

# The power of information

## Implementing the right to information laws

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*South Africa boasts what has been referred to as the gold standard of constitutional development in terms of its constitutional reforms, its bill of rights, its access to information act, its protection of whistle blowers and the elaboration of other civil, political, social and economic rights. However, a number of state institutions have faltered on the bedrock of implementation of these reforms, especially the implementation of laws aimed at promoting the public's access to information held by the state, and providing for protection of individuals who raise concerns about corruption and fraud in these institutions. This article explores the mixed fortunes of two criminal justice departments in the implementation of these laws.*

The year 2010 will be important to South Africa for more than just the World Cup soccer spectacular that the country will be hosting. 2010 will also mark a significant milestone in the country's efforts at transforming itself from a secretive police state to an open democracy. This will be the year marking a decade after two of the country's key right-to-information laws (RTI laws), called the Promotion of Access to Information Act No. 2 of 2000 (PAIA) and the Protected Disclosures Act No. 26 of 2000 (PDA), were passed by the country's second democratically elected parliament.

Shortly after the Nelson Mandela administration took office as South Africa's first democratically elected government in 1994, a five-member Task Group on Open Democracy was appointed. The brief of the task group was to investigate how the interim constitution's promise for an open society and democracy could be made reality through enabling legislation. The Task Group issued a

preliminary report early in 1995 setting out in detail its legislative intentions and proposals as well the principles underlying its approach to drafting. The policy proposals of the task group included laws on:

- Freedom of information
- Protection of whistleblowers
- Protection of privacy, and
- Open meetings

By August 1995 the Task Group had produced a draft bill that contained provisions covering the four areas of the policy proposals. The mantle was soon to be taken over by South Africa's democratically elected Constitutional Assembly, which adopted the final Constitution in 1996. By the time the Constitution of 1996 was adopted the right of access to information had been extended to include both public and privately held information and guaranteed by the following clause:

[E]veryone has 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.<sup>2</sup>

The constitution also required that legislation be passed by Parliament to give effect to the right of access to information. More importantly, in terms of the transitional arrangements contained in the Constitution, there was a further stipulation that the legislation envisaged in terms of Section 32 (2) of the Constitution had to be passed by Parliament within three years of the coming into effect of the Constitution.<sup>3</sup>

However, civil society campaigners for the law had to contend with what was later referred to as a 'slow and tortuous progress', which started with the tabling of the formal draft bill – the Open Democracy Bill – in Parliament in 1997, and was concluded with the enactment of PAIA and the PDA in 2000. In order to meet the constitutional deadline of February 2000 for the passage of the Open Democracy legislation, Parliament decided to split the access to information and whistleblower sections of the Open Democracy Bill and process them as two separate acts to be considered by two sub-committees of Parliament. The access to information section of the Open Democracy Bill became the Promotion of Access to Information Bill, which became the Public Access to Information Act (PAIA). The whistleblower section of the Open Democracy Bill became the Protected Disclosures Bill and later the Public Disclosures Act (PDA). A policy decision was taken by the executive to drop the open meetings sections entirely, and the privacy section is currently being considered by Parliament.<sup>4</sup>

## **IMPLEMENTATION BY THE SAPS AND DEPARTMENT OF CORRECTIONAL SERVICES<sup>5</sup>**

There is evidence to show that the less information officers know about the law, the higher the possibility that they will err on the side of caution by either refusing access to

information, or simply ignoring the request.<sup>6</sup> The rate of mute refusals (ignored requests) in South Africa has been around 52 to 60 per cent over the five year period between 2003 and 2008,<sup>7</sup> an unacceptably high rate.

On the other hand, the better trained the officials are in the law, the better they are in applying the exemptions that limit application of the right of access to information, and the better they are at defending their decisions. The 2008 Access to Information Index shows that only two per cent of requests receive a formal refusal in terms of the PAIA, and of the requests that are not ignored an overwhelming 98 per cent of them were granted either in full or partially.<sup>8</sup> This is consistent with the Open Society Justice Initiative-Open Democracy Advice Centre (ODAC) RTI monitoring reports between 2003 and 2006, which found that only one to two per cent of the requests received written refusals. This is below the international average of three per cent.<sup>9</sup> This is a good result, because it shows that there are a low number of formal refusals. It does however hide a bigger problem, that most public institutions prefer to simply ignore a request (as evidenced by a high rate of mute/deemed refusals) instead of refusing it directly and formally as is required by the law.

