's website, she said.

Webber Wentzel Bowens partner Peter Grealy said the purpose of the act was to foster a culture of transparency and accountability in public and private bodies.

He said the manuals should contain sufficient information to facilitate a request for access to a record from a company.

The manual should be updated regularly, he said. Situations could arise where a company could receive requests for information from a third party, Grealy said. For example, journalists might require information for articles. On the other hand, erstwhile employees might seek access to reasons for their termination.

Grealy said the granting of access to records was subject to the grounds of refusal set out in the legislation. A list of employees would generally not constitute unreasonable disclosure of personal information.

However, employee contracts, or arrangements with directors and employees, would be exempt from disclosure as that could "constitute an unreasonable disclosure of information about a third party".

Similarly, Grealy said many banking records of a company would also be exempted on the grounds that disclosure would result in harm to either the commercial or financial interests of the company concerned.

The act provides that as a pension fund is a separate legal entity, information pertaining to the fund must be requested from the trustees of the pension fund itself.

NMG-Levy senior consultant Lorraine Dias said a more "streamlined approach" should be adopted for retirement and pension funds.

She said the records for such funds would be similar. One manual pertaining to all retirement funds should be formulated, Dias said. "(That) would cut down on costs and the work load".

SA Chamber of Business CEO Kevin Wakeford said government should not place "too onerous conditions on small business".

He said small businesses kept the economy going. He said such operations did not have the same resources and specialities as big business.

Robert Millard, a director of Millard & Associates, said it did seem too onerous a task for small business to compile the manual.

He said all businesses "should have the necessary information at their fingertips".

Millard said he got a chartered accountant to compile the business's manual "it was not a costly exercise".

Aug 13 2002 12:00:00:000AM Sanchia Temkin Business Day 1st Edition

No pain for those with nothing to hide

Aug 20 2002 12:00:00:000AM Mukelani Dimba Business Day 1st Edition

By Mukelani Dimba

I hear from a source that it has been quite hectic at the Government Printers recently, what with businesses scurrying about to get their Access to Information manuals printed in the Gazette in line with the requirements of the Promotion of Access to Information Act No.2 of 2000.

In terms of the Promotion of Access to Information (POATIA or PAIA) and the regulations released in mid February this year business organisations (Private Bodies) and government departments & public institutions (Public Bodies) should publish manuals, which contain, amongst other things, an index of all records held by that particular private or public body. This section of the Act came into operation in February this year and private or public bodies had six months to compile and publish these manuals. Hence the current scramble to have the few manuals that are ready published in the Gazette.

It is important to start at the very beginning. South Africa has only recently come out of decades of the most atrocious human rights abuses, a number of which were made possible because of the closed and secretive nature of the public and private sector? The importance of the issue of openness in government and the private sector is, therefore, beyond question. It is hardly surprising then that a post-apartheid South Africa would be the first country in Africa to have Parliament pass an Act that seeks to open-up government and the private sector. Cases like Enron, Wolrdcom and our own Leisurennet

are classic examples of what secrecy and a lack of transparency can lead to in the corporate world.

The Act, which came into force on 9 March 2001, is an important and far-reaching law that has great significance for all three sectors: public, private and civil society. The rationale behind the Act is that information is not just a necessity for people – it is an essential part of good corporate and state governance. Article 19, a UK-based organisation, articulates this well by saying that weak companies and bad governments need secrecy to survive and that secrecy has been shown to allow for inefficiency, wastefulness and corruption to thrive.

With regards to the public sector, access to information allows people to scrutinise the actions of their government and is the basis for proper, informed debate of those actions.

At the core of this Act is a need to foster transparency and accountability and enhance proper corporate and state governance. However, the Act also provides for certain justifiable limitations - to the right of access to information - such as privacy, commercial confidentiality and effective, efficient governance.

Unlike with the public sector where anyone can make a request for any document or record, a person who makes a request for a document in the private sector has to show that they need the information contained in the document or record to protect or exercise any right. It is expected for example that people might request files which contain information which relates to them as members of staff, and unsuccessful candidates could make requests for records which relate to decisions which lead to them being not selected for particular vacancies.

Civil Society organisations and public bodies could make requests for records which contain information which relates to company operations in so far those operations affect the environment. People who have been aggrieved by lending practices at certain financial institutions could make requests for records which contain information which

relates to the financing or credit-granting policies of those institutions. The Act does not provide an exhaustive list of what records might be requested and released, but it gives guidelines to the person handling the requests by providing three categories – depending on the nature of the document or record – of what must be given, may be given and must not be given. The person handling the request – normally this would be the Information Officer – must then see whether any harm might be caused by granting access to such documents. For example the Act does not specifically require that incorporation documents, documents relating to taxation, employee contracts, share option schemes and banking details must be disclosed, not in terms of this Act anyway.

However should a person make a request for such records, they should firstly show that such information is needed to protect or exercise another right. The information officer would then have to investigate the nature of the document, and his or her decision to grant access to such records would be determined by their consideration of issues of privacy and commercial confidentiality which are provided for in the Act.

Sadly, the message about this Act has largely been a negative one. Impressions have been created that the implementation of this Act will put an extra burden on the private sector. This sentiment is clearly illustrated in the results of the survey that was conducted by the Open Democracy Advice Centre early this year. In March this year only 24% of private bodies sampled for the survey were aware of the Act and, of that, only 11% of were actually doing something to implement the Act.

