

AUGUST 1998
SUBMISSION ON THE LATEST DRAFT OF
THE OPEN DEMOCRACY BILL

Introduction

The Freedom of Expression Institute (FXI) has been involved in the ODB process since its inception with the appointment of the ODB Task Group in 1994. Our historical involvement in this process is well documented. It included the task of establishing and ensuring the functioning of the Open Democracy Advisory Forum (ODAF) and the organising of a major conference in 1996 where we brought together various stakeholders - from business to labour and government and civil society - to discuss their various concerns and ideas around the ODB.

Apart from FXI's pivotal role in ODAF and the recommendations emerging from the Forum, we have continued to take an interest in the progress of the Bill and made a substantial submission on the October 1997 draft. We also encouraged other groups within civil society to participate in the process.

We are pleased to note the Bill is currently with the Portfolio Committee on Justice and Security and that organisations wishing to make oral representations will be given the opportunity to do so.

FXI recognises that the ODB is an unprecedented piece of legislation, unlike any other legislation seen in this country. South Africa has had a history of undemocratic, unaccountable and secretive governance which ignored the rights of citizens and allowed government to operate in a manner far beyond the scrutiny of citizens. The secretive nature of previous governance in this country, and the lack of access to information, also contributed to a situation now where many people, particularly white people, are able to claim ignorance about the violations and illegalities that have been attributed to the past administrations.

We recognise therefore that the ODB provides an important and ambitious step forward in providing a legislative framework for participatory and accountable government and we welcome this. We also see this legislation as a fundamental break with the past allowing citizens to, among others, ensure full knowledge of the activities of their government by participating in decision making and scrutinising actions once decisions have been taken.

Regarding the most recent draft, FXI is pleased to note that the new wording of the preamble. In our 1997 submission we noted that the preamble did not acknowledge the constitutional right to access to information. However, a major omission in the new wording is the commitment to the second part of the right, i.e. the right of access to any information that is held by another person and that is required for the exercise or protection of any rights. It is of paramount importance that the entire access to information clause is acknowledged in the preamble and therefore FXI suggests that the

opening sentence read: "To give effect to the constitutional right of access to information held by the state and privately held information;".

However, FXI notes that the fundamental problems identified in the October 1997 draft are still there. Therefore many of the problems we drew attention to in our last submission to the Task Group are repeated here. As we noted previously, it is our contention that the current draft represents a serious departure from the original spirit and purpose of the recommendations of the ODB task group as well as from previous drafts of the ODB, which enjoyed substantial civil society input.

The submission following was prepared with the help of comments from Justine White from Edward Nathan and Friedland Inc attorneys and Gideon Pimstone, a Chief Researcher at the Human Sciences Research Council but commissioned by FXI to assist in our research. Many of our comments and submissions also flow from documents and resolutions passed at a conference organised by the FXI at Mabula Lodge in 1996, as well as from a consultative meeting organised on November 17 1997 and attended by the following organisations: Congress of South African Trade Unions, Ceasefire Campaign, Jewish Board of Deputies, South African National NGO Coalition, South African Democratic Teachers' Union, South African Students' Press Union, the National Community Media Forum and the Centre for Applied Legal Studies, University of the Witwatersrand.

During 1998 FXI continued to consult with civil society particularly in the area of access to information held by private bodies. Several meetings were held with groups in other parts of the country but more particularly in Gauteng. On 31 July a seminar was held at which the following organisations were represented: COSATU, UN Office of the High Commissioner for Human Rights, the Press Ombud, Lawyers for Human Rights, Transparency International, South Africans for the Abolition of Vivisection, National Institute for Public Interest Law and Research, Public and Development Management, University of the Witwatersrand, Article 19, the IBA, South African Students Press Union, the Eastern Cape NGO Coalition, the Centre for Applied Legal Studies, University of the Witwatersrand, Ceasefire Campaign, the Black Sash and others.

This submission

Section I of the this submission looks in detail at the ODB itself and analyses the more problematic areas.

Because the Bill fails to give effect to the right of access to privately held information, Section II of the submission argues the imperatives for such inclusion, examines some of the problems relating to access to privately held information, identifies who may be requesters and the categories of information which would be applicable, and finally offers different models to ensure this inclusion.

Section III offers some peripheral input - most of it informal - which needs further research and records some of the discussion which took place at the last meeting FXI held with civil society.

SECTION 1 SPECIFIC COMMENTS ON THE ODB

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1. General constitutionality

The over-arching rationale behind the ODB is to increase public participation in administration and governance, to empower the public to effectively scrutinise governmental decision-making and to promote open and accountable administration at all levels of government. The objective is also to give people a right to conduct their affairs and improve standards of living with justice and fairness.

However, the main and immediate purpose of the ODB will be to give effect to Clause 32(2) of the Constitution. In turn, this clause, is meant to give effect to Clause 32 (1) &(2), which is the access to information clause. In short, therefore, the most immediate function of the ODB will be to CLARIFY the public's right of access to information. While the FXI recognises that effective public participation in governance and administration etc is contingent on a free flow of information, the RIGHT OF ACCESS to information does not only serve this function. While the ODB was out of the public eye and doing its rounds in government circles, this right was tested in numerous ways, both in and outside the courts. In the process, the public's right of access to information held by both government and the private sector has been shown to be crucial to the exercise and protection of a number of other fundamental rights. Moreover, the extent of the public's right of access to information has been the subject of great confusion (see list of recent access to information issues at the end of the document). The FXI contends that it is crucial for the ODB to clarify and stress the RIGHT of access to information over and above its framework for open and accountable government and participatory governance.

Notwithstanding the body of case law reinforcing the right of access to information and inclusion of this right in many statutes, particularly those introduced and passed by the current government, we still believe that the Open democracy Bill is essential and will be the backbone for all litigation on access to information.

2. Points of principle

The FXI would like to outline several principles which we believe legislation such as the ODB should conform to. We are mindful that some of these principles may already be contained in the current ODB, while others are not. Nevertheless we list these for consideration by the parliamentary committee which will deliberate on the acceptable form and structure of the ODB.

Legislation such as the ODB should stress maximum disclosure both in its objects and interpretative guidelines. Where there is doubt about the disclosure of information, the information officers and the court should lean .in favour of maximum disclosure.

Legislation such as the ODB should be user-friendly. The manner in which access to information can be requested should not be burdensome and complicated, preventing under-resourced or under-educated people from being able to use the legislation effectively. Complicated procedures will also alienate the officials tasked with responding to requests.

Legislation such as the ODB should not reduce the obligation on government to proactively disseminate information to the public. It should also not diminish the responsibility of organs of government and parastatals to make information available about issues of public concern.

Legislation such as the ODB should not close up existing avenues of sources of information. The media particularly should be guaranteed access to timeous government information. Government should not be allowed to hide behind the request procedures of the ODB to hamper journalists in getting information out to the public as quickly as possible.

Exemptions to information disclosure should be narrow and well-justified. Government should have legitimate grounds for the non-disclosure of information, but these should include the minimum possible information and should not be constructed in such a way as to provide blanket exemptions to particular organs of government. The harm that exemptions are meant to protect should be real and not speculative, while the information that may be exempt from disclosure should be weighed up against the tests which have been put there for that purpose.

All exemptions should be subject to a public interest override, while confidential information already in the public domain should not be prevented from being disclosed. Information which may be subject to certain exemptions must be disclosed where there is a compelling public interest for the disclosure of this information or where the disclosure of the information will be in the public interest. Information which may be subject to the exemptions of the ODB, but which has surfaced in the public domain, should not be prevented from being disclosed or published, where there is a compelling public need for this and where it relates to government accountability to the public.

Legislation such as the ODB ought to comply with other provisions of the Constitution. We wish to refer in particular to Section 195(1) of the Constitution, which sets out the basic values and principles governing public administration. Of these, we regard the following as particularly crucial to be reflected in the ODB:

195 (1)

(c) Public administration must be development orientated;

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making;

(f) Public administration must be accountable;

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

We wish to point out further that Section 195(3) requires that national legislation "must ensure the promotion of the [above] values and principles".

Arising out of what has been said above, our comments on the current draft of the ODB are addressed at a number of different levels: from suggestions about broad policy issues and including (or reinstating) entirely new chapters to suggestions concerning proposed sections, paragraphs or even word changes in order to better implement the principles of access to information and open government as required by the Constitution.

3. The Constitutional right of access to information

The FXI contends that the ODB fails to clarify this right effectively. Its failure to do this means the Bill falls short of the actual Constitutional requirement calling for this legislation. In addition, the Bill's flaw in this respect means it is an ambiguous piece of legislation that fails to clear up the legally uncertain terrain of access to information in South Africa.

The FXI submits that :

Section 3 (1) (a) should state as one of the objects of the Bill, "To provide for the exercise of the citizens' Constitutional RIGHT of access to information held by government and the private sector." This will further ensure that any interpretation of the Act (Section 3 (2)) does not weaken the citizen's Constitutional Right.

The FXI contends that the scope of the Bill with respect to information held by the private sector is not consistent with the Constitutional right relating to this information. Section 32 (1) (b) states that everyone has a right of access to "any information that is held by another person and that is required for the exercise or protection of any rights". However, the definition of a private body that is subject to the provisions of the ODB is defined as a "natural or a juristic person (other than a governmental body) in possession of or controlling a personal information bank". As such, the private body that is subject to the ODB is confined to bodies that are in possession of or controlling a personal information bank. The implication is that the access granted to citizens to information not held by the government is limited to personal information. This is inconsistent with Section 32 1 (b) which grants citizens access to "any" information by a private body in so far as it is needed for the exercise or protection of any rights.

The FXI submits that:

The definition of a private body be changed to a person other than a governmental body and including a partnership, but excluding a natural person.

A new clause be added to the objects of the Bill stating clearly that one of its objects is to: "grant citizens access to any privately held information so far as it is required for the exercise or protection of any rights".

