

DRAFT

Twenty years of power contestation in South Africa: the role of the right to information¹

Abstract

In recent years, there has been a perceived and sometimes real threat to openness in South Africa. Though South Africa was the first country to pass a freedom of information law in Africa and recognized the right of access to information in its constitution applicable to both public and private bodies, certain legislative developments has led to concerns about South Africa's commitment to open government. These also extend to concerns around threats to freedom of expression and media freedom given the increasing use of apartheid era laws to draw a veil on public interest matters. The biggest barrier to resolving this challenge is perhaps the increasing tolerance for corruption in South Africa in the public and private space. This paper will provide insights on the role and relevance of the right to information in understanding of administrative justice in South Africa; the enforcement of socio-economic rights; as a tool for the contestation of power between state and citizen and in the creation of spaces for engagement; the shift towards proactive disclosure of information; as well as attempts by the South African Human Rights Commission (SAHRC) to play a role in the power-knowledge gap through redefining access to information as a communitarian and egalitarian right using clinical legal education as a way of increasing the demand for accountability at a grassroots level.

1. Introduction

*'It is objected against the regime of publicity, that it is a system of distrust? This is true; and every good political institution is founded upon this base. Whom ought we to distrust, if not those to whom is committed great authority, with great temptations to abuse it?'*²

Prior to the conduct of the controversial 2002 presidential election in Zimbabwe, former President of South Africa, Thabo Mbeki, appointed the Deputy Chief Justice of South Africa, Dikgang Moseneke and Constitutional Court Judge, Sisi Khampepe, to travel to Zimbabwe and assess the constitutional and legal issues relating to the upcoming election.³ The judges submitted a report to the President which has never been released to the public. The Mail &

¹ Dr. Fola Adeleke, University of Witwatersrand, South Africa

² J Bentham 'Of Publicity' in M James, C Blamires (eds) *Political Tactics* 1999 Oxford University Press 37

³ [2011] ZACC 32

Guardian newspaper requested access to the report in terms of the Promotion of Access to Information Act (PAIA) which was refused by the Presidency. This refusal marked the beginning of what has now become the longest running access to information case in the South African courts despite the courts deciding on all occasions on different points of law that favoured the public release of the report. For the second time in three years, the state served notice in October 2014 that it will again head to the Constitutional Court to challenge the most recent court order to release the report.⁴

English Philosopher, Jeremy Bentham argues that political institutions are founded on distrust and if public office holders are to earn the trust of the governed, the principle of publicity based on the availability of information to the public is necessary.⁵ At the centre of Bentham's argument is that transparency can improve trust in the governors by the governed.

The conduct of the state in the Mail & Guardian case aptly demonstrates the persistent and perceived resistance to disclosure that has frustrated the realization of access to information rights in South Africa. While such resistance by the state further raises the level of distrust within a broader context of a perceived agenda of secrecy by the state, the absence of trust in the relationship between the state and the governed is not as simplistic as a breakdown in communication which can be cured by access to information disclosure, as suggested by Bentham, or through compliance with transparency laws like PAIA. As Hardin argues, to ask any question about trust is implicitly to ask about the reasons for thinking the relevant party to be trustworthy.⁶ Based on this premise, this paper questions the assumption that increased transparency implies a more trustworthy government and uses examples from the South African political discourse, particularly in relation to the supply and demand of information, to argue that the expected outcomes of transparency in terms of good governance, public trust and accountability are improbable as a result of the flawed assumptions often made about the nature of the state, the nature of the law, the nature of the 'public'⁷ and the inherent nature of information.⁸

⁴See <http://mg.co.za/article/2014-10-06-another-step-back-in-access-to-disputed-khampepe-report> (accessed 13th October 2014).

⁵ J Bentham 'Of Publicity' in M James, C Blamires (eds) *Political Tactics* 1999 Oxford University Press 29-44

⁶ R Hardin *Trust and Worthiness* 2002 New York 1.

⁷ I deal with the notion of the public in the context of the scepticism express by Foucault on the idealised view of the public opinion as an expression of the entire social body and would be a sort of democratic surveillance. See M Foucault 'L'oeil du pouvoir' in *Dits et ecrits II 1976-1988* 2011 Paris 204.