However the picture is not entirely bleak. There are best practice examples in South Africa too. Within the Gauteng Provincial Government the Department of Health is a shining example of good implementation of the Act. Not only have senior officials been trained on the requirements of the Act but also a policy discussion document has been drafted relating to the implementation plan and what should and should not be released, and this being built upon through on-going consultative sessions. There is no need for business to fear the implementation of this Act – unless corruption and mismanagement are the order of the day.

March 1, 2002

Mail & Guardian
Richard Calland
CONTRETEMPS

Openness is a friend, not a foe

RICHARD CALLAND

Ulla Hildert's office is on the seventh floor of a simple but elegant Swedish government building, Rosenbad, that looks out over one of the many stretches of water that bisect Stockholm, the "Venice of the North".

Hildert works for Prime Minister Goran Persson and is responsible for the administration of the system of public access to his documents. So the fact that bright light streams into her office is entirely apt: "Sunlight," goes the cliché, "is the best form of disinfectant".

I tell Hildert that I have come to inspect the prime minister's correspondence. "Of course, would you like to see today's correspondence first," she replies. No, I would like to see correspondence with Nelson Mandela and Thabo Mbeki. She types and out come two lists. One, for Mandela, shows 27 items of correspondence from 1992 until now. From Mbeki, there are just two items, which turn out to be short notes of congratulation from Mbeki in relation to the Swedish presidency of the European Union during the first half of last year.

I ask to see the actual documents of two on the Mandela list. One, from 1998, has as its title "EU-South Africa trade negotiations". I imagine a request for support from Mandela against the stubbornness of the French and Portuguese. "Oh dear, I am so sorry," Hildert says, "this correspondence has been marked 'secret'." She asks me whether I would like to take the matter up for review.

One of the many qualities of the Swedish system of openness is that although there are exemptions to public access, such as international relations, they can be reviewed again and again. This is entirely sensible: what may be secret one year may no longer require protection a year later. In Britain and elsewhere you have to wait at least 30 years before what by then may be entirely innocuous documents are made public.

I ask: What will the review involve? Hildert informs me that she will speak that afternoon with the prime minister's special adviser to see if he will permit access on the basis of changed circumstances. If not, the Cabinet will need to review the matter and, she says, they will only be meeting next week and would I mind waiting that long?

A number of things go through my mind. Am I dreaming? Can it really all be so civilised? And, in contradistinction, I imagine walking into, say, 10 Downing Street and asking to see Mr Blair's correspondence ... Well, I say to Hildert, I really don't want to

intrude upon the Swedish Cabinet's time, but if they have nothing better to do ... well, why not?*

The other correspondence had no such exemption and I made copies of it. It is rather interesting. On September 8 2000 Mandela wrote to the Swedish prime minister asking for support for the Nelson Mandela Foundation's work on HIV/Aids. Mandela writes: "It is estimated that the position is so serious that approximately 10 teachers die of Aids every month, and that one student dies in one university every week." And: "In a neighbouring country three Cabinet members have died from this pandemic."

He then informs Persson that the response from the United States has been "excellent"; the Melinda and Bill Gates Foundation donated \$10-million, and \$7,5-million came from Gates's partner, Craig McCaw; in addition, president Bill Clinton contributed \$5-million.

These are substantial sums of money, which makes the big point about the sort of transparency that is apparently ingrained within the Swedish bureaucracy: it promotes genuine accountability. People can ask questions about the facts revealed by such public documents; with knowledge they can act; and so the wheel of accountability turns.

This is part of a global trend. In Rajasthan in India, for example, a new state access to information law is being used by community organisations to expose corruption and ensure that people get the houses and hospitals promised to and budgeted for them. In a remarkable video, *The Right to Information — the Right to Live*, one organisation shows how it assembled a village of people and then amused and appalled them by reading from a document obtained under the new law recording the building of a canal to bring clean water to the village. Of course, unscrupulous middle-men had siphoned off the funds and the canal was a fiction. One man had, according to the record, been paid for two weeks' work and the hire of his plough. "Impossible," he says, "I was away in Delhi that month."

The Swedes have had their freedom of information law for 250 years — which raises the question, what was or was not happening in Swedish society to prompt the passing of the first such law about 200 years before any other nation? The short answer is that it was busy sorting out a social consensus and a system of government that has provided stability and quality of public service ever since. Openness is easier when there is political and social stability because it is probably easier for the government to have confidence in itself and in its people. The Social Democrats have ruled for 61 of the past 72 years and look likely to extend this after the general election later this year.

South Africa has its own openness law, the Promotion of Access to Information Act 2000, which has been in force for about a year. Already it is becoming clear that the South African bureaucracy lacks the confidence to see that openness is a friend and not a foe. This is a question of mentality as much as system. And on this, it has a lot it could learn from Sweden.

- I have subsequently been notified by Hildert that the secrecy protection has been removed after my request for a review and that a copy of the correspondence is in the post.

Richard Calland has been in Stockholm as a member of a three-person delegation to study Sweden's system of governmental openness, as a part of a project grant from the Swedish International Development Agency to the Open Democracy Advice Centre

-- The Mail&Guardian, February 15, 2002.

B Extract from The Consitution of South Africa, Act 108 of 1996

Chapter 2:Bill of Rights

Access to information

32. (1) Everyone has the right of access to -
- a. any information held by the state; and
 - b. any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

C Useful Links on Freedom of Information Advocacy

1. The Open Democracy Advice Centre: www.opendemocracy.org.za
2. The South African History Archive: <http://www.wits.ac.za/saha/programme.htm>
3. Wits University Law School: <http://www.law.wits.ac.za/rula/rula.html>
4. FreedomInfo.Org: www.freedominfo.org