4. Open meetings

The FXI notes with concern that the current version of the ODB, like the October 1997 draft, has omitted the Open Meetings section as contained in the 1996 Draft. In the task group's recommendations on the ODB it is stated that: "The principle underlying an open meetings law is that the public is entitled to see not only the product of governmental deliberations, but also the deliberations themselves". Recently we've seen that while Parliament has attached great importance to public access to its deliberative processes, this policy has not been applied consistently in other organs of governance (e.g. the closed session in the Mpumalanga legislature noted in the list of recent access to information issues). Moreover, public access to meetings will allow for important and timeous intervention by civil society on certain issues before, for example, deals are struck or decisions become binding. The need for this becomes more compelling at a local government level. The need for an open meetings clause is not only to allow for public access to meetings of government bodies, and other bodies administering quasi-government functions such as hospitals and similar institutions, but also to ensure that in the event of the closure of meetings, officials follow proper procedures and are not able to close meetings simply at their whim and fancy.

It should also be noted that prior to the Nationalist Party coming to power meetings were open. Therefore legislation on open meetings is essential for the restoration of that right, otherwise the possibility exists that the current democratic government will be seen as perpetuating the apartheid government's denial of that right.

Because of the reasons articulated above and the constitutional commitment to openness and transparency generally and more specifically in Section 195 and other sections in the Constitution, we are pleased to note that the Adv Gumbi of the government Task Group is on record as saying that separate legislation on open meetings is currently being drafted. This was confirmed by another member of the group, Adv Empie van Schoor. However, although we believe that legislation is essential we question whether it is appropriate to make this a separate piece of legislation. We have envisaged the ODB as being the overarching legislation on access to information and therefore as a statement of principle it needs to be in the Bill. Furthermore it is germane to the ODB.

The FXI submits that:

The Open Meetings section as contained in the 1996 Draft be included in the current draft;

Further amendments be made to the preamble of the Bill, the objects and the enforcements provisions to reflect the right of the public to have access to meetings of governmental bodies at every level;

That consideration be given to the extensive list of grounds for closure of meetings included in the section on open meetings in earlier drafts. It would appear that this list is not unrelated to the list included in the grounds for refusal apropos access to information held by government. We submit that the grounds are excessive and that they offer considerable opportunity for an official to exclude access on a whim or without sufficient justification;

Consideration also be given to the immediacy of a complaint relating to the closure of a meeting. Whereas refusal of access to information by an information officer may at times have the same degree of urgency, we submit that the right of access to a meeting once refused cannot be retrieved.

5. Government's obligations with respect to proactively disseminating information to the public

The recommendations of the ODB Task Group as well as the Task Group on Government Communication (COMTASK) placed great emphasis on the need for government to proactively disseminate information to the public. The point is that it is not sufficient for government merely to respond to particular demands or requests for information, but for there to be a culture of transparency within government that is nurtured by government itself. We believe the current draft of the ODB, stemming from numerous changes to the 1996 Draft, undermines this obligation in a number of ways and we strongly urge that this be addressed and corrected.

The current draft removes the obligation on government to provide information on the decision-making guidelines used in reaching decisions which confer or recognise any rights or privileges or impose obligations or penalties on anyone (Section 9/10 of the 1996 Draft).

The FXI contends that these obligations should be included in the Bill, as these guidelines form an integral part of the extent to which the public can hold government accountable to the decisions which it takes. It prevents government bodies from taking decisions which are out of are not in line with prescribed guidelines and allows the public to scrutinise the guidelines before decisions are taken, allowing them to ensure that all aspects which they feel should be considered in making a decision are included in the guidelines. The publication of these guidelines will also be in line with Section 33 of the Constitution, which guarantees just administrative action.

The FXI submits that:

The provisions requiring the publication of decision-making guidelines be included in the current draft of the ODB

According to the latest draft, the manuals which government departments are obliged to print and distribute detailing the structure, powers and duties of the departments, and the subjects and categories of information it holds, need only be in two official languages.

The 1996 Draft required these manuals to be printed in ALL official languages. The FXI

regards the role of these manuals as crucial in facilitating the public's means of access to government information. We contend that in the absence of an obligation to print them in all official languages, there is a danger that this role may be weakened while it also may not sufficiently enable the majority of South Africans to enjoy meaningful access to the information contained in the manuals. We note too that the current draft of the ODB does not include the obligation for these manuals to be made available at educational institutions and for their publication in telephone directories. A major concern is that the section on the "distribution of guides and manuals" has been excised from the October 1997 draft. This removes the obligation to proactively distribute information we believe government carries. Moreover these omissions have further reduced the easy accessibility of the information contained in the manuals.

Of considerable concern in the 1998 draft, is the addition of a clause which precludes public enterprises from having to provide the stipulated manuals. Although it may be argued that as the Bill only recognizes certain private bodies (its definition of a private body, is a person in possession of or controlling a private information bank), and that parastatals as described in this new clause are seen as outside this definition, we submit that this is unacceptable. Firstly, parastatals, many of which have been privatised perform public services yet do not feel it is necessary to provide the ultimate shareholders, i.e. the public through the Minister concerned, with information on their activities.

The FXI submits that:

The government be obliged to print and publish these manuals in at least three official languages; and

The manuals be translated into all official languages and that they be made available on-line via the Internet, or similar communication devices;

The "distribution of guides and manuals" section (Section 8 in the October 1997 draft) be reinstated;

Parastatals, privatised or not, are not given exemption in this regard.

6. Rights of access

The FXI notes with concern the fact that persons who are party to civil or criminal proceedings are expressly prevented from using the ODB to gain access to information. Once again, no reasons were advanced for this change to the Bill, and we are therefore unable to consider government's concerns in making this exclusion.

The FXI feels that it is particularly during court cases, and especially civil cases, that the compelling need for information arises (for example the Horak case noted in the list of recent access to information issues). We realise the sensitivities in allowing certain information, particularly those relating to criminal cases such as investigation dockets, being disclosed but we feel appropriate exemptions can be formulated to allow for the protection of this information. However, as the matter stands now, we feel it is an unfair discrimination.

The FXI submits that:

Parties to civil or criminal proceedings should be granted the right to use the ODB to gain access to information.

The FXI notes that Cabinet has been granted a blanket exclusion from the provisions of the ODB by way of it being excluded from the definition of a "governmental body". No reasons have been advanced for this change to the Bill. We find no compelling reason why cabinet, which is at the heart of government, should be specifically excluded from the regime of the ODB. If cabinet holds information, the content of which falls within one of the exemption clauses, it will not be under any obligation to disclose such information.

The FXI submits that:

Cabinet should be subject to the disclosure provisions of the ODB like every other organ of state.

7. Forms of access and request procedures

The FXI notes that the provision in the current draft allowing for oral requests has been limited to individuals who, because of illiteracy, poor literacy or a physical disability, are unable to make a request in accordance with the Act (i.e. on the prescribed form). We contend that this has the potential of making the exercise of the right to access to information a very cumbersome process. It will not always be ideal for people to make their requests for information in writing especially where the nature of the information or record sought will not be difficult to process. We feel that Section 11 (2) of the 1996 Draft provided a reasonable obligation on the part of the information officer to ensure that an oral request for information was reduced to writing.

The FXI submits that:

Citizens be allowed to make requests for access to information both orally and/or in writing; and

Oral requests for information should not be unreasonably rejected;

The provisions of Section 11 (2) (a) and (b) of the 1996 Draft be included in the current draft.

The FXI notes that the current draft does not make provision for an information officer to acknowledge receipt of a written request for access to information. We contend that such a provision is an important part of good governance.

The FXI submits that:

A provision requiring an information officer to acknowledge receipt of an information request be included in the current draft.

8. Grounds for refusal of access to records

The FXI notes with concern that the harms test included in the 1996 draft of the ODB has been removed from the current draft. This test obliged an information officer to apply his or her mind to establishing whether substantial harm would be done by complying with a request and prohibited the non-disclosure of information "if the harm that the provision is intended to guard against would not occur if the request were granted". We contend that the deletion of this clause can have the effect of diminishing citizen's right of access to information. We feel this will give rise to the possibility of the information officer evaluating the disclosure of information simply on a classification basis and justifying non-disclosure, when in fact the occurrence of the harm which the exemption is meant to guard against is not likely at all.

The FXI also notes that Section 44 of the current draft, requiring the mandatory disclosure of government information where this is in the public interest, does not apply to private bodies. We feel this provision would be in line with the Constitutional guarantee of access to "any information held by another person where this is required for the exercise or protection of a right"(see second part of submission for further detail). The FXI submits that:

The harms test as contained in the 1996 Draft be included in the current draft; and

That both this harms test and Section 44 of the current draft be applicable to information held by private bodies

The FXI contends that many of the clauses exempting government from disclosing information remain too broad in scope with the potential of excluding information that may be crucial in affording citizens the right to participate in government decision making.

The FXI respects the need for government protection of information the disclosure of which will be likely to cause substantial harm to national defence or security of the Republic (Section 36 of the current draft). We are confident too that the Constitution provides reasonable checks and balances preventing the undue derogation of rights during a period of a state of emergency. We note too that Section 198 of the Constitution requires that national security concerns must reflect the essential concerns of our democracy, that they must be pursued in accordance with the law and fall under the authority of national legislative and executive organs of government. Having said this, we regard it as imperative that the principle be entrenched that all activities of government be subjected to the rigours of the Constitution and that no government activity can be elevated above scrutiny. Where there is a legitimate case for withholding information, it is for government to make it. We contend that Section 36 is a very broad ground for refusal which could have the effect of information officers over-including information falling within its ambit. We contend too that this Section carries the danger of allowing the government of the day to unnecessarily suppress information relating to its security and defence operations through the over-identification of its own interests with those of the nation.

The FXI submits that:

A provision be applicable to Section 36 to the effect that information contemplated cannot be denied unless it can be shown that national security will be seriously affected. The FXI notes that Section 36 is silent on the patent distinction between sensitive information relating specifically to this democracy and sensitive information relating specifically to apartheid technology and the activities of apartheid agents. While the latter has been inherited by many of the current government's state apparatuses, it is most definitely open to question whether information exposing the intrigues of the apartheid military can ever constitute a threat to national security and defence, even as widely defined as Section 36. We contend that the national security and defence referred to in this section is that of the new democratic order. We contend further that this order is served primarily by the detailed scrutiny of every aspect of apartheid criminality, rather than the perpetuation of its military secrets.