Institutions that have made resources available for the implementation of the Act and for training officials, such as the South African Police Service (SAPS), are the top performers. The SAPS receives the highest number of requests for information (over 20 000 per annum at the last count), yet they have refused only one per cent of those requests. Over the eight-year period of implementation of PAIA, after having received tens of thousands of requests, the SAPS has only once been sued for information and the court found that its refusal was justified.

SAPS's implementation of PAIA demonstrates that officials need not see the law as something that may be a liability to the interests of the institution. Rather, a competent application of the exemptions regime can promote both the right to information while protecting the interests of the

organisation. It is worth noting that the coordinating information officer at SAPS is not a legal practitioner. This demonstrates what can be achieved if information officers are well trained in the Act and enjoy support from their superiors, which is the case at SAPS.

Unfortunately the example of the SAPS is not the rule. Some key criminal justice departments have not set the best example for compliance with right to information laws. This seems to reflect the lack of commitment by senior management to implementation of the Act, and the result is reluctance on the part of many public officials to provide information where there is a perception that this may open up public bodies to litigation.

Over the past five years ODAC has been dealing with requests by prison inmates<sup>10</sup> to assist them to access information. Since ODAC re-launched its Right to Know help line over five years ago, the organisation has continued to receive calls from inmates who complain about not having access to court records that they need to prepare for appeals or parole hearings. It is the policy of the Department of Justice that such documents are made available to the prisoners, but at a cost to cover expenses such as photocopying of documents or transcription of trial proceedings. Some of these costs run into thousands of rands, meaning that those who cannot pay are disadvantaged as their access to justice is limited.

In one case handled by ODAC, the organisation assisted a prisoner to acquire his court transcripts through PAIA. The inmate had initially attempted to acquire the records from the court where he was sentenced and was asked to pay close to R4 000. When ODAC requested the records from the Mankwe Magistrate's Court in the North West on his behalf in terms of PAIA, the records were supplied without a need for any payment because of fee exemptions built into PAIA. When ODAC received the information, the organisation assumed that a precedent had been established. However, a couple of months later the clerk of the court wrote back to ODAC to ask for a return of the documents because they had been released in error. The official had assumed that ODAC was

part of the Legal Aid Board, which has the privilege to obtain these records without payment of reproduction fees. This experience indicated that an inmate who, for whatever reason, is unable to rely on the Legal Aid Board, cannot afford to pay for reproduction of the records or cannot afford the services of a private legal representative, is unable to access information related to his or her trial. This is an unjustifiable limitation of a person's access to justice, and is not in keeping with the spirit of the law and the constitutional provisions for access to information and access to justice.

There have also been problems in relation to the release of information by the Department of Correctional Services, which brought embarrassment upon itself when it refused to release the Judicial Inspectorate of Prisons' report on the death of an inmate due to AIDS-related illness. The court finally settled the matter when the presiding judge ordered the release of the documents that had been requested by the Treatment Action Campaign. Moreover, the judge made some important remarks in relation to the Department of Correctional Services, noting that:

The papers in this case demonstrate a complete disregard by the Minister and his department of the provisions of the Constitution and PAIA which require that records be made available. There is no indication in the first respondent's [the Minister's] papers that the Department complied with its obligations under PAIA at any stage... Only after proceedings were instituted did the Minister and the Department attempt to justify failure to hand over the report and then on spurious grounds. It is disturbing that the first respondent has relied on technical points which have no merit and instead of complying with its constitutional obligations has waged a war of attrition in the court. This is not what is expected of a government Minister and a state department. In my view their conduct is not only inconsistent with the Constitution and PAIA but is reprehensible. It forces the applicant to litigate at considerable expense and is a waste of public funds.<sup>11</sup>

This rebuke of a senior government leader is directed towards an attitude that is quite prevalent in the public service. There have been instances where officials have discouraged applicants from filing formal PAIA requests for information and advised them to 'just ask nicely' for it. There is a view that using formal PAIA procedures to make requests for information shows that the person making the request is being confrontational or adversarial. In those instances the applicants are often bullied into 'asking nicely'.

