Preface

The Promotion of Access to Information Act, Act 2 of 2000, was passed by Parliament on the 21st January 2000 and brought into operation on the 9th March 2001 in terms of Proclamation R20 of 2001. The Act evolved over a period of six years, changing from its original omnibus format (the Open Democracy Bill), to an Act that regulates only the control of access to information held by government and private bodies.

There have been varied responses to the Act. There are those who view the Act as a demonstration of the deepening of democracy in South Africa. There are also those, adopting a class analysis, who argue that while the Act does promise a greater degree of openness, its procedure and costs for requesting and accessing information are prohibitive for poorer sections of society. Also, there is an argument advanced by many critics that the Act offers an overly restricted right of access to information held by private bodies.

Many of the criticisms, particularly those that point to the fact that the Act seems to favour the rich and educated instead of the poor, have merit. Nonetheless, the passing and implementation of the Act must still be welcomed and seen as an important step and opportunity in the exercising rights to information enshrined in the Constitution. Obviously, the debates around the relevance of the Act for working class communities and their organisations and what needs to be done to expand the opportunities provided by the Act need to continue and be sharpened further.

This handbook is aimed at, firstly, providing a simplified analysis of the Act. There has been growing concern that, besides the privileges given to private bodies and the costs for access to information, the Act itself is complicated and might not be useful to the less privileged. This handbook aims to address this concern. It is hoped that many individuals and organisations involved in everyday struggles to access information relevant for communities, will find this handbook useful.

Secondly, this handbook is aimed at making the task of requesting information much easier than would be the case in the absence of an instrument like this. It is our sincere hope that this handbook shall proof a useful guide for everyone, particularly those who cannot afford expensive legal assistance to gain access to information.

Thirdly, the handbook aims to contextualise the Act within the broader field of Freedom of Information in South Africa.

Lastly, we hope that this handbook shall assist in raising further debates on how the Act should be improved to make it user-friendly and more useful for working class communities and their organisations.

Only time will tell whether the Promotion of Access to Information Act will achieve its main purpose: the realisation of the basic right to information. Like any process in history, we need to influence the course of history by making interventions when we are called to do so. This handbook can be one of these small but necessary steps.

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Introduction

Knowledge is power

"Access to information is the oxygen of democracy. If people do not know what is happening in their society, if the actions of those who rule them are hidden, then they cannot take a meaningful part in the affairs of that society"

The public's right to know: principles on the freedom of information legislation. Article 19: International Centre Against Censorship'

"Everyone has the right to freedom of expression, which includes ... the freedom to receive or impart information or ideas"

The Constitution of the Republic of South Africa, Act 108 1996

Reflection and discussion
All the above statements point to the centrality of access to information and freedom of expression to a healthy democracy.

Do you agree with these statements?

What role do you think governments and legislation need to play in order to ensure that there is free circulation of ideas and information in society?

The Promotion of Access to Information Act, Act 2 of 2000, represents both an opportunity and challenge in consolidating and extending the democratisation of South Africa. As an opportunity, the Act allows for greater of accountability and the broader participation of people in the processes that define their lives. As a challenge, the Act allows us to break with the bureaucratic and alienating nature of modern liberal democracies. As such, it represents one moment in a broader struggle to create a world in which all people are able to gain access to, express, and circulate ideas in a manner that allows them to become the authors of their own future.

This handbook is an attempt to provide a guide to navigating the technical and bureaucratic framework of the Act.
It places the Act within the broader global context and charts its development in South Africa's transition period.
The handbook presents all the key features of the Act and relates them to the manner in which civil society organisations and individuals can use the Act. It also points to possible ways in which the extension of the framework could be extended to ensure the effective circulation of information to all members of society.

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1 In The Promotion of Access to Information Act. A Resource Manual. SAHRC

Chapter 1

Access to Information and the International Human Rights Framework

What are Human Rights?

The UN Universal Declaration of Human Rights, the core instrument of Human Rights' protection and promotion at an international level, begins with the following words:

Whereas recognition of the inherent dignity and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...

This suggests that we all are entitled to these rights because they are inherent to all humans. However, different types of societies often disagree on what these rights are. So how do we decide?