⁸ In Fenster's work critiquing transparency as a theory of communication, he speaks of an invisible open government, the non-existence of government information and the imaginary public.

The assumption made within the transparency discourse that increased access to information disclosure by government will increase trust by the public in government discounts a number of factors while presuming a number of others as well. The purpose of this paper is to critique these assumptions about transparency and access to information disclosure not with the aim of abandoning the transparency agenda for the state but to argue that transparency and access to information has little relevance for active citizenship without consideration of other factors that gives more weight to the value of this right.

2. The State, Transparency and Trust

In the darkness of secrecy, sinister interest and evil in every shape, have full swing, where there is no publicity, there is no justice.⁹ Whether described as publicity, transparency, or access to information, the values attached to these concepts have been consistently heralded as the ultimate tool to challenge state authority and to remove the public perception of distrust. The evil that transparency is perceived to fight is, according to Bentham, secrecy; but as O'Neill argues, to increase trust, what needs to be avoided is deception and not secrecy.¹⁰ Transparency does not reduce deception and a flow of information may in some cases be deliberately released to further mislead the public, leading to more uncertainty than trust.¹¹ Also, this position assumes that distrust of government arises firstly as a result of lack of information, and when such information is disseminated, such information is devoid of manipulation by the discloser and that disseminated information is used in a particular form of rational way to formulate a particular public opinion that constitutes a form of democratic surveillance. The South African context is vastly different from these theoretical assumptions as is discussed from various perspectives in this paper.

The operability of transparency emanates from principles and bureaucratic strictures of administrative justice consistent with Bentham's position that where there is no publicity, there is no justice. Freedom of information laws like South Africa's PAIA gives effect to this administrative law principle which is mandated by section 32 of the South African constitution which recognizes the right of access to information. The running narrative here is that with a right of access to information, the public can be active citizens that engage in

⁹ J Bentham 'Constitutional Code' in J Bowring (ed) *The works of J Bentham* New York 493.

¹⁰ O O'Neill 'A question of Trust' 2003. Cambridge University Press 72-73.

¹¹ O'Neill above.

reasoned decision making as is equally expected of administrative officials in government, and this decision making leads to democratic participation that holds government accountable.

This narrative is however flawed in many respects, not least for its underestimation of the bureaucratic nature of government, but also the optimistic expectations of the desire of the public to interact with government on this platform, ignoring the historical context of South Africa and how power tussles have been and continue to be contested between the state and the governed.

2.1. The Right to be Heard: the distrust between the State and the Governed

A 2013 research report by Global Financial Integrity stated that South Africa has suffered an illegal outflow of over \$100 billion due to corruption in both the public and private sectors since 2002.¹² Two years earlier, the former head of the Special Investigating Unit (SIU) reported to the Parliament of South Africa that between R25 billion and R30 billion of government's annual procurement budget alone was lost to corruption.¹³ The adverse effects of corruption have significant impacts on the lives and livelihoods of South Africans, affecting the lofty ideals of the Constitution to improve the quality of life of all citizens and free the potential of each person, which are found in its preamble. As a result, at the heart of twenty years of constitutional democracy in South Africa remains the struggle for wealth creation and poverty reduction.

In addressing the inequality of arms between the state and the governed, the corrupt and those who suffer the effects, a power struggle emerges which the right of access to information, perceived as an egalitarian right and recognised in Section 32 of the South African Constitution has become central to. The promise of the right of access to information by its proponents was the delivery of a powerful tool to empower the public to hold government accountable and demand service delivery particularly at a local government level. These claims about what access to information can achieve was spurred on by the successes recorded in other countries like India where before the law of access to information was passed or the right to information recognized, there had been documented successes on active

¹² D Kar and B Le Blanc *Illicit Financial Flows from Developing Countries: 2002 – 2011* 2013 Global Financial Integrity.