Civil society organisations that are active in the promotion of usage of PAIA, such as the Open Democracy Advice Centre (ODAC), the South African History Archive (SAHA) and the Freedom of Expression Institute (FXI) do encounter instances where even well established and reputable NGOs who work with government departments on various projects request them to assist in making 'anonymous requests', for fear of losing a seat at the table or a foot in the policy formulation door. Organisations and researchers do this in order to shield themselves from a possible backlash from the departments they work with, should they be seen to be taking the 'confrontational step' of seeking the information in terms of PAIA. A clear demonstration of this is the fact that crime statistics continue to be seen as graces that are dispensed annually from Pretoria. Instead of taking the fight for this information to the Ministry of Police and from thence to the courts, you find local police stations slipping the information on the sly to the local community policing forums, local media, researchers and opposition politicians. It is an outrage that the public has to resort to these hush-hush arrangements while the country continues to boast a golden standard access to information law.

## WHISTLE-BLOWING

Political leaders have given more attention to the whistle-blowing aspect of the right to information than to the access to information aspect. The former Minister of Public Service and Administration during the Mbeki

administration, Geraldine Fraser-Moleketi, is on record as saying blowing the whistle on corruption is a patriotic duty of every citizen. Her ministry supported the rollout of the Public Service Commission's extensive training project for government officials on the whistleblower protection legislation contained in the PDA.<sup>12</sup> The Minister of Justice under former President Kgalema Motlanthe, Enver Surty, is also on record as stating that whistleblowers have to be protected.<sup>13</sup> Organisations that promote the protection of whistleblowers have been brought on board as partners with government and business in multi-sectoral initiatives such as the National Anti-Corruption Forum, where ministers of government and leaders from business and civil society meet as equals in determining and implementing the country's anti-corruption strategy.

Unfortunately some of Fraser-Moleketi and Surty's cabinet colleagues have let them down in practice. The most notable case was that of the former Minister of Correctional Services, who not only hounded whistleblowers out of the department, but also earned a stern rebuke from the courts for trampling on the right to information.

In one case Dr Paul Theron, a former sessional doctor at Pollsmoor Prison, and Mr Slingers, a nurse at Pollsmoor, reported poor medical conditions at the prison to the Judicial Inspectorate and to the Parliamentary Portfolio Committee for Correctional Services. This resulted in an inspection at the prison. The DCS reacted and Dr Theron was suspended from his sessional duty at Pollsmoor Prison for contacting the Judicial Inspectorate and the Portfolio Committee.<sup>15</sup> Slingers was dismissed for not returning all expired medication to the pharmacy. ODAC brought an urgent court application against the Department of Health (DoH) to lift Theron's suspension and referred an unfair labour practice to the Bargaining Council. A settlement agreement was reached and DoH lifted the suspension, but told Theron that the Department of Correctional Services would not allow him to return to work. ODAC then brought another

urgent application against the Department of Correctional Services, asking for Theron's return to Pollsmoor Prison. The order was granted by the court. ODAC legal representatives accompanied Dr Theron to Pollsmoor so that he could report for duty, but he was refused entry to work. He was told that nobody senior enough was able to meet with him to allow him in, as they were not on the premises. The following day Theron again reported to Pollsmoor. ODAC tried to negotiate with the authorities but was told that DCS would not let Theron back as they wanted to appeal the interim order. More litigation between Theron and DCS ensued, including a defamation lawsuit by the former Minister against Dr Theron. Ultimately Theron won the case against his removal from Pollsmoor, but the fight against DCS took such a toll on his health and personal circumstances that he decided it would be better to move to a different public health facility.

## **POLITICAL WILL<sup>15</sup>**

Many of the gains in the realisation and promotion of the right to information in South Africa were only achieved as a result of the tremendous tenacity of civil society organisations that saw access to information as a cornerstone of transparent, participatory and accountable governance. However, these efforts by civil society organisations would have been futile had it not been for the opening up of political space during the period of transition from the apartheid system to democracy. Unfortunately, post the liberation euphoria, the right to information regime has not been seen by political leaders as a means to strengthen democracy.

Looking back at the last eight years since PAIA and the PDA were enacted, the South African experience shows how important it is to maintain levels of political will after enactment of the law. It does appear that the executive assumed that passage of the law was in and of itself enough to promote access to information.

The best way of demonstrating political will in making an RTI law succeed is by allocating resources to the proper implementation of the law.

This has not been the case across the board in South Africa. Not enough resources have been allocated to supporting the access to information regime. For example, between 2000 and 2003 hardly any money was allocated to official public awareness campaigns on these laws.