Some theorists argue that these rights are self evident, and that merely by acting on gut feeling we will be able to determine what human rights are. The problem is that what you consider as a right could be determined by the moral code you grew up under, your class or, even your gender. Slave-owning communities believed that they had a right to oppress and exploit other 'inferior' races, just as many men still

think women are inferior and not entitled to the same rights. What different people consider to be a 'human right' depends on their society and the manner in which they intepret the values within that society.

Still, most people would argue that human rights are different from other types of rights. There is a growing consensus that human rights depend upon 'equal respect and mutual comprehension between rival cultures ... a consensus between different societies and cultures, not the application of standards, derived from the culture and context of a particular society, to all other societies.'[2]

In terms of this view, the viewpoints of the proponents of independence struggles of Africa or those struggling for economic justice against the effects of globalisation are as important in determining what rights should be considered as inalianable to all people living within the global community as those held by the liberal theorists of 18th century Europe.

Freedom of Expression and Access to Information

Increasingly, we are coming to realise the importance of freedom of expression and access to information in creating a society in which people are not only able to guard against the arbitrary abuse of power but, more importantly, in which democracy is extended and ordinary people are able to participate in defining the human rights framework of the societies in which they live. In this way freedom of expression and access to information work to protect and extend other rights and are core elements of any workable system of human rights protection.

Human Rights are usually divided into three categories:

Civil and Political Rights: These include the right to political participation, freedom of expression, freedom of association and participation, freedom of opinion, liberty, and security of persons.

Economic and Social Rights: These rights relate to an individual's socio-economic life and include the rights to work, food, shelter, education, and health.

Environmental, Cultural and Development Rights: These rights include the rights to a clean environment, as well as rights related to cultural and developmental concerns.

Some theorists see these rights as falling into a particular hierarchy within the general system of human rights protection. For instance, civil and political rights are often considered as the most fundamental of all rights and the basis for a democratic and just society. The international framework, however, allows for economic and social rights and environmental and cultural rights to be gradually introduced depending on the particular circumstances of a country. For this reason, civil and political rights are often called 'first generation rights' while socio-economic rights are called 'second generation rights'.

Although the above categorisation remains strong, there is also a growing consensus that these rights cannot be easily separated. Instead, these rights are mutually supportive of each other. A social system in which people can easily participate in the economic activities of their community is as important to a culture of democracy and respect for human rights as the right to freedom of association. In fact, socio-economic circumstances often determine the extent to which people are able to access other rights, including the right of access to information and freedom of expression.

2 Ansell and Veriava, Human Rights Handbook for Southern African Communicators, Institute for the Advancement of Journalism

The United Nations (UN)

At the international level, the most important mainstream organisation for the protection and promotion of the human rights is the United Nations (UN). Formed after

World War II, against the background of massive human rights abuses during the War, the stated goals of the UN were to help facilitate international peace, as well as to promote and encourage respect for 'human rights and for fundamental freedoms for all without distinctions as to race, sex, language or religion' (UN Charter).

The first meeting of the General Assembly, made up of member states, took place in London in June 1946. Since then the UN has grown to include representatives from almost every country and wields a great deal of influence in determining domestic policies and foreign relations of member states. However, there is growing criticism of the UN's ability to foster an international climate for the respect of human rights. Increasingly, many people view the UN as being unable to enforce respect for human rights when countries like Israel continue with the genocide against Palestinians and deny them the right to rule themselves.

The UN and Human Rights

Aside from all the criticism, on paper (and sometimes in practice) the UN has played an extremely important role in developing consensus on the core features of the international human rights system. The UN Universal Declaration of Human Rights has come to represent one of the guiding documents in defining the basic standards by which a country's human rights record is measured.

The UN Declaration, along with the International Covenant on Civil and Political Rights, the International Covenant on Social and Cultural Rights, and the Optional Protocol to the International Covenant on Civil and Political Rights (which expands on the rights in the UN Declaration), has come to be popularly referred to as the International Bill of Right Many local and regional instruments for the protection of human rights mirror its structure.

Access to Information in the UN Framework

With respect to freedom of expression and access to Information, the UN Declaration protects the 'freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers...'

However, like many constitutions which protect the right of access to information, the International Bill of Rights sets out the limitations to this right. The International Covenant on Civil and Political Rights lists the instances in which the right of access to information may be restricted. A state may restrict the right of access to information to:

- Ensure rights and reputation of others;
- Protect national security or order public or public health or morals;
- Prevent incitement to discrimination, hostility or violence.