¹³ See www.corruptionwatch.org.za (accessed 13th October 2014).

citizenship which included public accountability by government officials of monies allocated to local councils.¹⁴

These claims and the expected successes in South Africa ignored the political history of South Africa and the role of culture in demanding accountability by the public from government. South Africa's political history is one that has been characterized with violence in the struggle for power and contestation.¹⁵ As the African National Congress (ANC) alongside other liberation movements used various methods, including sabotage through violence, to wrestle for control of South Africa from the Apartheid government, street protests which occasionally turned violent due to various reasons - including police brutality - also frequently characterized the daily lives of the previously marginalized majority in South Africa in protesting against various policies, laws and regulations of the former government.¹⁶

Historically, South Africans have therefore often found themselves resorting to protests in making their voices heard and this has continued in democratic South Africa.¹⁷ For generic reasons, this has partly been due to the failure of the former and current governments to satisfactorily engage in open government practices. Since the start of 2014, there have been more than 500 protests in the Gauteng province alone with over 100 characterised as violent.¹⁸ A more comprehensive study reports that between 2008 and 2013, there have been more than 3000 protests in South Africa.¹⁹ According to Ngwane of the Social Change Research Unit at the University of Johannesburg which conducted the research, 'when protests get disruptive it often means that peaceful means, such as imbizos, local councils, and even the president's hotline and the public protector, have been exhausted.'²⁰ Ngwane stated further that the top five grievances for protests related to service delivery in general,

¹⁴ See R Calland (ed) *Right to Know Right to Live* 2002. Open Democracy Advice Centre.

¹⁵ <http://mg.co.za/article/2014-02-13-violent-protests-entrenched-in-sas-culture> (accessed 10th October 2014).

¹⁶ <http://www.sahistory.org.za/article/public-protest-democratic-south-africa> (accessed 10th October 2014).

¹⁷ <http://mg.co.za/article/2014-04-16-the-politics-of-counting-protests/> (accessed 10th October 2014) Professor Jane Duncan works in the school of journalism and media studies at Rhodes University.

¹⁸ <http://www.sahistory.org.za/article/public-protest-democratic-south-africa> (accessed 10th October 2014).

¹⁹ <http://www.sahistory.org.za/article/public-protest-democratic-south-africa> (accessed 10th October 2014).

²⁰ <http://mg.co.za/article/2014-02-12-research-shows-sharp-increase-in-service-delivery-protests> (accessed 10th October 2014).

housing, water and sanitation, political representation and electricity, corruption, municipal administration, roads, unemployment, demarcation, land, health and crime'.²¹

The statement by the researcher is telling. At the heart of South African protests is the failure of administrative justice in the enforcement of both civil and political rights, socio-economic rights encapsulated in the Bill of Rights as well as expected effective administration of the functions of the state. Can increased transparency and access to information disclosure about the state's intended plans around the various protest issues single handedly appease a frustrated community? Attempts have been made to use the right of access to information as a tool for the contestation of power to create fundamental social change by bridging the power-knowledge gap between government and society and to ultimately create a paradigm shift for engagement.²² While there have been modest successes in using the right of access to information as a tool for power leverage, the potential of the right remains underwhelming due to numerous bureaucratic constraints.

The South African government is big, complex and in many respects uncontrollable.²³ One of the requirements in South Africa's PAIA is for the SAHRC to monitor the implementation of PAIA in government departments. A consistent trend in monitoring is the lack of delegation of decision making powers from the senior management of state institutions to other employees on the release of requested information. As a result, the requirement for institutions to respond to a request for records within 30 days is often violated. The chain of command in access to information disclosure firmly rests with the top echelons of power where the interests of public institutions to protect their image from embarrassment remain a priority over public disclosure.

The lack of internal administrative systems in state institutions with respect to records management, classification systems for information as well as decentralization of functions still remains highly problematic.²⁴ With institutions using classification policies approved by

²¹ <http://mg.co.za/article/2014-02-12-research-shows-sharp-increase-in-service-delivery-protests> (accessed 10th October 2014).

²² Examples of these include using the Promotion of Access to Information Act (PAIA), the law enacted to give effect to the right of access to information to demand access to housing on behalf of community groups, enforce compliance with environmental standards and in seeking restitution for the victims of the apartheid regime who failed to receive compensation through the truth and reconciliation commission.

²³ Government Spending in South Africa on public service salaries is over R200 billion rand for a work force of over 1.2 million people. Government Spending in South Africa is reported by the Statistics South Africa.