There has not been a sense of strong political leadership on the compliance with, and implementation of, the PAIA. Throughout the nine-year term of his administration, former President Thabo Mbeki failed to make any significant public statements on PAIA, despite the fact that he had sponsored the enactment of the legislation as deputy president during the Mandela administration. None of the Ministers of Justice – five different ministers from the time the law was passed in 2000 to the present – have publicly expressed their views on the law. In fact, in private conversations some ministers have expressed an opinion that the law is a political liability for the ruling party, especially since some of the most prominent users of the law are groups that are considered to be their chief detractors, such as the Democratic Alliance, investigative journalists and NGOs such as the Treatment Action Campaign and the Institute for Democracy in South Africa (which, in its capacity as a pro-democracy watchdog, is given to asking the ruling elite what many perceive as rather uncomfortable questions regarding the conduct of the country's public affairs and state governance).

Related to the issue of the law being used by government detractors, is the incorrect perception held by senior government officials and political leaders that the law is an elitist instrument and therefore cannot be regarded as a national priority in terms of the government's development agenda. This is a spurious argument because it dismisses the fact that access to information is a cross-cutting issue that plays a significant role in the ability of poor communities to access public services and resources. This has been clearly demonstrated by groups and communities who have sought to use access to information in order to access and protect their rights to health services (e.g. anti-retroviral

medication for people with HIV/AIDS), housing, and clean and drinkable water.

## CONCLUSION

In the field of socio-economic justice, RTI laws create a basis for contestation and justification of government's decisions on resource allocation. In the field of criminal justice RTI laws can create a means through which access to justice can be made easier and more meaningful. In both cases, RTI allows for a fair and reasonable manner of decision-making. In this area, the late Professor Etienne Mureinik's remarks are quite apposite:

If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected and justified, in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.<sup>16</sup>

The experience of the last eight years in the implementation of RTI laws in South Africa shows that while we can see in the horizon signs of the culture foretold by the good legal scholar, the walk across Mureinik's bridge is a mighty long one still.



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## NOTES

- 1 A Puddephatt, Unpublished opening address at the 2nd Annual Open Democracy Review Conference held in Cape Town, South Africa on 10-12 October 2002.
- 2 Section 32 of the Constitution of the Republic of South Africa, Act No. 108 of 1996.
- 3 The Constitution of the Republic of South Africa was adopted in 1996 and came into effect on 3 February 1997.
- 4 The Protection of Personal Information Bill was released for public consultation on 14 August 2009.
- 5 This section borrows heavily from an unpublished country report on the implementation of RTI laws in South Africa compiled by the Open Democracy Advice Centre and commissioned by the World Bank, 2009.
- 6 Report on the Golden Key Awards 2009 by the South African Human Commission and the Open

Democracy Advice Centre, 2009. Johannesburg, 10-26; Public Service Commission State of the Public Service Report, Pretoria: PSC, 2006, 50.

- 7 Open Society Justice Initiative, Transparency & Silence: A Survey of Access to Information Laws and Practices in 14 Countries, New York: Open Society Institute, 2006, 47-48.
- 8 Report on the Golden Key Awards 2009, 10-26.
- 9 Open Society Justice Initiative. Transparency & Silence, 51.
- 10 M Dimba, Implementation of the Right-to-Information Laws by Criminal Justice Agencies, unpublished speaking notes prepared for the Open Society Foundation's Justice Leadership Roundtable meeting, Cape Town, 2009.
- 11 In *Treatment Action Campaign vs Minister of Correctional Services and the Judicial Inspectorate of Prisons, 18379/2008*, 30 January 2009.
- 12 L Ensor, Whistleblowing is a patriotic duty, says Fraser-Moleketi, *Business Day*, March 29, 2007.
- 13 F Rabkin, Legal cover for whistle-blowers, *Business Day*, November 26, 2008.
- 14 Theron's employer was the Department of Health but he was located within DCS. DCS demanded his suspension. When the matter went to the courts, the Courts found that both the DCS and DoH were to be regarded as Theron's employers and therefore assumed all responsibilities of an employer towards him. DoH lifted his suspension but DCS refused to allow him back within the prison grounds.
- 15 Unpublished World Bank report, Implementation of RTI laws, 2009.
- 16 E Mureinik, A Bridge to Where? Introducing the Interim Bill of Rights, *South African Journal of Human Rights*, 10(1) (1994), 31-32.