Countries which have ratified the components of the International Bill of Rights must also report to the UN every six years on what measures have been put in place in order to realise the rights of freedom of expression and access to information.

Enforcement

As already stated, one of the criticisms of the international framework for human rights protection is the unwillingness of the international community to act against certain nations that violate human rights. The UN is made up of member states which differ in the amount of economic and military power they command. Decisions made by the UN often reflect these differences, and the organisation is much more likely to act against human rights abuses when the interests of the more powerful nations who dominate the UN are threatened.

Commentators on the UN have often cited the reaction of the Security Council to the invasion of Kuwait by Iraq in the early 1990s as opposed to the assistance given

to the victims of genocide in Rwanda as examples of different degrees of commitment shown by the UN. A general view held by many commentators is that what motivates the UN is often determined by the security and economic interests of the richer and more powerful member states.

Enforcement of the rights of freedom of expression and access to information is no exception The international community has often ignored violations of these rights when perpetrated by more powerful countries. The state of Israel, for instance, has been particularly harsh in suppressing international coverage of the intifada3 and has often acted with force against leaders of Arab communities when they have spoken out against Israel's internal and regional policies.

Economic considerations often take precedence over human rights enforcement and countries are reluctant to use instruments like sanctions against rogue nations lest they unsettle the fragile system of global trade.

Despite these genuine and well-founded criticisms UN documents do, however, set basic principles that are important in how the global community views the practices of nations. Liberation struggles around the world have successively made use of the media and other forms of information dissemination to raise awareness within the international community about local human rights violations. One of the best examples of this is the defiance by the liberation movement and sectors of the media of the South African state's attempts to deny access to information about human rights conditions under apartheid. The simple television production of the court transcripts of the Biko inquest4 in the United Kingdom drew massive attention to conditions of political prisoners and detainees in South Africa. Anti-apartheid activists and journalists often worked under severe restrictions in order to ensure that both local communities and the outside world were made aware of apartheid's realities. Thus, in spite of misinformation campaigns, arrests and bannings, enough international condemnation of the South African state was raised in order for the United Nations to declare apartheid 'a crime against humanity'.

Reflection and discussion

The UN Security Council is one of the most important parts of the UN. It is made up of five permanent members from the more powerful nations in the world (the USA, Russia, China, Britain and France) and 10 elected by the general assembly.

How do you think its composition affects the decisions it takes?

International Financial Institutions and Access to Information

Earlier in this chapter we noted the mutual dependence of socio-economic rights and political rights. The manner in which the international economy is structured has important implications for realising a culture of human rights.

The main bodies in determining the rules governing world trade and aid are the International Monetary Fund (IMF), the World Bank (WB) and the World Trade Organisation (WTO).

3 The struggle by the Palestinian people against the indipendence from Israel.

4 Steve Biko, the founder and leader of the Black Consciousness Movement, was killed in custody on the 12th September 1977. Initially thr police and the state claimed that he died from a hunger strike. The then minister of police Jimmy Kruger stated infamously that 'the rights of prisoners to starve themselves...' must be respected. It was only after intense international mobilisation that the truth about Biko's death came to light.

Together these institutions wield a tremendous amount of influence in defining the economic, environmental and political futures of individual countries. A global movement of activists has begun to raise criticisms over the manner in which these organisations contribute to the structure of the world economy and the perpetuation of poverty in poor countries. They argue that the models promoted/imposed by these institutions, particularly neo-liberal structural adjustment programs (SAPs), as conditions of international loans to poor countries, are not really appropriate for ensuring growth and economic stability. Instead they enforce policies of tariff reductions, the casualisation of labour, cuts in social spending, reduction in the size of the public sector and privatisation. It also means that democratically elected governments are not able to determine their own internal economic policies. Instead, these international financial institutions undermine the nation-state in favour of multinational corporations and richer countries, which are constantly looking for access to new markets in order to make greater profits.

The manner in which these institutions allow for the perpetuation of poverty also has important effects on the kind of democracies that exist in poorer countries. Without access to work, schooling, and health care, which often suffer under SAPs, other rights central to a democratic culture, like the rights of access to information and freedom of expression, become more difficult for countries to realise. Power in these societies becomes increasingly monopolised by small pockets of local elites, while the majority of people are excluded from the political life of these societies.

