

## **Campaign to Popularise Section 32, the Promotion of Access to Information Act and the Promotion of Administrative Justice Act**

On 21 January 2000, Parliament passed the long-awaited legislation on access to information: the Promotion of Access to Information Act. During its six year evolution the Act changed from its original omnibus format (the Open Democracy Act) to an Act which regulates only the control of access to information held by government and by private bodies. Although the Open Meetings Section was removed during its time with the Cabinet, as far back as 1997, it was only as the Act neared the passing stage that the sections on privacy and whistle-blower protection were excised. The drafters in honing down the contents of the Act, Parliament said it recognized that what was needed was three separate acts. Consequently, whistle-blower protection is now contained in the recently passed Protection of Disclosures Act and presumably the privacy section will be included in privacy legislation to which it is more germane.

A victory for civil society is the inclusion of access to information held by private bodies in the Promotion of Access to Information Act. Although this right was clearly included in the bill of rights - albeit it on a more restrictive level than access to information held by the state - and should automatically have been accommodated in the legislation, it was only in the last stages that a section dealing with this part of the right was drafted.

The passing of the Promotion of Access to Information is a milestone for South Africa. Earlier apartheid governments thrived on the suppression of information with South Africans never knowing what was being done in their name. Along with welcoming the new Act, FXI also celebrates the ushering in of the access to information clause in the Constitution. Until the passing of the new legislation, South Africa had been saddled with the clause from the Interim Constitution. This provided only for access to information from government in exercise or protection of a right. The 1996 Constitutional clause reads:

Everyone has the right of access to-

- a) any information held by the state; and
- b) any information that is held by another person and that is required for the exercise or protection of any rights.

In addition FXI welcomes the passing of the Promotion of Administrative Justice Act. The objectives of this piece of legislation are contained in the preamble which in turn reiterates the contents of the right in the Bill of Rights:

"WHEREAS section 33 (1) and (2) of the Constitution provide that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.." Furthermore the preamble says the Act is enacted in order to: \*promote an efficient administration and good governance; \*create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action.

FXI therefore will be embarking upon a campaign to inform civil society of the arrival of the new clause, the Promotion of Access to Information Act and the Promotion of Administrative Justice Act. FXI also hopes to make an input on the regulations relating to this legislation and to dialogue with government on their implementation.

#### Brief Outline on Promotion of Access to Information Act

The Act gives effect to the access to information right in our Bill of Rights. It lays down procedures for accessing information from government as well as from private bodies - subject to limitations. In addition, Section 9 says that the Act must promote transparency, accountability and effective governance of all public and private bodies. The Act overrides any other act which has a more restrictive approach to information.

In the main the act deals with information in terms of "records" (any recorded information). If the information requested can be severed from a document which the information officer deems cannot be released, it must be. The Act does not apply to records required for criminal or civil proceedings, the argument being that there are specific procedures already in place in regard to records for trials. The information officer has a duty to assist a request and to transfer that request if s/he cannot accommodate it in that particular department.

A "government body" is no longer defined. Government bodies therefore are included in the definition of "public body". Depending on whether a record relates to a private or public body function, will determine when bodies are perceived as public and when they are perceived as private.

The Human Rights Commission is tasked with a number of obligations in terms of the Act. Firstly it must compile manuals on the Act including information on information officers, how the Commission can assist requesters, all the legal remedies available to requesters, fees, etc. The Commission must also monitor the implementation of the Act, make recommendations and report to Parliament on these matters. It must also assist persons wherever applicable.

Furthermore, the Commission must conduct educational programmes to advance the understanding of the Act and promote the dissemination of information by public bodies. The information officers in turn are also tasked with preparing manuals. Information for these manuals must include basic details but also a description of the subjects on which the body holds records and categories of records and of information available without anyone having to request access in terms of the Act. Information officers must also report annually to the Human Rights Commission with statistical data relating to the number of requests during that year. Information relating to information officers and their contact details must also be published in the telephone directory.

Mandatory grounds for refusal as well as discretionary grounds, are also contained in the Act. The Act does not apply to records of Cabinet, certain special tribunals, MP's and members of the provincial legislature.

Mandatory refusal relates to certain records of the South African Revenue Service; commercial information (trade secrets and other information which could cause harm to the commercial interests of a private body); certain types of third party information; documents whose disclosure could result in endangering the life or physical safety of an individual; certain police dockets; certain categories of research. However, the information officer has a degree of discretion in documents relating to defence, security, international affairs, and the economic and financial welfare of the Republic. Despite these restrictions, the Act does provide a "public interest" override.

An entire chapter is devoted to the duty of the information officer to notify a third party of a request for information relating to that third party.

The section on access to information held by private bodies mirrors in many ways the sections on access relating to public bodies. Naturally in accordance with the constitutional provision, it is necessary for the requester to prove an antecedent right and in the case of government being the requester, government must in addition prove a public interest.

The responsibilities of the information officer in terms of information compilation are less onerous than that of a "public body". Similarly the grounds for refusal are fewer as private bodies do not have the same functions as government bodies. A "public interest" override is also applicable.

The remedies available to an aggrieved party (including a third party who opposes the access granted) include an internal appeal which must be lodged with the relevant authority within a specific period of time. If such an appeal fails, the requester may make application to the court for relief. Initially the requester will have to make application to the High Court but the Act allows for the making and implementation of rules of procedure for a court in respect of applications as per the Act. Of concern is the fact that hearings can be heard in camera.