The FXI submits that:

Section 36 make a clear distinction between information relating specifically to the current democratic order and information relating to apartheid military secrets and which have been inherited by current organs of governance;

There be no grounds for the refusal of the disclosure of information relating to apartheid military secrets and which have been inherited by current organs of governance.

The FXI contends that Sections 34(3) and 36 (2) , allowing an information officer not only to refuse to divulge information requested but to refuse to acknowledge the mere existence of the information, is a frightening extension of the information officer's powers. The FXI contends that the likelihood of harm following the disclosure of the existence of facts, does not equate with the assessment of the requirements for the disclosure of the facts themselves. Where the harm contemplated in these sections is likely to occur with the disclosure of information, then the information should not be disclosed. However, this should not preclude citizens from later trying to have the information disclosed, and the requirements of sections 34 (3) or 36 (2) will effectively preclude citizens from doing this.

The FXI submits that:

Section 34 (3) and 36 (2) be scrapped.

The FXI finds Section 38 (1)(c) of the current draft to be very broad. It extends potentially to all subsidiary information relating to every proposed contract involving or affecting government in respect of the economy in addition to all information pertaining to potential trade agreements with other countries. We find this type of wide-ranging clause unacceptable as it can be used to frustrate the disclosure of information which is often of great public interest and which involves South Africa's international profile and includes details of the countries with whom we trade and the content of such trade. We refer in particular to arms deals brokered for and on behalf of this country, although our concerns are not confined to this aspect of trade. As the Denel case (cited in the list of recent access to information issues) earlier this year indicated, details of arms deals are highly relevant to a critical understanding of government performance, particularly government's assessment of the often competing interests of open trade and human rights considerations. Further, it is arguable, that trade is the paramount expression of any

government's foreign policy. There is a fear too that this clause could be used as a barrier behind which details of unpopular or contentious dealings with other countries are hidden from an inquiring public. We contend too that retrospective confirmation of a done deal will effectively have removed the capacity of the public to assess and possibly influence the course of government-decision making. The political process rationale thus demands a far more open flow of the information contemplated in this clause, which, we submit, ought to be considerably narrowed.

The FXI submits that:

A provision be applicable to Section 38(1)(c) to the effect that this subsection will not apply where compelling public interest may require the disclosure of the information and where there is reason to believe that the sale or international trade agreement contemplated in (i) and (ii) is not in the best interests of the republic;

Subsection 3 of Section 38 be applicable to the entire section.

The trend internationally is for diplomatic relations to be far more transparent. South Africa's policy on international relations has been groundbreaking in many respects: the Department of Foreign Affairs' consultation with civil society on policy being one example. Therefore, although fairly standard, we contend the grounds for refusal are out of step with current thinking. FXI believes that civil society engages in international relations independently of government. Very often these relations serve to inform civil society of the appropriate policy with respect to the international relations which government should engage in. As such, we contend that civil society has an interest in information relating to government's international relations and which will effectively afford citizens the opportunity to participate in debate and policy around these relations, while also allowing citizens to hold government accountable to international treaties or conventions that it is party to.

In terms of obligations imposed on the Republic by international law, we refer to the recent case in which the department opposed access to Wouter Basson's (the head of the previous government's biochemical warfare programme) bail application on the basis that if the information in it was revealed it would compromise their international obligations. However, the same argument was not accepted at the Truth Commission despite the Department's opposition to an open hearing on the biological warfare programme on the same grounds. The FXI believes that a distinction must be drawn between information disclosure which will be in breach of international law, and the disclosure of information which will reveal government's breach of international obligations. We contend that it is manifestly in step with the constitutional requirements of legality, accountability and openness that the latter violations be made known. Secondly, the provision for refusal on the harm certain information may cause to the Republic's relations with other countries referred to in the 37 (1) (b) is also questionable. Unfortunately embarrassment is often equated with harm as was the case with the secrecy surrounding Log 17 at the Cameron Commission. What was at issue here was a list of countries which had been categorised in terms to whom and what arms the previous South African government could sell. We would therefore suggest that his section needs revision.

The FXI submits that:

If section 37 remains, a provision be included to the effect that only if it can be adequately shown that substantive harm will be caused to our relations with other states, can information be refused.

The FXI notes that the current Bill has extended the exemption for information supplied in confidence to include information supplied to a governmental body for payment. This is an amendment to the exemption contained in 1996 Draft (Section 33 (2) (a) (ii)), which did not include this information. We contend that the policy reasons underpinning the exemption of information supplied in confidence, namely the public interest in the continued supply of such information, is not in jeopardy here as the payment is likely to constitute an incentive for the continued supply of such information.

The FXI submits that:

Information supplied in confidence to government and which was paid for should not fall within the exemption clause.

The FXI notes that the current Bill no longer provides that the likely prejudice referred to in Sections 34(1)(a) and 34(1)(c)(I) has to be substantial or that the impediment to prosecution referred to in Section 34(1)(b) has to be substantial, as was the case in the 1996 Draft. We contend that this an unwarranted broadening of the exemptions relating to law enforcement and submit that the "substantial" qualifier be reinstated to ensure that as much access to information as possible is given to the public, subject to the public's interest in ensuring that no substantial prejudice in the field of law enforcement occurs as a result thereof.

The FXI submits that:

The "substantial" qualifier be added to the prejudice referred to in Sections 34(1)(a) and 34(1)(c)(I); and

This same qualifier be added to the impediment to prosecution envisaged in Section 34(1)(b).

9. Protection of Whistle-Blowers

The FXI feels that this part of the Bill should apply to the private sector as well. Often information held by private bodies, and which has proven to be in the public interest or discloses the likelihood of serious harm or damage to people or their environment, has been disclosed to the media through sources in those private bodies. We contend too that often private bodies wielding great public power engage in unlawful activities which require to be exposed in the public interest. As such, we feel this warrants extending this section to the private sector.

The FXI submits that:

The current draft of the ODB be modified to protect persons who disclose information concerning a contravention of law, corruption or malpractice in a private body from civil or criminal liability or disciplinary action in relation to such disclosure.

10. Notice to third parties

The FXI notes that Section 45(2)(b) contains a provision obliging an information officer to furnish the name of the requester to a third party in relation to an information request concerning that third party. We contend that this provision may have a "chilling effect" on the individual's choice to exercise his/her democratic right to information. We understand it may be crucial for a third party to know who is requesting information concerning them, but it should refer rather to the status of the request, namely, whether the requester is an individual, non-commercial or commercial requester. The FXI submits that:

Section 45(2)(b) of the current draft be amended to prevent an information officer from divulging the name of a requester to a third party, unless the requester agrees, and that only the category of requester be made known.

11. Judicial route in the event of non-disclosure and other mechanisms of relief

The FXI notes that both the role of the Public Protector and the specially constituted Open Democracy Commission have been removed from the current draft of the ODB. We regard these as a weakening of the mechanisms of relief which citizens may resort to in the event of the non-disclosure of information. We contend that the scrapping of the role of particularly the Public Protector should be reconsidered since this office is Constitutionally empowered to investigate and report on the conduct of government where there is a suspicion of irregularity or a dereliction of duty. We feel the issues surrounding the ODB are intimately linked to the duties of this office and the role afforded to this office in previous drafts of the ODB remain appropriate. The FXI is concerned that the complete abolition of the Open Democracy Commission and its replacement thereof by the Human Rights Commission (SAHRC) could place not only great strain on the SAHRC but also on the effective implementation of the ODB. We contend that the functions imposed on the SAHRC with respect to the ODB require the oversight of skilled persons whose specific function will be to ensure compliance with the objects and provisions of the Act. We are concerned that the Draft bill does not provide the SAHRC with the institutional support it requires in order to ensure that it will have the funds and the person-power to effectively carry out the tasks of the ODB. The FXI submits that:

No limit should be placed on the Public Protector's role in relation to the ODB;

The ODB guarantee dedicated funding to the SAHRC to ensure that it can effectively carry out its duties and functions with respect to the ODB;

A special unit be set up within the SAHRC to ensure that the tasks relating to the ODB receive dedicated attention and is carried out by a specialised group of persons. The FXI notes that the current draft has done away with the provision calling for the establishment of special information courts. We note that government has advanced no reasons for this change. Among the arguments behind the establishment of these courts is

that open democracy and access to information, by way of the new law, will lead to specialised case law that is best dealt with in specially designated courts. We feel that the lack of specially constituted courts could weaken the resolve of the courts to deal with cases arising from the ODB expeditiously. While we welcome the provision allowing litigation arising from the ODB to be conducted by way of urgent motion proceedings in the High Court, we feel this has the danger of excluding a vast majority of people as applications to the High Court are not only complicated but also very costly. There is also the danger of cases concerning access to information being swallowed up by the criminal justice system. It should be noted that a request for access to information carries with it an element of urgency, irrespective of whether the request was an urgent or ordinary request in the first place. Disclosure of information can hardly be effective if an appeal against non-disclosure succeeds only several months after the initial request. We contend that certain provisions contained in previous drafts and pertaining to special information courts can be reinstated in order to compliment the current process of applications to the High Court.

The FXI submits that:

If special information courts cannot be established, consideration be given to a form of outside arbitration as an interim step before a requester has to resort to the High Court.

12. List of some recent access to information issues

As a way of reminder of the legally uncertain terrain of access to information rights in South Africa, we provide a list of some important access to information issues that have surfaced over the 18 months. It may also be important to interrogate these issues further with a view to examining whether the ODB could be used effectively to realise the rights underlying these various incidents.

The Dolphin Deal in Mpumalanga - The deal between the Dubai-based Dolphin group and the Mpumalanga Parks Board surfaced only after the deal had been struck. It involved the ceding of commercial rights in six state-owned game reserves to the Dolphin Group for the next 50 years. The deal was struck in secret, there was no tendering process and there was minimal, if any, consultation with national interest groups and with communities in the area, some of whom were laying claim to sections of the land involved. The deal included a secrecy clause that stipulated that the terms of the deal should remain secret for the entire period it was in force. It was re-negotiated with some difficulty following a public outcry and amid a threat by Dolphin, which was not carried out, that it would sue the Provincial Government for renegeing on the deal. While the lack of transparency in negotiating the contract was a crucial factor in rendering the deal irregular, at stake was also the right of a community's historical claim to land (and the lack of information and consultation which would have militated against this right) as well as the public's right to have a say in the manner in which national heritages, such as national parks, were being developed.