Critics have also raised concerns over the undemocratic and untransparent manner in which these organisations make decisions. For instance, critics of the WTO have raised concerns about the secrecy surrounding the trade dispute settlement process. All proceedings of dispute settlement tribunals are conducted in secret and documents relating to the dispute are confidential. There are no systems that exist for direct public input and scrutiny in spite of the fact that agreements have far-reaching effects on the manner in which countries will deal with economic matters.

Reflection and discussion
Think about the press release below from the International Federation of Journalists (IFJ).

Should financial institutions, like the WTO or the WB, be made more accountable?

(IFJ/IFEX) - Below is an IFJ media release followed by an IFJ letter to the President of the World Bank, James D. Wolfensohn:

Secrecy at the World Bank: Journalists Call for Open Government

The International Federation of Journalists, the world's largest organisation of journalists, today called on the World Bank to follow its own policies of good governance and open up its own work to greater public scrutiny.

In a letter to World Bank President James D. Wolfensohn, the IFJ says that current restrictions on access to information keep hidden from public view many vital documents that explain Bank policies. 'Without the release of these documents, journalists cannot adequately fulfill their responsibilities to inquire and subject public bodies to scrutiny,' says Aidan White, IFJ General Secretary.

The IFJ criticises a new disclosure policy that will keep important materials secret. In particular, documents about Bank structural adjustment loans, even though they often contain specific prescriptions for change. Access to this information will remain at the whim of

borrowing governments with the re

sult that disclosure will be 'subject to political expediency rather than the public right to know.'

The IFJ also takes the Bank to task over its failure to mandate the release of all Country Assistance Strategies, one of the broadest policy-setting documents.

'Taken as a whole, the policy shortcomings are particularly unfortunate because the Bank often extols the virtues of transparency when attempting to encourage principles of good governance,' says the IFJ. 'There is no place for unnecessary secrecy in Government and the World Bank should be setting standards that others will follow.'

The IFJ challenges the Bank's Board of Directors to disclose archived materials after five years, not after 20 years as proposed in its new policy, and also to release minutes of its meetings or the summaries of board discussions. 'Such an approach should be a basic tenet of good governance', says the IFJ.

All Bank staff should act in accordance with the principle that the first rule 'should be in favour of openness, not secrecy.' Above all, the challenge to the World Bank is 'to discourage secrecy and to promote informed debate,' says the IFJ.

The text of the letter follows:

Access to information and the World Bank

The International Federation of Journalists, the world's largest organisation of journalists representing more than 450,000 mem

bers in over 100 countries, is dismayed that the World Bank is unwilling to allow greater disclosure and public access to World Bank documents.

Our common cause is a professional commitment to public knowledge. We believe openness in the processes of decision-making strengthens institutions and societies and is a bulwark against corruption and mismanagement. It is the fundamental right of all citizens to have access to public information.

While we welcome the strides made by the World Bank towards greater transparency, we note that the draft Policy on Information Disclosure now under consideration makes only modest additional steps. Some changes are to be applauded, for example, the release of more evaluative documents. However, the draft policy falls short in many other respects.

The draft policy would keep hidden from public view many vital documents that explain Bank policies. Without the release of these documents, journalists cannot adequately fulfill their responsibilities to inquire and to subject public bodies to scrutiny.

Important materials will remain secret unless the draft disclosure policy is broadened. Specifically, when the Bank makes structural adjustment loans, with specific prescriptions for change, the terms are spelled out in documents such as the President's Report and Tranche Release Memorandum.

However, the Bank does not release these documents, nor does it propose to do so.

Instead, disclosure of these critical documents will remain at the whim of borrowing governments, allowing many governments to shield these documents from public view. Disclosure will be subject to political expe

diency rather than the public right to know.

On occasion it remains unclear whether the impetus to withhold information comes from borrowing governments or if it is the result of pressure applied by the Bank.

Similarly, the Bank's proposed policy would not mandate the release of all Country Assistance Strategies, one of the broadest policy-setting documents. Nor would the Bank allow for the release of draft project appraisal documents, which are the key evaluative assessments of projects.

While some improvements are suggested regarding disclosure of evaluative documents, the findings of the Bank's Quality Assurance Group and the Quality and Compliance Unit would never see the light of day, yet they should. These documents, and any pertaining to relevant follow-up, serve an important role in the Bank's ability to hold itself accountable, to measure and learn from its mistakes, to capitalise on its successes, and to demonstrate this to journalists and stakeholders alike.

