1

Illuminating the Politics and the Practice of Access to Information in South Africa

Richard Calland

> ‘Secrecy is the first essential in affairs of state.’
>
> Cardinal Richelieu

> ‘Do we have a right to information? Certainly. But we also have a responsibility to act on it.’
>
> Al Roberts, associate professor of Public Administration in the Maxwell School of Citizenship and Public Affairs, Syracuse University

Introduction

Institutions and bureaucracies have a life of their own. Or so it seems. When they are under attack, they retreat; like tortoises, there is a tendency for the head to glide back under cover. This is one of the two central messages of this book: despite its constitutional obligations, the South African state has not yet cast off its historical tendency towards secrecy. Secrecy, the evidence suggests, remains its first essential. But the second message is as positive as the first is disappointing. When used diligently and with persistence, South Africa’s new access to information (ATI) regime is capable of penetrating the tortoise’s shell. That shell may be tough and the state’s approach may be imperfect, but in many cases the information will emerge eventually. At the very least, the system now requires, and applies, the legal principle of *justification* — the principle that must underpin any human rights culture. As Professor Etienne Mureinik, one of the original architects of South Africa’s ATI law, explains, the link between the right of ATI and the principle of justification is a profound one:

> Access to information is a matter of the utmost importance to any effort to bring about a culture of justification. A government which closes its files will be under much weaker pressure to justify its decisions than one which has to open them.[1]

Now, thanks to South Africa's new constitutional order, and the law that gives effect to the right of ATI that is enshrined in the Bill of Rights — the Promotion of Access to Information Act No. 2 of 2000 (PAIA) — the state must explain and thereby justify its retreat to secrecy, both in law and in fact. It is tempting to stop at this point rather than delay the reader, because this book contains a series of compelling stories, but my task is to provide a framework for what lies ahead by setting out the legal and conceptual background; by putting South Africa's own position in an international context; and by identifying in headline terms the main political, institutional and other fault lines that appear to be predominant in determining the effectiveness or otherwise of an ATI regime such as South Africa's.

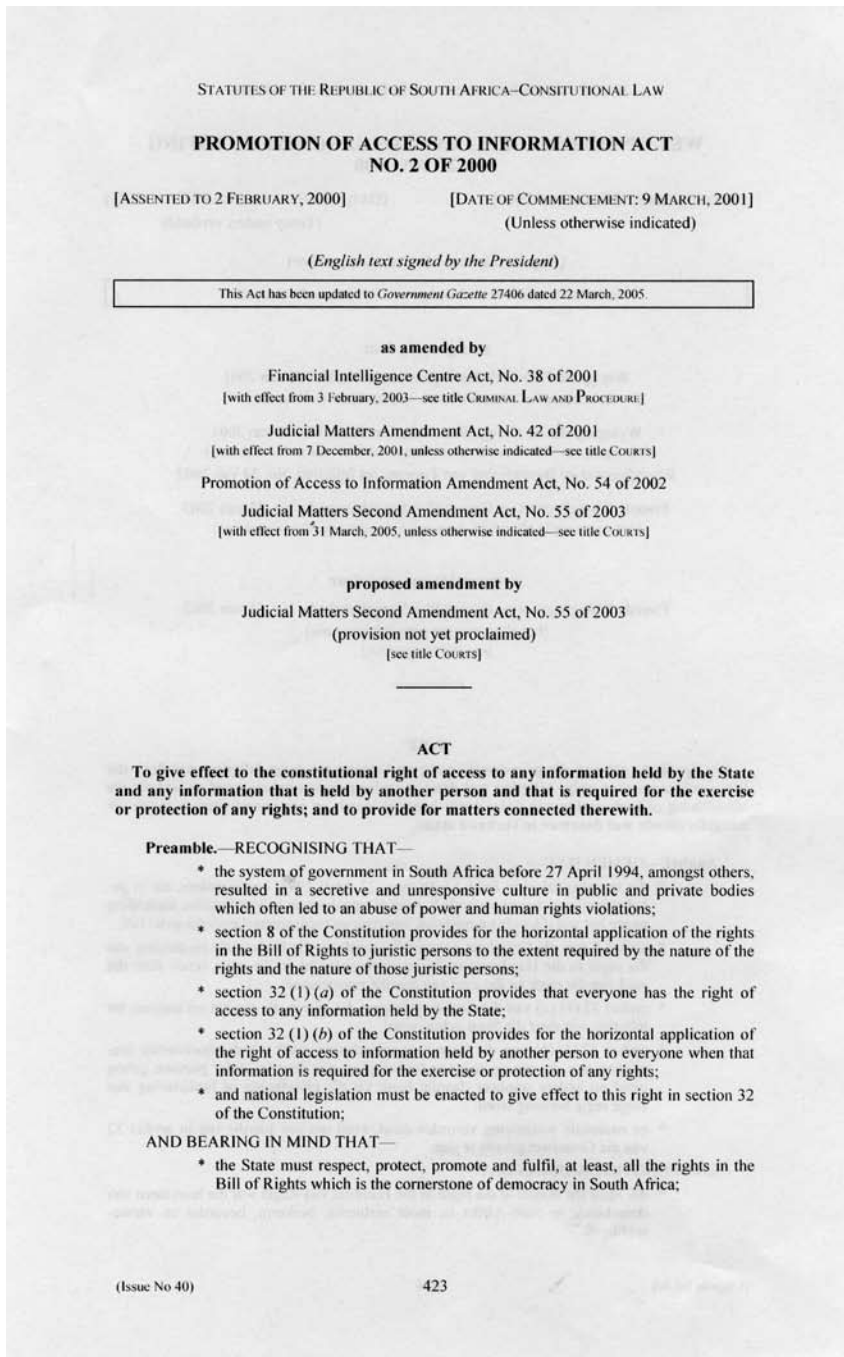
South Africa's place in the global explosion of ATI law and practice