Olympic bid - In June 1997 this year, a coalition of environmental groups in the Western Cape tried unsuccessfully to gain access to certain financial and economic information relating to Cape Town's bid for the 2004 Olympic games. The information was held variously by the Olympic Bid Committee (a private concern), the Development Bank of South Africa, the Western Cape Provincial Government and the Department of Finance. It included a report prepared by the DBSA and which formed the basis on which the cabinet decided to support the bid. Other information that was withheld were full environmental impact assessments (EIAs) of all the proposed Olympic sites as well as certain economic and financial information vital to a Strategic Environmental Assessment of the bid. At stake was the ability of the environmental groups, and the public in general, to effectively appraise whether the bid they were being urged to support and which, if successful, would consume an enormous amount of public resources, was based on sound economic and environmental considerations. The information was finally released at the end of June - two months before the outcome of the bid was expected to be announced. It was subsequently shown that the macroeconomic predictions used in the DBSA report had been off the mark resulting in the benefits of the games as well as the revenue and employment benefits being overestimated.

Mpumalanga legislature - In July 1997, the Mpumalanga legislature evicted journalist Justin Arenstein from a joint portfolio session - comprising the joint-chairpersons of all the committees in the legislature - when it met to deliberate over the re-allocation of a R5.1 billion budget. He was the only journalist present at the time. The legislature cited the right to privacy over (1) Arenstein's right to access to information, (2) his right to report on the deliberations of the house, and (3) the legislature's obligations with regard to openness and transparency. The budget was eventually passed without anyone outside the meeting gaining insight into the reasons why certain monies from the budget were allocated in the way they were. At stake therefore was also the right of the citizens of Mpumalanga to be informed about the manner in which their elected representative were making decisions around the allocation of money in the province.

The Wouter Basson case - The FXI remains locked in a High Court battle with several organs of state and the former head of the government's chemical and biological warfare programme, to secure the full disclosure of Basson's bail hearing held in February this year. During this bail hearing, reference was made to several documents confiscated from Basson and which relate to the former government's dabbling in chemical warfare. The case is not being fought to secure the public disclosure of the contents of these documents, but for the public disclosure of the list of records found in his possession. We believe that the disclosure or non-disclosure of the contents of each document should be weighed up against the tests which have been put there for this purpose, and that there should be no blanket-ban on the disclosure of the documents. However, it is crucial that the public be aware of the existence of the documents in order to seek relief in the event of exposure to any of the chemical warfare experiments carried out in the past. Disclosure of the existence of these documents is also important in allowing the public to gain insight into the extent of the previous governments operations and to gain an understanding of the present government's management of the resources and expertise it has inherited. An understanding of the workings and operations of the previous

government will also allow the public to determine the boundaries of acceptable state behaviour with respect to the present government.

The Denel issue - In August 1997 the Denel arms manufacturer placed a gagging order on several newspapers preventing them from reporting on the largest-ever arms export deal in the country's history. Denel specifically wanted to prevent disclosure of the name of the country involved. It said it's contractual obligations prevented disclosure as there was a secrecy clause built in. It argued further that, as a result of this contractual obligation, disclosure of the name of the country would place the entire deal in jeopardy. Apart from media freedom, at stake was the ability of the public to hold government accountable for its foreign policy practices.

The Horak case - In October 1997, the government was forced to hand over information relating the National Intelligence Agency's pension scheme only after argument in this regard was heard in the Pretoria High Court. A former secret agent, John Horak, was suing the government for disability benefits he claimed was due to him after being declared medically unfit in January last year. Horak said in court that the rules of the scheme had never been made available to him because they were classified strictly confidential and he had, as a secret agent, signed an agreement to maintain secrecy. The legal counsel for the government argued that government was not obliged to disclose or discover the information because it was not necessary for its case and because the state did not want to help Horak prove his case. However, the Judge said he found this attitude shocking and surprising. He said the rule was that all relevant documents had to be discovered and there was no justification for the government's attitude. He said an employee did not have such information in his possession, and relied on his employer to disclose the information so that he could prepare his case properly. The case was postponed indefinitely with the Judge ordering the government to pay the costs resulting from the unnecessary delay.

The Truth and Reconciliation Commission - The TRC blazed a trail throughout its term. However, while full disclosure has been the mainstay of the TRC, there have been instances where this has not been the case, resulting in the public being the poorer. The right to the information which TRC has been seeking and finding is being made in the name of justice for victims of human rights abuses (reconciliation cannot take effect without full disclosure of crimes committed) and as the overriding condition for amnesty of perpetrators of human rights violations. Some of the information disclosures by the TRC:

It uncovered the litany of unsolved murders of anti-apartheid activists, notably the murder of the Pebco Three, Steve Biko, Victoria Mxenge etc;

It has co-operated with the African National Congress in keeping secret a list of former apartheid-era spies, a number of them from the media establishment. The list was regarded as important in exposing the role of these agents in facilitating the apartheid government's tactics of disinformation through the media. However, in September 1997,

several media spies voluntarily testified to the TRC, providing greater insight into how they operated;

It continues in its bid to force the former head of the National Intelligence Service, Neil Barnard, to divulge the names of various "prominent" people who supplied NIS with information in the 1980's. Disclosure of this information will go a long way towards understanding the network of spying activity in the country and in establishing the extent to which these networks still exist, and what they are being used for.

In June 1997, the Health and Human Rights Project testified how asbestos mining companies had suppressed the findings of scientific research in the 1960's which documented the health risks of asbestos. It was apparently not the first or last time that scientific findings unfavourable to asbestos companies had been suppressed.

It spearheaded the unprecedented move of getting the private sector to testify on its role in supporting the apartheid government and the measures it put in place in the workplace to perpetuate the system.

It held an open hearing into issues surrounding Winnie Madikizela-Mandela and the Mandela Football Club and a spine-chilling hearing into apartheid's biochemical warfare programme.

SECTION II - GIVING EFFECT TO THE RIGHT OF ACCESS TO PRIVATELY HELD INFORMATION

1. INTRODUCTION
2. THE CASE FOR INCLUSION
3. CROSSING THE PUBLIC-PRIVATE DIVIDE
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Giving effect to the right of access to privately held information

Introduction

Section 32 (1) (b) clearly states: "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" .

Section 2 states that national legislation will be passed to give effect to section 1. Section (2) does not differentiate between (1) (a) and (1) (b), i.e. it does not say that national legislation must only be enacted to give effect to information held by government and not "another person". Legally "person" includes natural and juristic persons, the latter being the category into which private bodies fall (private bodies are referred to in this submission, more often than not, as juristic persons or commercial entities).

Furthermore, it does not limit the rights which should be accommodated in that legislation. For example, it may well be argued that including private bodies in the limited way the ODB does, gives effect to section 1 (b) in that it provides anyone the right to protect their privacy by being able to access and regulate information held by a private body concerning themselves and, in certain circumstances, to change that information. However, this is only one right and it does not accommodate a person's protection and exercise of a plethora of other rights. Using this as a point of departure and recognizing that in many instances people's rights are profoundly affected by the lack of information forthcoming from private bodies, FXI embarked upon extensive research. Part of that research included commissioning a senior researcher, Gidoen Pimstone, to explore the issues, often controversial, surrounding the right of access to information held by private bodies. The first part of this section of the submission therefore is taken directly from that research. Crucial to the arguments are the body of case law and the authorities referred to in the original paper - particularly in relation to public safety information. Not all of these have been included in this part of the submission but a copy of the actual research paper is also enclosed for further reference.

It should also be added that as an institution FXI has been criticised in the past for not being as vigilant in holding private institutions as accountable as government . We concede that private institutions cannot be held as accountable as government who represent the people and who have to account for how taxes contributed by those people are being expended, however, we also admit that there are sound reasons for expanding the Act to ensure these institutions are more accountable and indicate just how they are conducting their business.

1. The case for inclusion

The case is built on sturdy constitutional foundations; the almost complete erosion of the public/private distinction in the Bill of Rights and the very specific wording of s. 32, the future right of access to information, from which the ODB derives its *raison d'être*.

2. Crossing the public-private divide

2.1 A premise

"Power is not the sole prerogative of the state" and a substantial overlap exists in the manner in which these entities function. Both organs of state and juristic persons are responsible for the manipulation of social resources, for employment and the distribution of patronage. Juristic persons, again of the larger, corporate variety considerably influence the formulation of public policy, considerably influence the shaping of society. The identity is even sharper, where the state organ is a public company performing, albeit in a different guise, the self-same productive and accumulative practices as a private company.

2.2 Constitutional dimension

The Constitution, recognises both the identity and difference between juristic and natural persons. In section 8(2) it provides that the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable. The Constitution stipulates that in determining applicability, the nature of the right concerned and the nature of the duty imposed by the right are the cardinal factors of assessment. This might seem to be a convoluted test but in practice it will afford our courts a degree of discretion in determining which right can be claimed and conversely, which obligation must be borne, by natural and juristic persons in private disputes in which the state is not implicated. The broadening of the reach of the Bill of Rights signals a more general diminution of the utility of the distinction between private and public realms, which distinction has long been held as virtually sacrosanct by our law. This marks a significant shift in constitutional purpose. Under section 8, the Constitution functions not only as a brake on state power, important as this no doubt is, but more readily as an instrument, the norms of which penetrate all social spheres and inform all social relationships.

Rights contained in the Bill can now be claimed against private parties, natural and juristic, in applicable circumstances. For the most part questions of applicability will involve questions of the suitability of such a claim of right. There may well be rights which, by their nature and the nature of the obligation entailed, are able to be claimed by or against natural and juristic persons in different ways. The rights congregated for example, under section 23, incongruously termed "labour relations" rights, are clearly enforceable against private employers, both natural and juristic. The right contained in section 12(1)(c), "to be free from all forms of violence from either public or private sources", is similarly enforceable against private persons.