²⁴ See South African Human Rights Commission PAIA Reports on www.sahrc.org.za.

the National Intelligence Agency and out of sync with PAIA and an underwhelming appreciation for the relevance of records keeping and management to aid information disclosure, access to government records is a frustrating and complicated process.

The complexity of the state also moves away from the practical considerations of bureaucracy to the theoretical understanding of the notion of the right of access to information by the public without a qualified obligation on the part of the public to give reasons on why the record is requested. State officials operate under the assumption that state information can be controlled from public access and as a result, operate from a default position of denying access to information for reasons beyond the ground of refusals to be found in PAIA. This flawed position assumes that perpetual secrecy is probable but the South African experience has shown that eventually documents intended by government from public disclosure are eventually released if not through access to information requests. The latest example of this is the recently released ‘spy tapes’ to the official opposition party by government after a protracted legal battle relating to the decision by the Prosecutions Authority of South Africa not to charge the current President of South Africa for corruption five years ago.²⁵

Absolute states of transparency and secrecy are implausible. While information that is intended to be kept secret eventually becomes public knowledge due to the inability of the state to perfectly control information, so is the state of desired transparency by idealists improbable because behind the release of information, the intent of the state behind certain decisions or actions cannot truly be fully determined. And this is largely as a result of flawed assumptions on the inherent nature of state information.

3. The Nature of State Information

Within the transparency discourse and consistent with Foucault’s argument about public opinion referred to earlier, the assumption is often made that if government information is released, it should be capable of interpretation in a singular, unified fashion by the public. In a South African society which is extremely polarised by politics, a singular, unified response to government information is improbable where the release of government information is contested for by institutions which though support democracy (media houses, chapter 9

²⁵ See www.corruptionwatch.org.za for more information about the ongoing developments.

institutions such as the Public Protector and opposition parties) are perceived by the ruling party as being in opposition to a state action is being in opposition to the ruling party, an unacceptable situation in a political setting where there is little tolerance for dissent. As a result, the inferability drawn from state information released to the public is often not read objectively.

Central to the notion of transparency is the quality of information released to the public. According to Michener and Bersch, 'just because something is public does not mean it is visible. To be visible, information must reflect a high degree of completeness. Visibility also incorporates a second characteristic: the likelihood of finding information.'²⁶ Embedded within the idea of finding what the ideal transparent system should be is what has been termed the 'moral hazards' which consists of the possibility of manipulating the disclosure of information by the discloser which is informed by a motive to meddle with the inferability that can be drawn.²⁷

The entire length and breadth of government information cannot be fully known. In recent times, there is a legitimate perception that government is clamping down on the public disclosure of information exemplified by Parliament's passage into law of the Protection of State Information Bill still awaiting the President's signature before it fully becomes law. In addition, the increasing use of apartheid era laws such as the National Key Points Act of 1974 and the Protection of Information Act of 1982 to chill investigative journalism into matters of public interest have fuelled the perception that government is systematically controlling information released to the public.²⁸ In this context, where information is classified and release is controlled, the extent of information that is in fact undocumented, redacted, and destroyed cannot be fully known. As a result, the existence of government information that may in the first place be capable of release cannot fully capture the intentions behind state actions.

²⁶ G Michener and K Bersch, 'Conceptualising the Quality of Transparency' Paper prepared for the 1st Global Conference on Transparency Rutgers University, Newark, May 17-20 2011 at 8.

²⁷ See above at 11.

²⁸ Examples include criminal charges being laid against journalist, wa Afrika after his report on the irregular expenditure on the police headquarters lease, criminal charges were also laid against Mail and Guardian journalists Sam Sole and Stefaans Brummer by the Presidential spokesperson after their report on the spokesperson's involvement in the arms procurement corruption allegations currently the subject of a commission of inquiry in South Africa.