Stories are important because they bring life to the law. And the explosion in ATI law and practice around the world over the past ten years has two dimensions, one legal, the other one human. On the legal side, the facts are straightforward. Over 50 countries have passed some kind of ATI law in the past decade. There are now over 60 in total.[2] The principle of transparency appears to be more than a passing fad, introduced into the 'good governance' lexicon in the early 1990s. While some of those 50 countries have responded cynically to the call of the World Bank and other such institutions for greater transparency by rapidly passing ATI laws so as to look good and tick a box, others have done so as a result of social campaigns for the 'right to know'.

South Africa's case falls into this latter category; or, at least, it does to my mind. But it should be noted that this is not necessarily the predominant perspective of those that have considered the question. There are two divergent views. The first posits South Africa's case as one that coheres with the idea of a global 'constitutional' movement. The other places far greater emphasis on the domestic lobby for an ATI right and asserts that the origins of South Africa's right of ATI are 'home grown' rather than part of a global trend.

Thus, on the one hand, Arko-Cobbah,[3] for example, cites Darch and Underwood[4] in support of his contention that 'South Africa's introduction of PAIA was influenced by a global constitutional imperative rather than by a popular pressure'. Puddephatt's briefing paper to the 2008 'state of the art' international conference on the right of ATI convened by the Carter Center (the Carter Center Conference) noted that the substantial move towards openness legislation around the world seems to be 'tied to the wave of democratization that followed the political events at the end of the 1980s and early 1990s'.[5]

Although it is probably true that the inclusion of a right of ATI benefitted from the influence of a 'global constitutionalism' that impacted on the overall process of constitution making in South Africa, there was surely a strong local imperative as well. Secrecy,



STATUTES OF THE REPUBLIC OF SOUTH AFRICA–CONSITUTIONAL LAW

PROMOTION OF ACCESS TO INFORMATION ACT
NO. 2 OF 2000

[ASSENTED TO 2 FEBRUARY, 2000] [DATE OF COMMENCEMENT: 9 MARCH, 2001]
(Unless otherwise indicated)

(English text signed by the President)

This Act has been updated to *Government Gazette* 27406 dated 22 March, 2005.

as amended by

Financial Intelligence Centre Act, No. 38 of 2001
[with effect from 3 February, 2003—see title CRIMINAL LAW AND PROCEDURE]

Judicial Matters Amendment Act, No. 42 of 2001
[with effect from 7 December, 2001, unless otherwise indicated—see title COURTS]

Promotion of Access to Information Amendment Act, No. 54 of 2002

Judicial Matters Second Amendment Act, No. 55 of 2003
[with effect from 31 March, 2005, unless otherwise indicated—see title COURTS]

proposed amendment by

Judicial Matters Second Amendment Act, No. 55 of 2003
(provision not yet proclaimed)
[see title COURTS]

ACT

To give effect to the constitutional 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; and to provide for matters connected therewith.

Preamble.—RECOGNISING THAT—

* the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations;
* section 8 of the Constitution provides for the horizontal application of the rights in the Bill of Rights to juristic persons to the extent required by the nature of the rights and the nature of those juristic persons;
* section 32 (1) (*a*) of the Constitution provides that everyone has the right of access to any information held by the State;
* section 32 (1) (*b*) of the Constitution provides for the horizontal application of the right of access to information held by another person to everyone when that information is required for the exercise or protection of any rights;
* and national legislation must be enacted to give effect to this right in section 32 of the Constitution;

AND BEARING IN MIND THAT—

* the State must respect, protect, promote and fulfil, at least, all the rights in the Bill of Rights which is the cornerstone of democracy in South Africa;

(Issue No 40) 423

Figure 1: South Africa's current Promotion of Access to Information Act, introduced in 2000 to give effect to the constitutional right to access information. SAHA's Freedom of Information Programme was launched shortly thereafter to test the parameters of this legislation.