3. Section 32 and the ODB

3.1 Persons as claimants and claimees

The words "another person" in section 32(1)(b) refer to both natural and juristic persons. The ambit of the latter term denotes far more than commercial entities, although the focus here will tend to be limited to this category. In addition to section 8(2), section 8(4) recognises that some rights are simply not capable of attaching to juristic persons, by virtue of the nature of the right or the nature of the juristic person. So, it could scarcely be the case that a juristic person of whatever sort can enjoy the right to human dignity, life or freedom and security of the person. And some juristic persons by virtue of their specific nature might be able to make differential claims to the rights of say, privacy or association. And it is a particularly poignant fact for smaller juristic persons which have arguably a greater need for information from larger counterparts, so as to be able to more effectively compete with them.

3.2 The rationale and broader principles

As to the rationale, the right of access to information has traditionally been rooted in the degree to which this right is embedded in the right of freedom of expression and the values that underscore that right. This correlation is clearly brought out textually, by the express inclusion in the right to freedom of expression (section 16 in the Constitution) of the right to receive or impart information and ideas. But the correlation is a deeper, normative one.

Our courts have repeatedly endorsed the founding values of the expression right, most notably, the search for truth, self-development and perhaps, most importantly, the singular relevance of open debate to democratic functioning. In regard to the latter, freedom of expression and as an important adjunct, the right of access to information, provide the basis for public engagement in political decision-making processes. Information is quite literally power. An informed public will make informed choices which in turn will lead to more accountable and efficient government. Because of this very public rationale, because the right of access to information is portrayed as intrinsically bound up with the duty of the modern, information-laden state, the right has been given a predominantly public colour. In truth, the self-same political process rationale, demands more than an information transfer from state to citizen, it necessitates a more comprehensive information flow so as to enable ordinary people to control the processes that govern their lives. In this regard, juristic persons, as important repositories of information most certainly affecting the lives of many, are not absolved of any duty to act fairly.

Private juristic persons have been treated as bearers of all manner of rights, more easily identifiable with the claims of natural persons. Thus the right to privacy, particularly significant in weighing up counter-claims to information, has been clearly attributed to juristic persons. The courts have based such attributions on loosely-framed tests of public interest. Beneath such overt reasoning lies the unstated premise of the importance of juristic personality to economic and broader social functioning.

3.3 Re-visiting the constitutional distinction

The advent of the final Constitution has, as mentioned, significantly narrowed the public-private divide. In reality, it recognises that while constitutional rights can be raised in the private sphere against private parties, such an exercise is distinguishable at least, from a claim of right against the state. In section 8 this is clearly shown by the mediation of

private claims of right by a test of applicability. So it seems that, while all rights can be claimed against state interference, only some fall to be so claimed against juristic persons. The Constitution also maintains a dual characterisation of private and public entities. The former are more broadly characterised as rights' bearers, while the latter as rights' infringers.

3.4 The command of section 32(2)

In section 32(2), the relevance of the ODB to privately-held information, becomes apparent. That section provides that - "National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden of the state."

Only one of the references is clear. The phrase "this right" manifestly refers to the totality of the right in section 32(1), that is the right of access to publicly and privately-held information. The national legislation referred to in the section could be the proposed ODB or the ODB and additional new legislation. It seems however far more likely that s. 32(2) calls for a single piece of legislation to give effect to the complete right. Given the inclusion of a limited right to privately-held information in the draft ODB, it is quite unthinkable that the balance of the section 32(1)(b) be given effect in some other truncated statute or statutes. Therefore the question of whether such national legislation, the ODB, should contain a schema detailing the right of access to privately-held information, must be answered by the phrase "give effect to" and the balance of the provision, commencing with the words "and may provide ...".

3.5 "to give effect to"

This could mean give "total expression to", that is, express the right completely for constitutional purposes, or more narrowly, "give procedural effect to", realise the process requirements of the right of access to information. It could also combine elements of the two, making the ODB the primary or at least first port of call, both procedurally and substantively, for claiming the protective cover of the right, without detracting from the utility of the right in section 32(1). But whatever approach is taken to interpreting the phrase "to give effect to" it seems to be an unavoidable conclusion that the ODB, the vehicle for giving effect to the right, must incorporate the private dimension of the access right. A failure to do so will surely render such legislation fatally flawed for want of requisite completeness, for failing to fully give effect to the right in section 32(1).

3.6 "and may provide ..."

An argument could be made for the proposition that the inclusion of the words "and may provide for reasonable measures to alleviate the administrative and financial burden", indicate that the incorporation of the public aspect of the right of access to information, is the only objective of the ODB. But the argument is thin. First, these words are added to the principal injunction to give effect to the whole right, they do not qualify it. They form a kind of constitutional instruction to the drafters of the ODB. Far more precise language would have been expected to herald a conclusion that the ODB was to exclude the private element. Second, these words merely stress the importance of a procedural framework for the expression of the right. A function of the ODB is precisely to lay down this framework. And it follows, that inasmuch as the right of access to information is more

readily enforceable against the state, it is the state that bears the more onerous procedural and (hence resource) obligations. The concluding words of section 32(2) merely allow the framers of the ODB to provide for reasonable limits on those obligations. The absence of an equivalent instruction to the drafters of the ODB to cater for the obligations of juristic persons, or at least limit such obligations, might tell us something about the difference between the information duties of state and juristic persons. It does not tell us that the ODB must disregard, fail to capture, the duties of the latter. Third, the wording is merely discretionary. It does not compel the ODB to contain measures to alleviate the administrative and financial burdens of state. As such, it could hardly form the basis for any broader conclusion as to a preemptory exclusion of the right of access to privately-held information from the ambit of the ODB.

3.7 Privately-held information in the ODB

The drafters of the ODB, we must assume, were aware of the scope of their task. It is evident that they did not envisage that the Bill only contain references to public information - hence the inclusion of a right to information held by certain juristic persons is included in the Bill. Section 32(2) could be interpreted to encompass the inclusion in the ODB only of a right to privately-held information which is established on the basis of a clear, an unmistakable, pre-existing right such as the right to privacy. But there are many other rights which can be identified to found access and even if such rights or their underlying interests were not individually to be identified in the ODB, there is nothing to prevent the drafters from broadening the scope of access to privately-held information in a relatively undifferentiated manner and setting out more detailed grounds of refusal. The ODB exhibits an overt bias towards the securing of a right of access to information held by what is defined as a "governmental body" - cl. 1(1)(v) provides a definition. It is said to include inter alia any body in which the state, a province or a municipality is the majority or controlling shareholder or which supplies products or services in terms of monopolistic rights conferred on it by legislation. This definition is broad, and will encompass parastatals but it hardly compensates for the absence of a developed right in respect of privately-held information for which a fuller definition of "private body" is necessitated. Indeed the amplitude of the definition of "government body" merely exacerbates the obvious tension between public and private obligations. The distinction here created -

"stands as an open invitation to government to proceed with ... privatisation efforts or at least attempt to disguise its hand in the functioning of commercial enterprises." The definition in cl. 1(1)(xxi) of a "private body", the focus of a request for privately-held information, is extremely curtailed, and said to include only - "a person, other than a governmental body in possession of or controlling a personal information bank (as defined)".

Clause 3 of the Bill makes it plain that insofar as private bodies are concerned, the sole objective of the ODB is to specify conditions of access to personal information. Such information is earlier defined in cl. 1(1)(xvii) as "information about an identifiable person". In cl. 50, provision is made for access only to personal information held by private bodies and a rudimentary procedure of request is specified. The access facilitator is the head of the private body, defined for non-natural persons as the chief executive officer, or the person acting as such. The clause makes certain, indeed most, of the

lengthy grounds of refusal which are operable in respect of requests for government-held information, applicable to requests in the private sphere. So not only are the grounds of request extraordinary narrow, but the grounds of refusal almost co-extensive with those granted the state. Clauses 53 and 55 contain, not access provisions, but non-use and non-disclosure provisions directed at private bodies in respect of personal information. They are adjuncts to the access right and emphasise that the whole tenor of the ODB in respect of privately-held information, is one of advancing privacy rights, not granting informational access at all.

3.8 Parliament's role

The memorandum accompanying the latest draft ODB makes it plain that the legislation in its current form was intended to give full effect to section 32(1)(a) and only partial effect to section 32(1)(b), the right of access to privately-held information. This is the very complaint. There is a clear constitutional direction contained in section 32, to give effect to the whole right in such legislation. In one and the same piece of legislation surely, Parliament is enjoined to finish the job. It is far from clear what additional and/or supplementary process is envisaged to give effect to the totality of the information right. The memorandum merely stipulates that it is considered desirable for the Human Rights Commission to investigate and consult "as widely as possible" so as to make recommendations regarding legislation (not stipulated to be the ODB itself) which would give full effect to section 32(1)(b). This is, with respect, neither clear nor particularly encouraging.

4. The test of section 32(1)(b)

4.1 Judicial exploration

Our courts have examined the right contained in section 32(1)(b) in considering the right of access to information under section 23 of the interim Constitution, which is similar in wording, if not in reach. They have been prepared to interpret the test in a broad, generous manner, buttressing such conclusions with an analysis of the very purpose of the right. The requirement of an antecedent right has been held to go well beyond a right which arises in the course of formal action through the courts or which is contained in the Bill of Rights. In addition, the term "required" has not been interpreted to signify "necessary", but merely "reasonably required".

4.2 Implications for the ODB

It could be argued that it is simply impossible to cater for the limitless array of possible founding rights section (1) (b) gives rise to. Moreover the very determination of a right is a judicial function. It is patently not an exercise which is to be undertaken by a private information officer or whichever representative is tasked with deciding on the specifics of a request for access to privately-held information. But the unequivocal demand of section 32(2) is that Parliament must legislate for the totality of the information right, including its private component. We should therefore be more concerned with finding drafting solutions. It suffices to make whatever content is given to such right in a fuller ODB, contingent on a founding right. It would be possible to list exemplars of such rights, but only in such a manner as to indicate that the list is not exhaustive, merely illustrative of

the types of rights that could be raised in support of a claim. However, because to list is often to entrench, it may be best left to the courts to enumerate such rights. And second, any provision for access to privately-held information, would not exclude judicial determination of whether an antecedent right exists. Just as the ODB currently provides in cl. 72, for the non-exclusion of other remedies, so it can make clear that the question of whether a prior right exists to found a claim is pre-eminently a matter of judicial interpretation, in addition to leaving open to the courts, the final determination of any other basis for refusing access.