Regarding archived materials, the Bank should disclose materials after five years, not after 20 years, as proposed.

Finally, the Bank's Board of Executive Directors should commit themselves to releasing minutes of its meetings or the summaries of board discussions. Such an approach

should be a basic tenet of good governance.

Taken as a whole, the draft proposal's shortcomings are particularly unfortu

nate because the Bank often extols the virtues of transparency when attempt

ing to encourage principles of good governance. There is no place for unnecessary secrecy in Government and the World Bank should be setting standards that others will follow.

The bank has long supported 'a presumption' in favor of disclosure. Now, as the bank considers revisions to its disclosure policy, it should make this presumption a reality. The Bank should ensure that all staff and project officials are fully apprised of, and act in accordance with the principle that the first rule is in favour of openness, not secrecy.

The International Federation of Journalists applauds the efforts of the World Bank to promote principles of good governance but we urge you most strongly to apply models of transparency in your own affairs. Above all, the challenge is to discourage secrecy and to promote informed debate.

With kind regards,
Aidan White
General Secretary

When thinking about South Africa's framework for the protection and promotion of access to information, it is extremely important to realise its limitations in allowing for people to hold trans-national and international financial institutions accountable to those whose lives they affect under globalisation.

What do you understand by globalisation?

Chapter 2

Access to Information in South Africa

In South Africa, like all societies, information plays an important role in shaping how political entities operate and the manner in which people view themselves and their relationship to the world. It also has important implications for the extent to which people are able to contribute to the shaping of their lives and the society in which they live. However, in South Africa people experienced both the trauma of colonialism and apartheid, which excluded the majority of South Africans from participating in the political processes that shaped their world. There was trauma included in the denial of basic human rights, including the rights of freedom of expression and access to information, on the basis of race.

The Colonial Period

Colonialism in South Africa, like on other parts of the continent, subjected communities to laws externally developed and enforced. Local systems for the protection of human rights were either destroyed or integrated into the colonial system of rule. At the same time, Europe was going through a massive transition as its people began to reject the feudal system. Freedom of expression and access to information became key components of the new 'exclusive' liberal democratic order that was being created. However, this did not extend to people in Africa who were being conquered by their armies. Within the European mindset, the people of the colonised world were not entitled to the same rights.

This continued even after colonialism ended, and in settler colonies like South Africa, 'non-Europeans' did not receive the same rights of participation and protection.

Access to Information and Apartheid

In 1948 the National Party (NP) came to power and with it the system of apartheid. While apartheid was justified as a means to ensure 'harmonious' separate development of the different races in South Africa, in reality it meant the institutionalisation of racial inequality and the exclusion of black South Africans from the formal political life of the country.

Many organisations condemned apartheid. Their increasingly militant resistance was met by severe force and restrictions initiated by the white minority government. Apartheid had devastating effects on all aspects of human rights, including freedom of expression and access to information. Critics of the government were either banned or imprisoned and, in some cases, even killed by agents of the state.

The state also kept a tight hold over information and systematically attempted to prevent the work of the press and the dissemination of information about the state. Many journalists were harassed, detained or sent into exile. Newsrooms came to reflect the paranoia of the rest of society.

In many cases the state not only denied the right to freedom of expression and access to information, but actively initiated or supported misinformation campaigns. These were often aimed at eroding the mass support base built up by the liberation movement and attempted to caricature organisations like the ANC as 'communist terrorists'. These misinformation campaigns also helped fuel the fear of white South Africans and helped ensure public support for apartheid from this sector of society.

Therefore, access to information became an important terrain of struggle for the liberation movement. Information about the reality of South Africa helped win international and local support for the liberation movement. By the early 1990s, the extent of internal opposition and international condemnation of apartheid (in the form of sanctions), left the South African economy in tatters and the state increasingly iso-

lated. The apartheid state had no choice but to release the leaders of the liberation movement like, Nelson Mandela, and begin negotiations with the anti-apartheid movement. In 1994 South Africa held its first democratic elections and Nelson Mandela was elected president.

Transition and the New Constitution

Between 1990 and 1994, South Africa went through a major transition as apartheid was beginning to be dismantled. Probably the most important aspect of this period was the introduction of the interim constitution that would provide a new framework for the manner in which government would operate. This included a progressive Bill of Rights guaranteeing all South Africans equal rights. The supremacy of parliament was abolished and the new constitution was established as the supreme law of the country. Under the new constitution, the Constitutional Court was established, which would ensure that people's rights are protected protected and that government legislation would reflect the spirit of democracy and respect for human rights.