In instances where information is made available, the inferability drawn on the understanding of such information also demonstrates the extent to which government information cannot fully achieve the objectives of accountability that transparency through access to information seeks to promote. In the infamous case of the investigations conducted by the Public Protector and the Special Investigations Unit on the expenditure spent by the state to upgrade the private residence of the President, different conclusions were drawn by both investigating institutions from the same set of documents released by the state on the irregular expenditure.²⁹

Where state information is misrepresented to this extent, recognition must be given to the role of whistleblowing in the disclosure of a more accurate and complete information to the public. Where whistleblowers form part of the decision making process of a state institution, their value goes beyond the release of documents but also in disclosing the intention behind certain state actions that makes the distortion of information far harder. In South Africa, there have been two sides to the role of whistleblowing. Within the context of a chapter 9 institution, the Public Protector, the investigative work of the institution has been aided by whistleblowers who report public maladministration to the institution. In a wider society context, the safety of whistleblowers is largely at risk not only in the context of the guarantee of the employment of the whistleblower but also in terms of their lives and property.³⁰ A relevant role and function of the South African Human Rights Commission which has not been taken on to date is the protection of this special category of people in South Africa and the need to promote a culture that recognises the importance of whistleblowing for constitutional democracy in South Africa.

As suggested earlier the right of access to information is an egalitarian human right. Richard Calland has argued that for the right to live to its true potential, it must be subject to at least three conditions, namely: it must escape legal formalism; it must be articulated and enforced as a collective, communitarian right, as well as an individual one; and, it must encompass privately-held information as well as public.³¹ This escape of legal formalism and the attempt

²⁹See minutes of the Parliamentary ad hoc Committee on the Nkandla Security Upgrades at <http://www.pmg.org.za/report/20140926-nkandla-security-upgrades-public-protector-and-siu-reports-consideration> (accessed 13th October 2014).

³⁰ G Razzano 'Empowering our Whistleblowers' 2014 Open Democracy Advice Centre.

³¹ R Calland 'Can Freedom Of Information Be An Egalitarian Idea Or Is It Trapped By Its Original Liberal Genealogy?' 2014 Unpublished paper 3.

by the SAHRC to promote access to information as a communitarian right is considered below.

4. The Imperfections of the Law

Transparency advocates have held the expectations that one of the constitutional promises that the right of access to information through the law giving it effect, PAIA, would deliver is the exercise of the right to realise other tangible human rights such as socio economic rights, which can improve the quality of life of all, and free the potential of each person. However the delivery of these constitutional promises remains an ideal yet to be achieved in 20 years of constitutional democracy.

In the wake of PAIA, it becomes easy to set the standard for optimal transparency as the quality of the legislation that has been passed and the extent to which this law enables citizens to access records from government. According to Colin Darch, this tells us ‘nothing about context, nothing about levels of use of the right, and nothing about levels of satisfaction with outcomes. Correlation is not causality. It is easy to see that in a country with an already secretive government, the number of ATI requests might be high; in a country with broadly transparent behaviours, the number might be low. Hence, a flood of requests may tell us many different things about the politics of a particular state. The mere handing over of documents does not necessarily mean that a citizen’s needs have been met.’³²

After the passage of the PAIA in 2000, the SAHRC, the institution tasked with monitoring the implementation of the law focused on ensuring compliance by public institutions with PAIA with the minimum obligations imposed including the appointment of deputy information officers and development of manuals detailing the records held by the public institution and the manner of access. The SAHRC’s focus on ensuring compliance was done under the assumption that compliance will ensure the disclosure of information to the public when requested. What was underestimated was the scale of non-compliance and lack of will by public institutions to comply with the provisions of PAIA as well as the underwhelming knowledge of PAIA and trust by the public on the effectiveness of PAIA. Indeed this lack of trust is exemplified in the research conducted by the University of Johannesburg which found

³² C Darch ‘Access to Information and Concepts of Citizenship in Africa: Can ATI take Root in the Post-Colonial State?’ Paper prepared for the 1st Global Conference on Transparency Rutgers University, Newark, May 17-20 2011 11.

that service delivery protests took place after communities become frustrated with the inefficiency of the formalities of engagement through official government channels.³³

In addressing this anomaly, the SAHRC developed a new strategy of promoting usage of the PAIA and the demand for information particularly from the community level through the development of access to information law clinics. The aim of the clinics was to use law students to promote knowledge of the right of access to information, usage of PAIA and assist community members in understanding the relationship between their needs and how access to information can serve as a first step in the realisation of these needs. It was expected that unsuccessful PAIA applications would lead to a challenge of the refusal at the Magistrate courts, a forum not yet utilised in the realisation of access to information rights in South Africa.