Such a provision might lead initially to a degree of dysfunction in the operation of access to privately-held information provisions in a re-modelled ODB. But not necessarily so. In many instances a claim will be obviously rights based and in many others there will be no objection to the grant of access. It is the statement of the right that signifies, rather than possible mechanisms for stalling its fulfilment. Furthermore, judicial decisions over time will serve to identify the rights' circumstances in which access can be secured. There will surely be gradually less and less recourse to initial adjudication on the issue of antecedent rights.

5. Information and antecedent rights

5.1 ODB mechanics

Regarding the types of privately-controlled information sought in a recast ODB, with all the types of information to which such a right could lay claim to, it is impossible, and indeed undesirable for legislation to so comprehensively encompass the full spectrum of rights and information categories. Any such attempt will leave the legislation both bloated and inflexible. It is worth remembering too that each detailed ground of claim must be accompanied by detailed grounds of refusal. The balancing between bases for information request and refusal does not lose its validity in the private sphere.

Many antecedent rights to information are secured by other statutes or by common law such as the rules relating to contractual disclosure. It would be a formidable task indeed to collate all of these and ensure their replication in, or even transfer to, the ODB. In effect, the argument for detail is a call to Parliament to legislate by numbers. There would inevitably be omissions and faulty insertions. Additionally, although listed as mere examples, our courts would be restrained in developing new antecedent rights to secure claims to privately-held information by the fuller disquisition of rights and information type in a Bill. Examples, as mentioned, have a habit of becoming principles. The role of the courts in such rights' development must not be compromised. This is after all the manner in which the ambit of the current right to information has been determined. Our courts have not shirked their interpretive responsibilities in this regard. It is surely not for Parliament, even under a legislative mandate drawn constitutionally, to legislate the entirety of the content of the information right. What is here being said is merely that it is unwise to specify in an ODB, an explicit right to say, information from companies to facilitate collective bargaining, as a pre-ordained category of right and information deserving of access. It is advisable to leave the determination fluid, so that, indeed, despite the existence of relevant labour legislation, workers may use an ODB to seek such information, but that the circumstances ultimately determine the success of the

request. The ODB should always stand as a residual or indeed additional mechanism to deliberate issues around the access to privately-held information.

5.2 Categorising information and rights

In discussing specific information types and the rights to which they are bonded, three sorts of privately held information, are identified which relate to an array of possible antecedent rights. It must be recognised that these categories overlap considerably. First, information which requires disclosure because of broad social interests like public safety or environmental hazard. This type of claim is premised on the duties of juristic persons, in this case, to society at large.

Second, the category that can loosely be collected around the concept of corporate governance, the manner in which a juristic person is directed and controlled and the repercussions this has for its conduct in the course of its activities. In this regard there are many possible claimants, including more prominently employees, shareholders and creditors. The claim here is grounded in the particular duties that a juristic person might have in relation to persons with which it has a specific social relationship. And third, there is the category of privately-held personal information, information which implicates the claimant directly. The basis for any such request lies in the specific relationship between the holder of the information and the requester created by the personal content of the information.

5.3 Public safety information

Grouped under this heading are a wide range of information types which concern an equally wide range of rights. More broadly the category can be denoted as privately-held information that raise substantial disclosure considerations because of the importance of such information in revealing some form of risk to society or the natural environment. That such concerns are weighty is attested to by numerous references in the ODB, albeit only in respect of governmentally-held information. But the limitation of such concerns to government information, exemplifies the crudeness, the artificiality of distinguishing between claims to privately- and publicly-held information. There will many instances where such information reposes with juristic persons only.

It is manifestly senseless therefore to drive a wedge between such claims. Such a division fundamentally ignores the interpenetration generally of rights in the Constitution, and the role that the information right in particular plays in giving expression to other rights. The private dimension of this right even more specifically, cannot stand alone. Its very construction couples it with other rights, although not necessarily constitutional. In many cases other rights, such as the right to a non-harmful environment in section 24 of the Constitution, are utterly denuded unless a mechanism is fashioned to provide access to privately-held information. The public safety and environmental categories of information should be expanded to include other information which affects the public as consumers of goods and services. It is frequently so that consumers' well-being is threatened by inadequate information relating to the quality or safety of products, the withholding of the identity of the manufacturer and the absence of any warranty.

5.4 Corporate governance information

Included under this head would be information that pertains to the manner in which juristic persons are directed and controlled and the impact that this has on a myriad of

stakeholders, most importantly for immediate purposes, employees. The rationale for the separation here, though, lies in the specific reference to such concerns in the ODB and the more tenuous bonds of duty that tie juristic persons to communities or the public at large.

Worker strength in the process of collective bargaining would be immeasurably increased if fuller information as to corporate finances, wage structures, corporate restructuring or down scaling plans and the like, were readily available. More principally, it is proposed that the claim to more substantial corporate information is linked to the protection of the right to equality, to ensure the absence of discrimination in hiring, promotion and salaries, and generally promote the democratisation of the workplace. The Labour Relations Act, 66 of 1995 has significantly expanded the scope of employers' duties of disclosure, in respect of some or all of the above information types. It recognises that effective collective bargaining is impossible without adequate disclosure mechanisms. Under section 16(3), whenever an employer is consulting or bargaining with a representative trade union, the employer must disclose all relevant information which will allow the union to engage effectively in consultation or collective bargaining. These provisions are made subject to broad grounds of refusal, including confidentiality, commercial prejudice and privacy. The introduction of workplace fora under chapter V, also facilitates greater information transfer. A workplace forum, in terms of section 84, is entitled to be consulted by the employer about proposals regarding a whole range of issues, including restructuring, organisational changes, closures, mergers, transfers of ownership, job grading, criteria for increases or bonuses, education and training, product development and export promotion. Proposals cannot be implemented until the employer has so consulted and attempted to reach consensus with the forum. Some proposals, for example in relation to affirmative action measures, require actual consensus before implementation. Under section 89, the employer is obligated, subject to similar refusal grounds as above, to disclose to a workplace forum all relevant information that will enable it to engage effectively in consultation and joint decision-making. In addition there are disclosure requirements set out in section 189 in respect of dismissals for operational requirements.

Further, provisions of the imminent Employment Equity Act impose a variety of duties of consultation and disclosure on designated employers as defined. Such employers must consult employees in the conducting of an analysis of employment practices, procedures and the working environment, in the process of preparing and implementing an employment equity plan and in preparing a report on progress made in implementing the plan. This report must be submitted annually. The disclosure provisions of section 16 of the Labour Relations Act are applied and the employer has a more general duty to disclose all information that will allow consulting parties to consult effectively. But, extensive as this legislation is, it simply cannot cater for the satisfaction of all information needs, nor indeed does it apply to all employees. The utility of a broad right to privately-held information in the ODB is not undermined.

The disclosure duties of public companies under the Companies Act, 61 of 1973 are notoriously light and basically encompass an annual report, with chairperson's and director's reports and audited financial statements. These requirements are even more sparse for private companies and close corporations. The King Report presented a code of corporate practices and conduct and included in its recommendations that companies to

whom the report applied disclose the total pay of executive and non-executive directors, details of employment policies, including staffing levels, skills levels, new jobs created, retrenchments, affirmative action policy and training programmes, environmental matters including planned pollution control, the business environs and impact thereon, social responsibility activities/programmes and donations and customer and supplier interest matters.

It further advised that communication to all stakeholders be prompt, relevant, open, comprehensible, truthfully and fairly represented and consistent. The report specifically, though blandly, endorsed the notion that employees be as fully informed as possible about the company for which they work. Apparently the Code's recommendations have been accepted by the JSE as listing requirements and from 1996, listed companies affected by these new requirements will have to state the extent of their compliance. In every other respect the code is unenforceable. So again, the utility of a right to privately-held information is not compromised, but on the contrary, must be seen as imperative to render limited corporate disclosure more susceptible to challenge.

Understandably employers might be reluctant to tolerate disclosure of many kinds of information, even those that they are now statutorily obliged to disclose, at least in any detail. And it is no doubt true that employers would have quite similar disclosure interests in respect of unions, particularly in respect of union finances. Trade unions, it must not be forgotten, are juristic persons in their own right. Such informational claims might be more difficult to substantiate in the context of the massive informational imbalance between employers and employees, but the claims nonetheless are the inevitable consequence of an expanded ODB.

It seems to be the case that employers, while acknowledging a broader range of social obligations and perceiving information flow as integral to business functioning, view the intrusion of the ODB onto the private disclosure terrain as unnecessary, in view of existing statutory mechanisms regulating corporate disclosure, as well as the King code. The fact that other mechanisms regulate corporate disclosure will most certainly affect the framing of these obligations, compelling, a broader and more residual construction. In addition, employers view disclosure as inherently risky, entailing as it does the possibility of the revealing of confidential, or at least sensitive commercial and technical information, the disclosure of which could reasonably lead to prejudice. This is a justifiable concern and proponents of broader employee rights to company information should not disparage it. It must be recognised too that such claims are often exaggerated or very baldly stated.

Our courts have made it abundantly clear that the many advantages that might flow from the use of corporate legal personality are inseparable from the many societal obligations with which corporations are visited. On occasions the courts have refused to find that the rights of corporate representatives have been infringed by statutorily authorised actions seeking to further the broad public interest in corporate rectitude, alternatively that any such infringement was justified. Even where rights have been found to have infringed unjustifiably, mention has been made of the singular importance of statutory objectives of regulating corporate activity for the public good. Taken together these judicial pronouncements have indicated a willingness to view juristic persons, particularly companies, as significant social actors, whose activities have far-reaching effects. Such effects demand concomitant corporate responsibilities. And the courts have found it to be

patently in the public interest that corporate activities be controlled to secure compliance with such responsibilities. Much of this regulatory power has an informational component and it should be stressed that many of the rights claimed in these cases - to privacy, to freedom and security of the person - were raised to counter statutory authority to compel the presence of corporate representatives for questioning and the disclosure of documentation.