after all, had been a hallmark of the apartheid regime; black South Africans had been denied any right of access to governmental power; ignorance, including a lack of any decent educational opportunity, had been a central tenet of the apartheid regime's strategy of oppression. As Justice Kate O'Regan, one of the most progressive and influential members of South Africa's first Constitutional Court, has noted: 'The Right of Access to information should not be seen as an afterthought or optional extra in our constitutional dispensation. It is integral to our conception of democracy.'[6] Hence, my own perspective supports the alternative view, although it is also subjective, because I was a part of the Open Democracy Campaign Group (about which more is said below). This notwithstanding, it should not be forgotten that the lucid and potentially far-reaching right to ATI that appears in the South African Constitution at section 32 did not appear from thin air or as a result of external pressure. Firstly, there was a strong campaign for its inclusion in the Interim Constitution that emerged from the political negotiations that preceded the country's first democratic election in 1994. Secondly, there was an even firmer lobby for the inclusion of the right in the final Constitution; indeed, section 32 represents a stronger articulation of the right than the provision that appeared in the Interim Constitution. In the years that followed, the Open Democracy Campaign Group — a civil society lobby that included human rights, democracy and environmental organisations, as well as trade unions — advocated for a strong piece of legislation to give effect to the constitutional right (as required by section 32(2)).[7]

It could be argued that PAIA came about simply because the constitutional provision said that there had to be legislation to give effect to the right; and, indeed, that is certainly true. But the question is: would South Africa have ended up with PAIA — or a weaker version — had there not been the civil society coalition pushing for a strong piece of enabling legislation?

It was a protracted process, to say the least — Parliament took the full three years that the constitutional provision gave it to pass the law — and not one whose story deserves to be retold in detail here. In fact, Parliament itself should not be blamed for the slow progress towards the statute book; rather, the executive took control of the Bill and removed it from public view for long periods. The first draft of the Bill had, in fact, been drafted and published as early as 1995 by the Open Democracy Task Force established by the then deputy president, Thabo Mbeki. The group was headed by Mbeki's trusted legal advisor, Advocate Mojanku Gumbi, but included a prolific human rights lawyer, the late Professor Etienne Mureinik. Driven by Mureinik's idealistic instincts, the group had produced a far-reaching draft, culling various sections from what it regarded as the best freedom of information laws from around the world. The Open Democracy Bill included chapters on 'open meetings' (so-called 'sunshine law') and on whistle-blower protection that were subsequently excised, totally in the former case, or hived off into a separate law in the latter case.[8] Between 1995 and 2000 the Bill vanished for long periods into

the nether regions of the executive, to emerge, months later, with further reductions to its overall reach; for example, after the Bill was discussed by cabinet, the exclusion of cabinet records from the scope of the Bill was introduced into the draft. Eventually, the Bill was tabled in Parliament, and in the second half of 1999 an *ad hoc* committee chaired by Advocate Johnny de Lange, then chair of the Justice Portfolio Committee, worked to finalise the Act (having first held a series of public hearings at which a wide range of civil society and business organisations made submissions).

Perhaps the main point that is of greatest significance for the future health of the ATI regime that can be extracted from the history of the passage of the law through Parliament is this: a number of organisations developed both an interest and a competence in ATI, and, moreover, the taste for using the law. There is empirical data in support of the assertion that where civil society organisations are involved in the implementation of the law, governments are likely to be more compliant.[9] Although the direct connections may appear vague now, there is no doubt in my mind that the fact that South African civil society is now willing and able to use the law that finally emerged from the elongated process (i.e. PAIA) is intrinsically connected to the fact that the law has civil society roots, although it could also be argued that those roots are neither deep enough nor wide enough, in that only a very small number of civil society organisations have been able to take up the challenge of not only using the law regularly, but contesting failures to comply with it by government and other information holders. The demand for the law that came from a very diverse and credible range of civil society organisations working together as the Open Democracy Campaign Group has not been subsequently fully matched by a similar appetite for using the law that was the fruit of their labours.

The quote from Professor Al Roberts that introduces this chapter — an academic who, as he puts it, ‘uses as well as studies’ ATI law — sums up this aspect of the challenge very well: an ATI law is useless unless it is actually used. Indeed, the usage is not only fundamental to its value; it is fundamental to its instrumentality. As many of the stories that follow this introduction show, the political will to comply with the legal obligations created by PAIA has only finally emerged as a result of unyielding pressure from civil society organisations such as the South African History Archive (SAHA). This replicates, in a South African setting, the experience of elsewhere — an experience that is being charted with increasing diligence by both the community of users and the academy internationally.[10]

Perhaps the three most significant aspects of the international trend — the state of the art, so to speak — are: first of all, the increased understanding of the relationship between the right of ATI and other legal instruments; secondly, the idea of the right of ATI as a human right with multiple dimensions, including the socioeconomic dimension; and, thirdly, the importance of the politics of the policy. These trends are reflected in the potentially watershed Carter Center Conference of February 2008. Each of these three

aspects of the global ATI community's understanding of the contemporary challenge is pertinent to the South African experience; and, indeed, all are traversed at various points and in different ways in this volume, and are now considered briefly in turn.