This model of promoting access to information while successful in increasing the usage of PAIA by the public and the understanding of this unique form of administrative law by students, also revealed a number of flaws and inadequacy in the law. Firstly, there were many mute refusals of requests, (public institutions failed to respond to the information requests) demonstrating that non-compliance with the provisions of PAIA still remain high. Secondly, in instances where information was released, there were very few instances where the information could assist the requesters in realising their rights which included access to housing, water, social grants and unemployment benefits. It was also quickly realised that the provisions of PAIA and the realisation of socio economic rights are only helpful if followed by a review of administrative decisions through the Promotion of Administrative Justice Act (PAJA), through investigations and assistance from the South African Human Rights Commission or other chapter 9 institutions or in the case of refusals or clear violations, through litigation, a luxury which cannot be afforded by most people in South Africa. It is important to mention here that the biggest challenge to PAIA has been the lack of a cheap, quick and effective dispute resolution system that can facilitate a redress for infringements of the right to information. As a result, an important lesson to draw from the South African experience is to recognise that an excellent law does not suffice in the realisation of the right but equally important is a means of redress that enables members of the public to quickly and cheaply seek recourse for the realisation of their rights.

³³ <http://mg.co.za/article/2014-02-12-research-shows-sharp-increase-in-service-delivery-protests> (accessed 10th October 2014).

South Africa has the oldest access to information law in Africa and before the passage of the African Union Model Law on Access to Information and the Nigerian Freedom of Information Act; it was regarded as the gold standard for access to information to be emulated by other countries. However, the annual reports of the SAHRC to Parliament capturing full compliance by state institutions with the provisions of PAIA have never reached the halfway mark.

The bureaucracy that comes with PAIA inherently also resists openness through failure to provide manuals to allow public friendly use of the law, inappropriate fees to access information, difficult requirements for processing requests such as filling out forms, failing to ensure the supremacy of access to information laws by decision makers in government, and the ineffective enforcement mechanisms that requires recourse to the courts where requests are denied, a forum that is complicated, prolonged and expensive.³⁴ These ways constitute means through which the government can resist transparency either actively or passively.

While there have also been attempts to define what constitutes access to information and why it is invoked and preached as the all-encompassing solution to many shortcomings of the state, clear alternatives to the well documented challenges faced by advocates of access to information to the attempts made by other social forces to scuttle transparency norms and standards have not been fully developed and will continue to affect the claims that access to information is an egalitarian and communitarian right.

However, despite this, the mobilisation at a community level for an information request for records that exposes corruption is possible because access to information can fundamentally be a matter of politics and political economy³⁵ and depending on the social context of a country, grassroots mobilisation around such issues can be achieved. An example of this is the Right to Know Campaign in South Africa, an existing campaign that was formed four years ago which constitutes a broad church of various organisations to oppose the passage of

³⁴ Bribbey, Excell, Kakuru, Tilley 'Active and Passive Resistance to Openness: The Transparency Model for Freedom of Information Acts in Africa – Three Case Studies' Research for the International Development Research Centre (IDRC), Canada. Published by the Commonwealth Human Rights Initiative.

³⁵ K Bentley & R Calland, Access to Information, in M. Langford, B. Cousins, J. Dugard & T. Madlingozi, eds, Symbols of Substance? Socio-economic rights strategies in South Africa, 2012 Cambridge University Press 15

the Protection of State Information Bill.³⁶ The passage of this Bill was objected to on the grounds that a Bill which restricts access to information on grounds of national security and creates a broad ground for classification of information creates a loophole to restrict access to records that could potentially expose wrongdoing. The campaign made a direct connection between the costs of corruption and its effect on the ability of government to deliver social services. While the campaign focuses broadly on transparency issues, what this campaign highlights is the importance of a different conceptual understanding of access to information where information was rather proactively and voluntarily made available to make this connection as opposed to the one requester, one record approach that access to information laws typically offer.