Access to information was an important aspect of the new constitution. Section 23 of the Constitution provided for the right of everyone to access any information held by the state or any of its organs at any level in so far as such information is required for the protection or exercise of individual rights.

The 1996 Constitution

Parties who participated in the 1994 elections were allowed to send representatives in proportion to the number of votes they received in the national election to a Constitutional Assembly. This Assembly would be responsible for the development of a new constitution. Although the African National Congress (ANC) received the majority of votes, it did not get a clear two-thirds majority. This meant that no one party would be able to dominate the constitution-making process and controversial aspects of the constitution would be remedied by building consensus amongst different interests and parties.

In 1996 the new constitution was adopted.

As in the interim constitution, the right of access to information was included in the 1996 Constitution. Section 32(2) of the Constitution reads:

Everyone has the right of access to:

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

The most important difference between the Constitution and the interim constitution is the manner in which the former extends the right of access to information held by the state. So, where the interim constitution only allowed for the right of access to information if the information was needed for the protection or exercise of any other right, the scope is much broader in the Constitution. Here the right applies to any information held by the state regardless of why a person needs the information. The Constitution also allows for access to information held by private bodies. However, in this case, the information must be required for the 'exercise or protection of any right'.

The making of the Act: A Short History

The Promotion of Access to Information Act (PAIA or Act) was enacted as a requirement of the Section 32(2) of the Constitution which states:

> *National legislation must be enacted to give effect to this right [the right of access to information], and may provide for reasonable measures to alleviate the administrative and financial burden of the state.*

The actual process of drafting the Act may

be traced much back to the development of the Open Democracy Bill (ODB). In 1994 the newly elected Deputy President, Thabo Mbeki, appointed a task team to look at how the constitutional ideal of a transparent, accountable and open democracy could be realised.

In 1995, the Freedom of Expression Institute (FXI) also initiated the formation of an Open Democracy Advisory Forum (ODAF) that would provide a framework for civil society to make submissions on both the process and the Bill. In October 1996, the task team reported that an Open Democracy Act was need to give full expression to this ideal. The task team then began working on this piece of legislation which was presented to Cabinet in 1996.

There were four principle elements of the draft Bill:

- A freedom of information section, applicable to information held by government bodies;
- A privacy section, providing for the correction and protection against unauthorised use of personal information held by both governmental and private bodies;
- An open meeting section, requiring government meetings to be open to the public;
- A whistleblowers' protection section, which would protect persons who disclosed evidence of a contravention of the law or maladministration from civil or criminal liability or from disciplinary procedures.

The Bill also envisaged the creation of two new bodies aimed at implementing and protecting the principles of the proposed Act: an independent Open Democracy Commission and Information Courts were to be set up.

In 1998, the Cabinet presented parliament with a substantially modified version of the Bill. The new Bill, called Bill 67, made the following modifications:

- The open meeting chapter of the bill was deleted;
- A blanket exemption of information held by Cabinet was included;
- All sections relating to the creation of Information Courts and an Open Democracy Commission were removed. Instead, the draft Bill transferred many of these duties to the Human Rights Commission (HRC)5.

The Parliamentary Ad-Hoc Committee on Open Democracy then made further changes to the Bill. Most significantly, the revised version of the Bill removed the sections relating to the protection of privacy. Instead these would be covered by separate pieces of legislation. The revised Bill also elaborated on the right of access to information held by private bodies. This revised version was presented to parliament and passed in January 2000, now called the Promotion of Access to Information Act.

On the 9th of March 2001 the Act came into effect, with the exception of four sections that would gradually be implemented. The Minister of Justice also published the prescribed forms to be used in making requests, the fees that would be charged, and forms of notice for internal appeals[6]

Flashpoints: ODB to PIAIA

- In 1994 a legal task team is set up by Thabo Mbeki, then Deputy President, to investigate how legislation could give effect to the constitutional right to access information.
- The Open Democracy Advisory Forum (ODAF) is established to extend consultation on access to information legislation. ODAF includes representatives from civil society and experts on document management.
- ODB is sent to cabinet in 1996.
- ODB is published in October 1997 with changes made to the original Bill.
- Many organisations make submissions on the revised Bill.
- A new draft of the Bill is published in

June 1998.