Part of a family of laws

I will return to this driving theme later. But there is one additional framing issue that should be introduced at the outset. ATI law should not be seen — or assessed — in isolation. For one thing, by its very nature, it not only cuts across a whole range of institutional and political factors that may impact on its well-being, but, in legal terms, it is also not an independent vessel. Behind the sometimes complex facade of ATI lies a very simple idea: people want to know what is going on, and now, moreover, they have a right to know, enshrined in international law[11] and protected in many cases by a constitutional and/or statutory right. For the layperson, therefore, the legal instruments will be immaterial — they just want to know what is going on and why a particular decision was taken by those in power. Sometimes this involves a piece of paper — a 'record'; sometimes it involves a decision and the reasoning behind the decision; sometimes it may involve getting access to, or correcting, your own personal record held by a governmental or private body; and sometimes it may need someone on the inside to get the information out (a whistle-blower).

To cover this diverse ground requires more than an ATI right. Indeed, ATI — or its predecessor label, 'freedom of information' — is something of a misnomer. The right is not to information in a general sense, but to a record. Moreover, it is a right, therefore, to an existing record. Government is under no duty under an ATI regime to create a record or to scratch around to put together an answer to a question. The citizen has a right to request (to 'seek', to use the language of the international legal instrument, Article 19 of the International Covenant on Civil and Political Rights) a record; the state has a duty to respond to that request. Thus, in terms of access to written reasons for a decision — a so-called right to administrative justice — or to your personal records (a right to data protection) or to impart information as a whistle-blower, it is essential to develop an interwoven basket of legal rights and duties that will, together, comprise what the community of users is beginning with a growing degree of consensus internationally to describe as the 'right to know'.

Indeed, the initial approach of the Open Democracy Task Team in South Africa was to try and include as many of the component parts of what it conceived as 'open democracy' under the umbrella of the Open Democracy Bill, which in its first iteration included not just the provisions providing for a right of access to government information, but also public access to government decision making (so-called 'open meetings' law) and protection for whistle-blowing. In fact, although it may have appeared to be comprehensive at the time, the state of the art has moved on rapidly in the ten years that followed the first

draft of the Open Democracy Bill; now, there are other aspects of the 'right to know' that the Open Democracy Task Team would probably have wanted to add to its already extensive draft law — including records management, data protection and a right to written reasons for executive action.

While this volume focuses solely on ATI, this notion of a 'family of laws' — what Kate Allan in chapter 6 calls the 'multiple faces of information governance', which is a very appealing way of putting it that also captures the modern complexity of information management driven by rapidly changing information technology — is significant to both our conceptual and our instrumental understanding and application of the right of ATI. Thus, South Africa has in section 33 of the Bill of Rights a right to just administrative action and, from this constitutional derivation, a statutory right to written reasons for an executive decision by virtue of the Promotion of Administrative Justice Act of 2000. So far as whistle-blowers are concerned, the Protected Disclosures Act of 2000 (an offshoot of the Open Democracy Bill that was the predecessor to PAIA) provides a legal remedy for employees who disclose information of wrongdoing and who suffer a reprisal as a result of having done so. On data protection, we await the implementation of the work of the South African Law Reform Commission, which has for a number of years been engaged with the task of producing an appropriate piece of legislation.

As hinted above, the questions of both record making and record keeping are very pertinent. A number of the cases canvassed in this volume illustrate why this is so. They also draw useful attention to the danger that laws such as the Key Points Act or the Protection of Information Act, which, however justified or reasonable the public policy and public interest considerations that may well lie behind them may be, have the effect of undermining the purpose of the right to ATI. So, necessary though this legislative patchwork quilt may be, it is also possible that it may cause a degree of confusion. PAIA is supposed to be the overriding law. But there is evidence that public servants are as aware of the other laws and that they are, naturally, anxious not to breach them when giving out information.

A prime example of this risk averseness came in 2006 and 2007 with a number of cases where public servants were disciplined for disclosing information to the media in breach of public service regulations, even though they may have been doing so in accordance with the scheme advanced by the Protected Disclosures Act. Similarly, one can well imagine how a public servant faced by a request for a record that may have a politically sensitive disposition may choose to defer to a competing law or regulation — whether the Protection of Information Act or else some internal system of classification — and be led to conclude that the 'safer' course of action would be to withhold the information.

In chapter 6, Kate Allan writes from the perspective of SAHA, an organisation that has certainly taken up and met the challenge posed by Al Roberts in admirable fashion. Her chapter is a thorough review of many of the most important aspects of implementation

of PAIA since it came into force in early 2001. This introduction, which attempts to frame the issues and set the South African experience so far in a wider context with broader horizons, should be read in tandem with Allan's analysis. I write as a founder member of ODAC — the Open Democracy Advice Centre — a specialist law centre that, like SAHA, uses PAIA and supports its usage by communities in pursuit of socioeconomic justice; as a law centre, ODAC is also able to identify and launch test case litigation.