5.5 Personal information

It is apparent that personal information is treated as a sui generis category in the ODB, one standing apart and deserving of specific reference in the Bill. This seems to follow the manner in which such information is treated in the legislation of some foreign jurisdictions, from which much of the terminology of the ODB is drawn. But the insertion of this specific information category, premised on what are implicit but apparently obvious privacy implications (apparent to the ODB drafters that is), is problematic for the wider project of filling the ODB with a broader right to privately-held information. To the extent that the personal information provisions are doubtfully to be amended, should it not follow that other categories of privately-held information be incorporated into the Bill in identical detail? Why should the right of privacy be placed at the head of the antecedent rights' pantheon?

6. Grounds of refusal

Where information is sought from juristic persons, at issue are the contrasting claims of access, based on a pre-existing right, and any rights held by the juristic person that might mitigate or absolve the private duty to disclose. Integral to the formulation of provisions stipulating the duties of disclosure of privately-held information should be a public interest test, to co-ordinate the grounds for acquiescing or refusing requests and generally and residually, to assist in the balancing process. But specific ground of refusal should also be inserted to indicate that the right to access, even if relatively undefined in the Bill, is not a one way street.

The Bill would certainly have to include a ground of refusal that captured the kind of interests protected under the current cl. 31 in respect of third party commercial information - trade secrets, other confidential financial, commercial, scientific or technical, the disclosure of which would reasonably cause commercial prejudice, any information over which a juristic person could exercise a right of ownership, and the like. The ODB cannot be allowed to become a means of exploiting informational rights, of unsettling valid legal claims to commercial information. This is also not to say that other grounds of refusal, like the protection of privacy, countervailing health and safety concerns and privilege, are irrelevant. They might very well be of importance and should in shorthand reference form, be inserted in any new provision which gathers together the possible grounds for opposing requests of access to privately-held information.

7. Including section 32(1)(b) right in the ODB

This is the heart of the matter. From the above it is quite clear the ODB cannot be passed in its present form. Although there is the possibility of separate legislation to fill the

section 32(1)(b) gap, the very presence in the current Bill, of provisions relating to the access of privately-held information, makes this an extraordinary device. And how would we read the different statutes together, what would we make of conflicts? So the crucial question is what form is an amended ODB to take.

Four models were examined with the fourth, the "synthesis model" emerging as the most viable one.

7.1 Definition model

This model is built on the proposition that it is good enough to tamper with definitions in cl. 1 of the ODB and perhaps make peripheral changes elsewhere in the body of the statute. One variant would be to alter the definition of "government body" in cl. 1(1)(v) to include some juristic persons, specifically those that can be said to have a public impact. There are several fundamental problems with this approach. For one, the inclusion of juristic persons by a process of definitional expansion requires a degree of unanimity on determining characteristics. We would have to make distinctions between juristic persons on some public power basis. But these terms, "public power" and the like, are very contested, they present real problems of definition. Even so, it would certainly be open to the lawmaker to impose a definition. This leads to a second problem.

Whatever meaning "public power" can hold, the drafters have chosen to couple it with legislative authority. I am unclear as to how it could simultaneously be de-linked by the addition of "institutions exercising a public power per se". Even assuming it could be, an insertion into the definition of "governmental body", juristic persons that are considered constitutionally as falling within the ambit of the phrase "another person" in section 32(1)(b), would be to elevate their obligations above the constitutionally required level. Under the Constitution, all access to information claims against juristic persons are mediated by the requirement of an antecedent right. None of the current features of the ODB carry any such pre-requisite. It cannot be that by the stroke of a definitional pen, and in complete disregard of constitutional niceties, certain juristic persons' status is elevated (lowered?) to that of organ of state. The Constitution carries with it a sharp demarcation between natural and juristic persons on the one hand, and state organs on the other. To blur these distinctions would have some very peculiar consequences, not the least of which would be that certain juristic persons would carry all manner of other rights' obligations that they clearly do not. The definition of "organ of state" in section 239 includes similar wording to that used in the ODB - "exercising a public power or performing a public function in terms of any legislation".

So it cannot be that juristic persons, even very large corporations are identified as falling into cl. 1 of the ODB, unless they are so identified already. There is a spin on this approach. Rather than tamper with "governmental body", broaden the definition of "private body" in cl. 1(1)(xxi). The short answer to this line of thinking is that it would make no difference. You can have as wide a definition of "private body" as you like, but as long as the informational duties of such bodies are confined in the ODB, as they patently are, no effect will be discernible and no advance made in giving effect to the right. The key lies, not in extending the definition alone, but in concurrently extending the obligation.

7.2 Generic model

This model's foundation rests on a recapitulation of the wording of section 32(1)(b) in an additional clause of the ODB. It is unclear where such a clause would be situated, but it would possibly be most comfortable at the beginning of Part 4, which deals with access to personal information. The clause would echo, almost as a preface to this part of the ODB, the right of everyone to access "any information that is held by another person and that is required for the exercise or protection of any rights". "Person" is already defined as including a juristic person.

It might even begin with wording to the effect that "notwithstanding anything contained in this Act or other legislation ...". This short introduction would serve to indicate that the right is additional to any other aspect of the right to information, public or private, and might help to indicate that access to privately-held information provisions granted by legislation such as the Labour Relations Act, are not dispositive of the right. In addition, such a model would buttress the clause with extensions to the preamble so as to provide for the objective of giving effect to the right of access to privately-held information. In addition, it would tinker with the objects clause, cl. 3, to signal this shift. It might perform an additional definitional exercise in cl.1 in respect of the phrase "exercise or protection of any rights" and the word "required", to add colour to the generic clause. "To give effect", whatever it's true meaning, must connote more than paraphrasing. This is so because the same words are used in s. 32(2) in respect of both the right to publicly- and privately-held information. It cannot be that the ODB gives voluminous effect to one and repeats the constitutional phrasing in respect of the other. The words mean surely "to make operative", and I assume this to have both a substantive and procedural dimension. The inclusion of a generic parrot provision would make s. 32(1)(b) operative, but only if it is an acceptable means of giving effect - a circular argument. The absence of any scheme to "make the right happen" dooms this approach.

A further variation, a combination of the first two approaches, is provided for by changing the definition of "private body" to include specific juristic persons, possibly including partnerships, and thereafter adding a clause stating something to the effect that one of the objects of the Bill is to grant persons the right of access to any information by a private body in so far as it is required for the exercise or protection of any rights. This hybrid is defective principally by virtue of its failure to meet the "give effect" injunction, which relates to all persons, natural and juristic. We cannot allow policy preferences to prevail over constitutional requirements.

7.3 Detail model

The model contemplates, in addition to minor changes to the preamble, object's clause and certain definitions, a wholesale revision of the ODB and a specific Chapter on access to privately-held information. No distinction in principle can be made between different private sources, natural or juristic, because the right itself lies against both. The drafting would be long-hand. Just as the chapter on access to government-held information contains a myriad of particularised grounds of refusal, so must the chapter on access to privately-held information contain a list of particularised bases for granting access. What signifies for claimants to such information, is not first and foremost the ground of refusal, but the antecedent right of access, and related issues of information type and identity of claimant, to which the right relates. These would therefore have to be set out, not individually, but by category or cross-category. So we might find a series of provisions

dealing with access to privately-held information on the basis of a kind of right, like a common law right, for example or sections on access organised by information-type or identity of requester. Somewhere in this morass would be found a specific right of employees to certain employer information, based on specified rights, or the rights of environmental groups, indeed any person, to specific information pursuant to section 24 of the Constitution.

Whatever organisational method is utilised, categories would have to cross-refer to grounds of refusal as well. In addition, the model, by identifying the appropriateness of certain antecedent rights vis-à-vis certain juristic persons, might choose to make the procedural obligations of such juristic persons co-extensive with the state and create a simpler procedural mechanism for other persons from whom information is claimed. Although the model has been sketched here with a degree of irony, it is not difficult to see why detailed exposition of rights and information and claimants gets drafters into trouble. The unwieldy nature of the legislation, the impossibility of avoiding error, the inclination to advance certain interests above others, and the severe restraints such formulations would place on judicial functioning, make this model inappropriate.

7.4 Synthesis model

In essence, this model calls for compromise. The words "give effect to" cannot mean "detailed exposition". They must mean "adumbration" or outline. This model recognises the problems inherent in the formulation of section 32, the relative uniqueness of the access right as expressed in our Constitution and appeals for a measure of laxity in the conversion of the section 32(1)(b) right into legislative format. It accepts that the bulk of the ODB will be concerned with setting out the right to government-held information, but that, though spatially overwhelmed, a clause giving effect to the private corollary of that right will carry enormous weight and prove invaluable to information requesters. It calls for a separate clause. In the first sub-clause a general right is given to all persons to gain access to privately-held information subject to the contingency of prior right (in effect a generic clause). The second sub-clause would flesh out the concept of right, by stipulating, as our courts have already done, that it embraces all rights, not simply rights in litigation, or constitutional rights etc. A third sub-clause would establish a very broad test for establishing a right, a test that would encompass the information sought, the nature of the claimant, the circumstances of the case and the degree of congruence between these and recognised rights. It might specify some such recognised rights as illustrative and connect these to the types of information sought. A further sub-clause would add something to the effect that nothing in the contents of the clause in any way detracts from the primacy of the judicial function in determining whether an antecedent right exists. The clause would either include or be followed by, a provision in which grounds of refusal are set out. Such grounds would include the absence of a pre-existing right, all or most of the existing grounds, particularly those relating to commercial confidentiality and prejudice and perhaps other grounds more apposite in the private setting, such as a broad ground that the person from whom information is claimed has a counter-right on the basis of which access can be refused. Simplistically put, private tussles are primarily between conflicting rights, unlike in the public sphere where the conflict shapes up as one between a right and a countervailing public consideration. This should generally be recognised and specified in the Bill.