5. The Nature of the ‘Public’

The assumption often made here is that an informed public can make an informed decision and formulate public opinion that is rational and would hold the state accountable for its actions. On the other hand, the right of access to information is sometimes perceived as an elitist right that has little relevance for the economic hardships in South Africa that has led to the sacrifice of human rights agendas and the prioritisation of economic issues. Much writing on access to information embeds the freedom of information concept firmly and without question within the universal ideology of human rights. In Darch and Underwood’s work, they argue that the function of the right to information is based on the interest theory, which maintains that the function of a right is to advantage holders in some way by advancing their interests.³⁷ As a result, a person requesting information can use it to leverage the realisation of other socio-economic rights. However, this is only possible with a citizenry with the self-awareness, skills and resources necessary to confront the machinery of the State.³⁸ These abilities are lacking within the South African context which makes PAIA much less valuable without use by interested NGOs, opposition political parties and the media who serve as the true institutions supporting constitutional democracy in South Africa.

A key problem that threatens the legitimacy of governments and creates distrust in society is corruption. While more openness may curb corruption, a shift is needed in terms of our

³⁶ See G Sedungwa G., T O’Connor ‘Global Right to Information Update: An Analysis by Region’ 2013 FOIANet.

³⁷ Darch & Underwood *Freedom of Information and the Developing World: The citizen, the state and models of openness* 2010 Chandos Publishing 140.

³⁸ See above 243.

cultural understanding of holding government accountable in a number of ways. The South African ‘public’ due to historical and contextual reasons discussed earlier prefers to confront the state and exercise its powers to demand accountability through other means but the usage of the right of access to information.

Where such failure to demand exists and recognizing the distrust for the state coupled with the ability to manipulate the information disclosed to the public, a prescribed ‘voluntary’ disclosure of particular sets of information might correct and aid the public to exercise this democratic surveillance role. Through PAIA, members of the public file requests for information. This is a reactive process which is separate from a public or private entity disclosing information to the public at its own initiative - a proactive process.³⁹ With the advances in information technology and the digitization of information, a new approach is needed on the dissemination of information to the public at a time where production of records is cheaper and can be more easily disseminated and re-used. Globally, there is recognition for greater transparency on the part of public and private institutions given the advantages that voluntary and proactive disclosure offers. These advantages include for the public sector, the duty of the state to inform the public about laws and decisions that affect them as well as how government functions for the public to access government services.⁴⁰ It also includes the ability of the public to hold government to account in the use of public funds and for the public to participate in decision making (an example is in South Africa where there is a statutory requirement imposed on the extractive industry to develop social and labour plans for the benefit of the communities they work in and the development of those plans include a requirement to consult the communities affected on what should go into the plan). The more information is made available proactively, the less strain it places on government bureaucracy to process information requests, the more timely the information is available, and the less arduous the process is for any member of the public who wishes to access government information.⁴¹

Central to the disclosure of information detailed above are how to ensure these categories of information are accessible by members of the public, how to ensure the organisation of the information that it is relevant to the users, complete, accurate, free, timely and re-usable.

³⁹ H Darbshire ‘Proactive Transparency: The future of the right to information?’ 2009 World Bank Institute: Governance Working Paper Series 3.

⁴⁰ See above.

⁴¹ See above 3-4.

Prescribing the categories of information that must be made available as set out in the African Union Model Law on Access to Information is useful for the practical implementation of this argument.⁴² In recognition of these considerations and the digital age we live in, the concept of open data has been developed to create an online platform whereby government information can be shared freely.⁴³ Emerging trends such as open data to aid proactive disclosure of information achieves the desired objectives of open government and public participation in a way that was not previously envisaged by the drafters of PAIA. In the light

⁴² The African Union Model Law on Access to Information has a detailed provision on proactive disclosure including:

‘Each public body and relevant private body must publish the following information produced by or in relation to that body within 30 days of the information being generated or received by that body:

- (a) manuals, policies, procedures or rules or similar instruments which have been prepared for, or are used by, officers of the body in discharging that body’s functions, exercising powers and handling complaints, making decisions or recommendations or providing advice to persons outside the body with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to or for which persons may be entitled;
- (b) the names, designations and other particulars of the information officer and deputy information officer of the public body or relevant private body, including their physical contact details and electronic addresses where persons may submit requests for information;
- (c) any prescribed forms, procedures, processes and rules for engagement by members of the public with the public body or relevant private body;
- (d) the particulars of any arrangement, statutory or otherwise, that exists for consultation with, or representation by, members of the public in relation to the formulation or implementation of its policies or similar documents;
- (e) whether meetings of the public body or relevant private body, including its boards, councils, committees or similar other bodies, are open to members of the public and, if so, the process for direct or indirect engagement; but where a meeting is not open to the public, the body must proactively make public the contents of submissions received, the process for decision making and decisions reached;
- (f) detailed information on the design and execution of any subsidy programmes implemented with public funds, including the amounts allocated and expended, the criteria for accessing the subsidy, and the beneficiaries;
- (g) all contracts, licences, permits, authorisations and public-private partnerships granted by the public body or relevant private body;
- (h) reports containing the results of surveys, studies or tests, including scientific or technical reports and environmental impact assessment reports, prepared by the public body or relevant private body; and
- (i) any other information directed by the oversight mechanism.

Other categories of information that must be made available include:

‘a directory of its employees including their powers, duties and title, indicating the permanent staff, the temporary staff and the outsourced staff, recruitment procedures and vacancies;
the yearly band of remuneration for each public employee and officer, including the system of compensation as provided in its laws, the procedures followed in its decision-making process, including channels of supervision and accountability;
detailed travel and hospitality expenses for each employee and officer, and gifts, hospitality, sponsorships or any other benefit received by each employee and officer;
a description of the composition, functions, and appointment procedures of the boards, councils, committees, and other bodies consisting of two or more persons, constituted as its part or for the purpose of advice to or managing the public body or relevant private body;
the detailed actual budget, revenue, expenditure and indebtedness for the current financial year, including all related estimates, plans, projections and reports, including audit reports, and for any previous financial years from the date of the commencement of this Act;’

⁴³ The term open data has been defined as ‘information proactively released, in an open format, accessible to the user at no cost, with no limitations on user identity or intent; it is in a digital machine readable format, reusable and interoperable and free of restriction on use.’ D Mckinley quoting Alison Tilley in ‘The Right to Know, The Right to Live: Open Data in South Africa’ ODAC 2012 10

of politics of transparency and the desire to shift the balance of power from the state to the citizen, proactive disclosure of information creates a new form of engagement between the citizen and the state which increases the ability of the public to make better and informed choices when engaging with the private sector or access government services and monitor usage of public funds. In the context of South Africa, proactive disclosure of information has been seen as a tool that might lessen the confrontation of state by citizens through protests in the delivery of social services, as a possible anti-corruption strategy and arguably to improve trust in the state.⁴⁴

6. Conclusion

Darch cautions that in environments where political systems are patrimonial, bureaucracies have low capacities and politicians are largely not accountable to the citizenry, the rights character of access to information might not advance its cause.⁴⁵ Access to information has of course been embedded in the notion of human rights in South Africa and the constitutional and statutory scope of the right has also been extended to the private sector. The extension of this scope to private entities rendering public services is uncontroversial but where a private entity operates in a wholly private space, the right is still extended to private power provided reasons are given to demonstrate the need for the information requested. This link made within the constitutional framing of the right supports the argument in favour of access to information as a tool for power contestation and to seek the delivery of tangible constitutional promises.

While a transparent system is expected to ensure public participation, such an outcome will depend on how a particular society reacts and respond to its government and the information it receives. There can be situations and specific isolated circumstances that can lead the public to trust the state in a particular situation, the opposite can also exist and in instances like the latter, the state occupies a position where its motive would be to earn the trust of its citizens and the tendency to manipulate information to suit its purposes will be strong. To work against this urge of the state, a persistent demand for information should exist.

⁴⁴ D McKinley 'The Right to Know, The Right to Live: Open Data in South Africa' 2012 Open Democracy Advice Centre.

⁴⁵ See above 46.

The assumptions made about transparency have been explored in various forms and contexts and in all the ways transparency was considered, it is an ideal that is crucial to the notion of open democracy that we strive for in South Africa. In distilling the notion of transparency and the right of access to information, the ultimate lesson to be learnt in twenty years of constitutional democracy is that access to information is more than the law and administrative justice, it is also about the contestations for power and at the heart of the constitutional promise of improving the quality of life of all and freeing the potential of each person.

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