ATI as a human right with a multidimensional instrumental value

Civil society's approach has been in concert with what I would regard, and describe, as a paradigm shift in the understanding and application of the right to ATI around the world, which is worth noting in order to recall a major underlying purpose of the right. The paradigm shift has been viewed as being a shift away from seeing the right merely as a companion to the right to freedom of expression (which is its international law derivation) towards seeing it as a leverage right,[12] important in and of itself, but far more significant in terms of its value in helping to protect and exercise other rights, particularly social and economic rights. It is a subtle shift conceptually and legally, but in instrumental and practical terms, the consequences, especially in developmental states and societies, are potentially huge, although there is also now a growing consensus that the right to ATI is a fundamental human right with its own set of attributes and intrinsic worth, aside from its instrumental value.[13]

Either way, many of the most vivid stories that have emerged around the world in recent years have shown the human side — and the wider human rights potential of ATI — of the transparency explosion. For example, in early 2004, along with fellow members of the Institute for Policy Dialogue Transparency Task Team, I attended a *jun sunwai* (public hearing) at the rural village of Kumbhalgarh in Rajasthan, India. We watched, spellbound, as the MKSS (Mazdoor Kisan Shakti Sangathan) conducted a forensic examination with and alongside the community that exposed the corruption that had contaminated the state's food-rationing scheme. The use of Rajasthan's ATI legislation was fundamental to the methodology, in which information garnered from state records, from the records of the (private, licensed) ration dealers and from the community itself was triangulated so as to reveal the discrepancies in the ration dealers' records and, thence, the extent of the corruption.[14] As a result, many ration dealers lost their licences and/or were arrested, and the state scheme was overhauled.

In South Africa, work with various communities has shown how, when they are accompanied along the way by specialist organisations like SAHA or ODAC, community organisations can access information that enables them to leverage the right to access to adequate housing or to water or health care.[15] For example, in Ntambana, a small village

in rural KwaZulu-Natal, a province of South Africa, ODAC's support of a community request for information about water access policy led to the community receiving clean water for the very first time — one of many stories in which the persistence and skill of the professional NGO when accompanying an equally determined local community organisation or activist individual will ensure that the relevant records are prised from government and used to claim other socioeconomic rights. Thus, in these circumstances, PAIA is helping ordinary poor South Africans regain their human dignity and achieve a better material quality of life.

This is the good news side of the story. The downside is the realisation that has emerged here and elsewhere that Rome was not built in a day, and that these success stories are perhaps the exception to the general rule, benefitting as they do from a special combination of factors that are not available to all. I have quipped previously that, in fact, the phrase should be 'Stockholm was not built in a day', since it is the Swedish model of habitual institutional openness to which we should all aspire.[16] But Sweden has had 300 years of practice to perfect its habit. It takes a long time to reorient institutional practice and culture to the point where openness is the default position. Platitudinous though these sentiments may be, they do capture the essence of the struggle for the full realisation of the right to ATI, which has a practical, implementation dimension, but also a political one.

The politics of the policy: Why is South Africa such a tortoise?

'Political? Why so?' many people might ask. Isn't this just a technical issue? Is it not simply a question of processing a request for a record: get the mechanics right and all will be well? But, to use another cliché, information is power. Hence, getting access involves issues of power relations and the insecurity that accompanies them. The politics of the policy is attracting new attention, both in South Africa and elsewhere around the world, as a wide variety of countries grapple with the challenge of implementing ATI law. The Carter Center Conference sought to recognise this by devoting two of the five commissions to which the 140 delegates from 40 countries contributed — one on the politics and economics of ATI, and the other on the structural and cultural context. As Andrew Puddephatt, the convener of the former commission, noted in his briefing paper:

> If progress is to be made we will need more rigorous analysis of the politics of the policy … [the politics] will include structural factors such as the level of socio-economic development, the strength or weakness of various institutions, the type of political system, and its stability, the perceived self-interest of political actors, specific national and regional histories and cultures, the wider international dimension, and certain contingent factors of both personalities and events.[17]

In response to this political challenge, the delegates to the conference produced a wide-ranging declaration that can safely be described as the 'state of the art' in terms of the current understanding and agenda for the international ATI community of practitioners.[18] The declaration has a very strong emphasis on combatting the political obstacles to effective implementation of the right, and can usefully stand as a call for action in any society, including South Africa's.

The cases in this volume illuminate both the politics and practice of an ATI policy. They reveal that two of the government agencies that one would hope and expect would be champions of the law — the Department of Justice and the National Archives — have, in fact, turned out to be at times two of the most obstructionist of government bodies. This is disappointing, to say the least. Admittedly, they have been faced by difficult requests, with potentially profound political consequences. When we (ODAC) took the information commissioner of the Republic of Ireland to visit the National Archives in 2006, she was told by the national archivist that there were certain documents in the Archives that must never see the light of day, because were they to be revealed, they would threaten the stability of the democratically elected government. One can speculate on the type and nature of such records, and it is likely that some of the requests about the past made by SAHA — concerning the relationship between the liberation movement and the apartheid regime, especially the existence of apartheid intelligence operatives amid the ANC leadership — have come very close to touching this particular nerve.

It may well be the case, therefore, that requests of this nature have the effect, whatever the intention, of turning people who otherwise might be, if not champions, then at least non-obstructionist in their attitudes to the Act, against it. When discussing possible reform with government, including the creation of an ATI commissioner, we were told by a senior government source that the minister of justice (Bridget Mabandla) had little or no appetite for pushing a reform agenda in cabinet, because 'when the cabinet looks out of the window, what it sees is the law being used by its political enemies to embarrass it'.