In addition, it might be possible to narrow claims of right against small juristic persons and natural persons, by adding a ground of refusal relating to more prudential concerns such as administrative capacity. Connected in some manner to this set of refusal grounds would be a public interest co-ordinating dimension, for the public interest most certainly does intrude, even into private disputes. The model might consider it difficult to incorporate the extensive personal information provisions as currently exist in the ODB, inasmuch as they extravagantly exceed the demands of section 32(1)(b). But in a spirit of reconciliation it might be deemed prudent to let that extravagance remain. As to procedure, the synthesis model would recognise the differential resource capacity generally of state and private person and seek to simplify procedural requirements accordingly. It might be that the request procedure be expedited, the duties of assistance lessened and fees increased. Similarly the duties of specific information personnel in relation to the administration of records will clearly have to be re-conceptualised. Some might argue that the model presented here is really of the generic type. It cannot be ignored that it contains very little specificity. But, in its defence, it builds substantially on mere paraphrasing, by at least mapping the contours of the section 32(1)(b) right. It is not definitive because it is hard to imagine how that right can be definitively expressed.

7.5 Objections

But even this watered down version of incorporation will raise the hackles of many, particularly in business. They will say that it denatures the function of the ODB and that it is widely cast. But this is the nature of the right in section 32(1)(b). It is a contingent right but it is very broad nonetheless. It does not make distinctions of size, it does not defer to natural persons. The antecedent right does create an adjudicatory emphasis, but this does not detract from the relevance of the right, nor can it affect the necessity of its inclusion. There will be arguments too about the general incapacity of corporate executives or their appointees to make subtle legal distinctions, to properly answer requests for access. But there have been few complaints about the role of information officers under the ODB, who are no more skilled in such matters. It will simply be the task of companies in this information age to become more information aware and efficient. Complaints will be levelled too at the obligations on business in respect of information records, procedures for making information available and other administrative problems.

We must recognise that administrative obligations and attendant costs are frequently imposed on business, in some instances, as with the Employment Equity Bill, to achieve specific constitutional objectives. But it is nonetheless conceded that procedure has to be rendered far less complicated for companies. It is also recognised that the ODB system can be abused to gain competitive advantage. That is why the drafting must be tight and adequate balancing mechanisms in place to weigh up competing interests. And then business might raise, possibly as a last resort, the cumulative weight that these information burdens will place on new businesspeople, how these obligations will act as a disincentive to new businesses.

SECTION III - PERIPHERAL INFORMATION

1. QUOTES FROM THE ODB MEETING 31 JULY 1998
2. THE MEETING
3. CONSUMERISM
4. WHISTLE-BLOWER PROTECTION
5. VIVISECTION AND THE NEED FOR INFORMATION
6. PROCUREMENT POLICY

1. Quotes from an ODB meeting 31 July 1998

On information:

"Because information is quite key, its quite an irony that as we approach the close of this century you have such a developed and sophisticated information infrastructure, but alongside the information super highway you're having massive inequalities in terms of access to information.... I think in the spirit of the Open Democracy Bill you are going to face the challenge of how do we make information usable, how do you make it accessible in a way that a person in the rural areas or in marginalised communities are able to access this information and are able to use this information.....the task is a very difficult one indeed."

On saving the Bill:

"This Bill seems to be haemorrhaging.... but it's bleeding like a person who has been injured. Unless we heel it now it may bleed to death. All the important bits and pieces in here may leak out until we've got nothing but a skeleton and its not really the strong, act that we really wanted in the first place

On its purpose:

" It should be a 'Grand old statute' regarding access to information: We shouldn't have bits and pieces carved out of it so that we have to read this as relevant in part to some or most access provisions, but not in respect of certain (other) provisions. We can't simply immunise the disclosure process".

On disclosure in criminal or civil matters:

"I think that the concern raised in section 49 is that the principles of discovery are settled and are settled by the court and we don't want to disturb a process which gives effect to very specific rights. The Shabalala case saw access to docket information developed by the Constitutional Court."

On whether the ODB suggests we don't trust the people we elected:

"....doesn't always apply to bureaucrats where there is not a real culture of service and although transforming, the public service is still transforming: we want to deliver; we will deliver; we must deliver. Open meetings are a way of going right into those meetings where things are happening and listening to what is happening and helping those structures transform, listening to the debates, adding to the debates. This is a way of contributing to transformation, moving transformation along."

On principle:

"My own impression is that we have to fight this Bill and get back to the first principles of it and understand that access to information is a civic right."

2. The meeting

A large number of sectors and NGOs were represented at the FXI 31 July meeting. Delegates were united in their belief that the ODB as it stands does not give effect to section (1) (b) of the access to information clause in the Constitution. They were of the opinion that this is a serious omission and that it should be urgently addressed.

Furthermore all delegates were of the opinion that the open meetings section currently omitted from the Bill, should be reinstated. Despite an argument that government is currently providing right of access to the majority of meetings, it was felt that this was not sufficient. The fact that it could take some 20 years to build up a jurisprudence confirming right of access, was a contributing factor to the majority support for legislation of this nature to be included in the Bill.

Adv Empie van Schoor, of the Government Task Group, confirmed that no reasons had been given to the group when they were instructed to remove the open meetings section. The only explanation offered was that open meetings legislation would be developed separately and become the subject of a different act. She indicated that there had been strong opposition against the open meetings section from various state departments who believed the section would hamper their activities and the effective administration of their departments. But in the end, Cabinet made the decision to omit it. This occurred even though the Task Group had suggested that they could make the provisions less restrictive. Furthermore, the notice requirements were made less burdensome. But even that was unacceptable.

One of the panellists posited the idea that because different departments operate in different ways, each department may need to suggest ways that they could make their departments adhere to the open meetings requirements. She suggested that a process should be put in place, both for government and the private sector with applicable exemptions.

Adv van Schoor said some departments are already using the Bill to make decisions regarding requests for access to information and one department is already compiling its manual. Most of the delegates had strong feelings that the Bill should not be delayed any further.

Concern was expressed that a "bad Bill" will be passed and that it would be problematic trying to put it right later. Comparing it to the Labour Relations Act a delegate pointed out that the mechanics had to be worked out to make that Bill effective - the CCMA, regulations, the forms that will have to be filled out - yet the Act is already making a difference to the people on the ground and that the ODB may be the same.

3. Consumerism

The Consumer Institute of South Africa has done substantial work on the need for access to information. We trust the Institute will be making a submission and reinforce the need for consumers to be well informed generally and more specifically about products. At the

recent FXI seminar the Consumer Institute referred to certain drugs on the market which are harmful and have in some cases resulted in death. It believes that information on these products should be made available to the public. Yet it feels if companies can hide behind a guarantee that "trade secrets" cannot be accessed, the public will not know the dangers the products pose.

Furthermore the Consumer Institute advocates that information on manufacturers of products is significant if the consumer is to enforce warranties or guarantees against service providers; to enforce product liability one must know who manufactured the product. The Consumer Institute posed the question: what about consumers' right to safety, to freedom of choice, their right to know are these medicines safe or not?

Delegates brought up the issue of the Housing Bill 82 of 1997 and although it was conceded that the Act illustrated the degree of disclosure sensitivity that many new pieces of legislation are exhibiting, concern was expressed about corruption in the housing sector. Information it was asserted is being hidden and this affects the vulnerable, those uneducated and ill-informed. The latter are prey to sophisticated financial institutions and builders.

Information is not available on builders who are blacklisted and on the nature of the ground where property is to be erected. A plea was made for the Bill to protect the homeless by dealing with corruption and equipping people with information which would empower them. Similar problems were referred to regarding the insurance industry and the misleading information often provided by agents who provide consumers with tomes of documents in inaccessible language.

The Advertising Standards Authority came in for particular criticism for failing to take action against unscrupulous advertisers who lure the unsophisticated consumer with untruthful claims in their advertising.

4. Whistle-blower protection

Delegates at the meeting supported the idea that whistle-blower protection be extended to persons in the private sector. They also expressed a desire that whistle blowers be given support, firstly by being placed on a witness protection programme, and, secondly, through legal assistance.

It was noted that the inclusion of whistle-blower protection in the private sector could affect and be affected by contractual as well as labour law. Legal opinion at the conference implied that the whistle-blower protection section in the ODB should be recast to deal with specific instances of the private employer.

5. Vivisection and the need for information

FXI also received a letter drawing out attention to the lack of transparency within the vivisection industry from the South Africans for the Abolition of Vivisection.

Organisations which conduct animal experiments are chemical and pharmaceutical companies, universities, technicons, government agencies and the manufacturers of cosmetic and household products. The military also use animals to see what radiation, bullet wounds and chemical warfare agents to living bodes even though the effects of these weapons on humans are well known The organisation contends that there is

currently no possibility for the public to discover what is going on in animal laboratories in South Africa. It is impossible to ascertain exactly how many animals are used, where the animals are obtained from, what animals are used, what experiments are being conducted and how much taxpayer money is spent on such experiments. It maintains that information relating to animal experimentation needs to be firmly placed in the public domain.

6. Procurement Policy

FXI has been approached by institutions wanting to know their rights in regard to the tendering process. Although we are aware that there is discussion currently surrounding the process, we believe that procurement procedures would only be enhanced by the principles the ODB stands for and that those who feel aggrieved by the process would have the new act to fall back on when it is introduced. Procurement is an area which affects government as well as the private and the non-governmental sectors. It is in the interests of all parties to have greater transparency in the process.

Furthermore, we note in the latest government documents on procurement policy the following commitment to improving the transparency of the process:

To make public procurement accessible to all by simplifying the process, and by encouraging fairness and transparency.

To encourage greater competition in the public procurement process through the creation of an enabling environment for small, medium and micro enterprises while retaining quality and standards.

To support participation of a broadened range of enterprises with appropriate inland revenue registration and labour practices in order to ensure sustainability.

We are also aware that a substantial body of case law is developing which confirms that tenderers have considerable rights to access to information particularly in regard to how tenders are awarded.