This is not to excuse this attitude; on the contrary, however sensitive the record, there is, as a matter of law, a right to access it unless there is an exemption that justifiably limits the right to ATI. But it does help explain the politics of the realisation of the right. If this is the case, does it raise questions about the strategy employed by SAHA and others in requesting such records at a time when the right to ATI is still 'bedding down' and PAIA systems are not yet firmly established? Would it, in the longer-term interests of the right and the usability of PAIA, have been better to have held off from their more politically awkward requests? In seeking to prise out some of the skeletons in the cupboard, has it inadvertently caused government to slam shut the door for everyone?

I used to take this view — that it was far more important to use PAIA in a tactically pragmatic manner in the first few years, to 'ease' government into the habit of a more open culture rather than to expect it to hit the ground running and to be willing and able

A2.2.15.24

STRENG GEHEIM

SUID-AFRIKAANSE POLISIE
1985-06-07
SOUTH AFRICAN POLICE

SECURITY BRANCH
PORT ELIZABETH
SOUTH AFRICAN POLICE

BERIG NR. 21
2315458 DD
1985/05/23
VAN : A/O, V/TAK, O.P. (LT.KOL. STRYDOM)
AAN : B/O, X302, PTA. (A.3)
KKKKK

UITERS GEHEIM

MATTHEW MATEWE G O N I W E (S.4/43680) : SEKRETARIS - CRADOCK RESIDENTS ASS. (CRADORA -S.9/823) : PLATTELANDSE ORGANISEERDER OP DIE STREEKS UITVOERENDE BESTUUR VAN DIE U.D.F. (S.13/436) OOS-KAAP

1. OP 85/05/13 HET MNR. JAAP STRYDOM, HOOF DIREKTEUR VAN DIE DEPT. SAMEWERKING ONTWIKKELING EN ONDERWYS 'N VERGADERING BELÊ BY DIE KOMMANDO HOOFKWARTIER TE CRADOCK MET BETREKKING TOT DIE SKOLE SITUASIE TE CRADOCK.

2. PERSONE TEENWOORDIG BY DIE VERGADERING:-
(1) MNR. JAAP STRYDOM - HOOF DIREKTEUR -DEPT. SAMEWERKING ONTWIKKELING EN ONDERWYS.
(2) MNR. JAN VERHAAK - DIREKTEUR VAN BEPLANNING.
(3) KOMMANDANT B. MARAIS, B/O, CRADOCK KOMMANDO.
(4) MNR. F. GERBER - VOORSITTER VAN DIE AKSIE KOMITEE.
(5) MAJ. CALITZ - DISTRIKSKOMMANDANT, CRADOCK.
(6) MAJ. W.F.N. WINTER, TAKBEVELVOERDER, V/TA, CRADOCK.

3. TYDENS DIE VERGADERING HET MNR. STRYDOM GEMELD DAT SY DEPT. SIMPATIEK OORWEGING SKENK AAN DIE HERAANSTELLING VAN MATTHEW MATEWE G O N I W E. HY HET DIE VERGADERING OOK MEEGEDEEL DAT HY VAN VOORNEME IS OM DEUR MIDDEL VAN MEV. MOLLY BLACKBURN (S.1/A/2766), P.F.P. - L.P.R. TE WALMER, P.E. MET MATTHEW GONIWE TE ONDERHANDEL OOR SY DEPT. SE VOORNEME OM LAASGENOEMDE S' HERAANSTELLING AS ONDERWYSER TE GRAAFF REINET MET BEVORDERING AS SKOOLHOOF.. DIT IS DUIDELIK DAT MNR. STRYDOM MEV. BLACKBURN AS TUSSEN GANGER WIL GEBRUIK OM GONIWE TE OORREED OM 'N AANSTELLING MET BEVORDERING AS SKOOLHOOF TE GRAAFF REINET TE AANVAAR. VIR DIE SKAKELING TUSSEN MEV. BLACKBURN, SIEN HIERDIE KANTOOR SE SKRYWE NR. OP.1/771 GED. 85/04/24 AAN SEKSIE B.1. ONDER OPSKRIF: ''WITVROU MOLLY BLACKBURN : ORG. UNITED DEMOCRATIC FRONT (UDF): ONDERHOUD MET MNR. J. STRYDOM, HOOFDIREKTEUR, DEPT. ONDERWYS EN OPLEIDING 85/04/17.

4. HIERDIE INLIGTING IS OP 85/05/23 TYDENS BESOEK DEUR DIE MINISTER VAN WET EN ORDE AAN P.E. HOINDELING DEUR DIE AFDELINGSBEVELVOERDER AAN HOM OORGEDRA. DIE MINISTER HET ONMIDDELLIK MET DIE KANTOOR VAN DIE MINISTER VAN SAMEWERKING ONTWIKKELING EN ONDERWYS TE KAAPSTAD IN VERBINDING GETREE MET DIE VERSOEK DAT DIE HERAANSTELLING VAN GONIWE AGTERWEË GEHOU WORD TOT TYD EN WYL MINISTER LE GRANGE DIE AANGELEENTHEID OP 85/05/24 MET MINISTER VILJOEN BESPREK HET.

1. B.O
2. B.
85-05-24

STRENG GEHEIM

Figure 2: Top secret security police situational report from Lft Col Strydom to security police headquarters in Pretoria, dated 25 May 1985, six weeks before the abduction and murder of the Cradock 4. Strydom applied for amnesty in the Truth and Reconciliation Commission in this matter (Archived as SAHA Collection AL2878 – A2.2.15.24).

to deal with the most complex and sensitive requests from day one. Hence, my argument was that in order to achieve a workable ATI regime for the future — the primary goal — we needed to hold back and even sacrifice some openness in relation to the past. Part of this argument contained a utilitarian dimension: a key element in a viable ATI system is record keeping.[19] Often record keeping is not at a level necessary to facilitate access, prompting the question: should an administration spend time and resources putting in place a record keeping system for old records or should it invest the resources in establishing a new system that will ensure that future records will be properly kept?

Perhaps it was wrong to posit this question as a zero-sum game. Perhaps it is possible to do both at once. In any case, partly because of the requests that SAHA has made or supported, I have come to revise my view. Verne Harris is better placed to make this argument than I, as a historian and an archivist himself, but I have come to appreciate that the digging out of old records is not just of passing academic interest for historians, but also about establishing accountability for past deeds and abuse of power, and that part of the task of establishing accountability in the future is also, therefore, about settling the account of the past. The best example of this is the case study of the request for records relating to the murder of the 'Cradock 4'. As the writer says, with a note of surprise, there turned out to be 'great interest in the case'. Indeed, it was a notorious case. And it seems to me that accessing information about what happened is also about accessing justice for the family and comrades of those who fell in defence of liberty against the apartheid regime. In other words, in this context, the right to ATI is not a luxury right, a 'nice-to-have' add-on, but a core right, central to the overall constitutional quest for human dignity in the new South Africa.

This is a central theme of the current phase of implementation of the right to ATI in South Africa. As the delegate from the Presidency told the second annual indaba meeting of the Deputy Information Officers' Forum on 28 September 2007:

> PAIA is seen as something that is an 'add-on' to our other responsibilities and which is, frankly, seen as a nuisance. We need to understand that if people want to ask us about what we are doing, then we need to treat them with dignity and respond.

This comes from a government agency that has been one of the least compliant of all. In successive studies conducted by ODAC on behalf of the Open Society Initiative (OSI), the Presidency scored very poorly; in the second survey, conducted in 2004, it failed to respond to any of the requests for information made to it.[20] It did not, however, represent an outlier.

Overall, the scores attained by South Africa, in comparison to the other 14 countries surveyed, were lamentable. While the South African government's record in terms of denial of requests was no worse — or better — than the others, it was one of the worst performers in terms of what the survey branded as 'mute refusals' — that is to

say, cases where there is no response by the information holder inside the statutory time limit (termed a 'deemed refusal' in section 27 of PAIA). Almost two-thirds of requests for information in the 2004 survey were 'mute refusals' (62 per cent).[21] In short, in South Africa, you are more likely to be ignored than responded to. Moreover, despite its ostensible linkage with the constitutional imperative of social transformation, noted above, not to mention the specific provisions in PAIA intended to ensure that socially disadvantaged people are assisted when seeking to use the Act, the OSI Justice Initiative methodology revealed how 'Ausi', an illiterate, non-English-speaking woman from a rural area was treated by a range of government departments. In nine out of ten cases, she was unable to even make the request for ATI.[22] South Africa's system is not delivering a service that respects a fundamental, constitutionally protected human right.

Enforcing the right of ATI

So, what to do? And, from the case studies presented in this volume, what is the diagnosis and what is the prescription? In this, one needs to distinguish between the challenges of implementation and the challenges of enforcement. At one end of this spectrum of challenges is the bookend of the law itself and, at the other end, the courts. In these two respects, South Africa is very well placed. PAIA is excellent in most respects and is underpinned by a constitutional right, as noted. Unlike many developing countries elsewhere in Africa, or in Asia or Latin America, the court system is both functional and mainly honest. One can say with a good deal of confidence that the rule of law prevails in South Africa. If you take a case to court, you stand a good chance of getting justice.

This is not to say that just because the court system operates in this way and rights can be enforced that there is necessarily access to justice. The greatest failing of PAIA is its enforcement mechanism — or, rather, the lack thereof. To appeal a denial, or a deemed refusal, an appeal must be lodged with the High Court. This represents, in many cases, a hammer to smash an acorn. As the *Ad Hoc* Parliamentary Committee, chaired by Professor Kader Asmal, appointed to consider the future of the Chapter 9 constitutional protection bodies noted: 'The complex and potentially expensive appeals mechanism provided for in the legislation places further obstacles in the way of ordinary individuals wishing to access information … it is significant that only a handful of cases reach the courts.'[23] Accordingly, the committee recommended that a dedicated information commissioner be appointed within the South African Human Rights Commission (SAHRC) (and that the appointment should be initiated 'immediately' with a 'ring-fenced' additional budget). As the report observed, the submissions arguing for an independent information commissioner mandated to receive appeals and make binding orders on access and disclosure resulted from impatience with the capacity of the SAHRC to provide real teeth in implementing PAIA. Certainly, as ODAC has discovered in the majority of its own cases, patience is a necessary virtue in pursuing PAIA

requests. The cases reviewed in this book demonstrate unequivocally the same need.

Thus, there is some light at the end of the tunnel, although it remains to be seen how easy it will be for the SAHRC to move forward with the Asmal recommendation and the extent to which the proposal will be resisted or supported in Parliament (which, at the time of writing, was still waiting for the formal tabling of the report before beginning the task of processing its recommendations). If it happens, and the SAHRC itself adopts the more 'aggressive' stance that Asmal suggests may be appropriate, then potentially the scope for enforcing the right rises exponentially. In other countries, as diverse as Scotland, Australia, Canada, Thailand and Ireland, information commissioners have made all the difference in terms of permitting the volume of caseload that will, in turn, provide both the jurisprudence and thereby the guidance to government over how to deal with requests, and how, in particular, to interpret and apply the exemption clauses.

Figure 3: Members of the Abahlali base Mjondolo (Shack Dwellers) Movement show their receipt for the PAIA request submitted, with the assistance of ODAC, to Durban City Council for development plans in their area. Source: ODAC.

The implementation challenge: Is it worth the bother?

As far as implementation is concerned, there is a dual need. One is political, the other more technical, although the latter is largely dependent on the former because of the need for a resource commitment, both financial and human. On the political side, it is clear that government needs to reach a macro-level decision to respect the Constitution, and section 32 in particular. Moreover, implementation needs champions spread across the various agencies who are willing to develop best practice. To an extent, this is already happening. As is noted elsewhere in this volume, ironically it is the South African Police Service that is providing the best example of compliance — putting in place systems and respecting the need for sound procedural responses to requests under compliance. It is ironic because this was the hound dog of apartheid, yet perhaps because of the institutional hierarchies, and the culture of legal obedience that comes with them, it has proved to be far more compliant with its legal duties in the case of PAIA than many other ministries that one would expect a far less secretive approach from.

But this is also about deepening our collective understanding of transparency and how ATI law works in practice. It is an international process: all around the world, a variety of democracies — old and new — are having to learn how to handle new responsibilities for openness legislation. So South Africa is not alone in facing this difficult challenge. And there are reasons for optimism amid the tardiness and political blockages. The Deputy Information Officers' Forum represents an excellent opportunity not just to exchange views and share learning and best practice, but also to recognise the importance of the job and to attach greater kudos to the position, pivotal as it is to the effective working of the ATI system.

Furthermore, a body of jurisprudence is now growing usefully. Government has lost every single case that has reached the High Court.[24] Some of the cases are responding creatively to the challenge of both implementation and enforcement. The Supreme Court of Appeal in the Earthlife matter ordered that a small panel of experts be appointed, by agreement between the parties, to review the records and advise whether the records were exempt or not.[25] The Earthlife case (dealt with by David Fig in chapter 3) also shows the importance of coalitions — in that case, a specialist NGO working with a specialist ATI specialist organisation. This is a virtuous model. It is unreasonable to think that civil society organisations, even well-resourced NGOs, will take up ATI as a useful addition to their advocacy armoury overnight. They have many pressing concerns, and it is clear that to use PAIA effectively requires skill and experience. Thus, the role of organisations such as SAHA and ODAC is vital — as companions to other NGOs with socioeconomic justice and human rights agendas.

This point is affirmed by Dale McKinley's case study on water access rights (see chapter 3, Box 3.1). He concludes that despite the difficulty of the struggle, and the many obstacles, in the end it produced 'positive results'. In his study, Terry Bell expresses

shock and disappointment at the response of government to his own requests for information (another of the stories recorded here; see chapter 2, Box 2.1). Yet, as he knows only too well from his own experience as an investigative journalist, when a government has something to hide, it will do its best to keep it hidden. The only question is whether the democratic system is good enough — and strong and robust enough — to force the information out in the end. This requires a collusion of institutions and social forces. One law does not make a democracy, and in this sense, PAIA should not be seen as a golden bullet.

Which throws up the final question: Is PAIA worth having? If it is like getting blood out of a stone to make PAIA work, why bother? The answer is twofold. Sometimes it works and sometimes it does not. When it does work, you get the information. Even if you do not get the information, the government has to then justify its secrecy. The rule of law bites and it must show that non-disclosure is not only lawful because it is covered by an exemption, but that the public interest in non-disclosure is greater than the public interest in disclosure. As the evidence accumulates, so society will be able to reach its own conclusion, and it is on that point that the argument comes to rest. In the end, it is only by meeting our individual and collective responsibility to act on it that we will be able to show the value of the right to ATI. If we do so, then the social demand for openness will grow to the point where the political costs of secrecy will be too great for any government to bear.