- In July 1999, the Human Rights Commission holds a major workshop on the Bill.
- In August 1999, the National Assembly adopts a resolution that the Bill be introduced in Parliament during the parliamentary sessions following the general election and is referred to an Ad Hoc Committee on ODB.
- In September 1999 further submissions are called for, although groups are asked not to resubmit comments forwarded to the Committee previously.
- Further public hearings are held in October 1999.
- In November/December 1999, the Committee deliberates on the draft of a new section on access to information held by the private sector. It is also rumoured that ODB will be revised in three separate pieces of legislation.
- In January 2000, the Act is passed excluding sections on privacy and protection of whistleblowers. However, a new section dealing with information held by public bodies is included in March 2001 when the Promotion of Access to Information Act comes into operation and the Department of Justice releases PAIA regulations and fees.

5 The South African Human Rights Commission is a body set up under Chapter 9 of the Constitution to monitor and consolidate the extent of the protection of human rights.

6 Under the Act, if a person wants to challenge the decision to grant or deny access to a particular record held by public bodies, he or she may appeal the decision and make a presentation to the authority charged with hearing such appeals. For more on internal appeals see chapter 3

The Act and the Constitution

In a Commentary on the Promotion of Access to Information Act, developed by the University of the Witwatersrand, the authors pose the question of the extent to which it may be said that the new Act exhausts the scope of the constitutional right of access to information as it is expressed in Section 32. Or, put differently, now that the national legislation has been enacted what is the status of Section 32? Is it still possible to rely on the direct application of the constitutional right?

The Commentary suggests that answering this question depends on what status is given to the Act. Two possibilities are provided:

> The Act is the entire expression of the right of access to information (that is it can be said to 'create' the right)
> **OR**
> The Act merely makes the right created by the Bill of Rights effective.

Which view is taken has important implications. By the first reading, there is no way of invoking the right expressed in the Bill of Rights and the Act should be treated as the final word. On the other hand, if we take the second view, the Act works only to 'elaborate on the right and provide for a framework of remedies to vindicate it'.

While the Constitutional Court will have to decide on this matter if such a conflict arises, it seems that the second view is favoured. Some theorists argue that it would not make sense to have a Bill of Rights that could be amended by ordinary legislation. Under the Constitution, Parliament may elaborate on rights protected by the Constitution. However, the Commentary argues that this cannot be seen as the power to 'construct the right as it sees fit'.

This means that the protection of records held by Cabinet under the Act may be circumvented by the direct application of the constitutional right. It also means that many aspects of the Act may be tested

against the Constitution. Another feature of the Act in relation the constitution, is that it speaks only about access to records. Information is not always relayed in the form of records.

In 2001, the Mail and Guardian newspaper carried a story about an opposition member of Parliament requesting the record of the probe into corruption in a large arms deal. The request was denied.

Reflection and discussion
Do you think it would be in the interest of the public for the report on the arms deal to be made public? Why?

While reading the next chapter, think about whether the Act expresses the spirit of the constitutional right to access to information. How far can the Act be said to 'give effect' to that right?

Chapter 3

The Promotion of Access to Information Act

It is extremely important that all sectors of society are able to use the Act. However, without a legal background it can be very difficult to come to grips with the technical aspects of the Act and what it intends to do. This chapter tries to explain the Act as easily as possible without sacrificing the need for a comprehensive understanding of the Act.

Why do I need to know the Act?

It is extremely important when using the Act to know how it works. This not only guards against the refusal of records because the correct procedure for requests wasn't followed but, more importantly, it ensures that people understand their rights and can hold public and private bodies to their obligations under the Act. It also allows you to think about the limitations of the Act and how these can be addressed. Finally, in order to ensure that as many people as possible participate in the extension of democracy in South Africa, it is important that people understand their rights and are able exercise these. Knowing the Act helps you to do this.

A User's Guide to the Act
The Aims and Objectives of the Act

The aims and purpose of the Act are listed in Section 9. These set out the framework for the principles and rationale of the body of the Act.

The first and most important object of the Act is to 'give effect' to the constitutional right of access to any information. This means that it will elaborate on the constitutional right of access to information as is stated in the Bill of Rights. It does so by setting out the procedures and mechanisms for obtaining any records held by public bodies, as well as records that are in the possession of another person or private body. However, in the case of private bodies, there are different principles governing records. The most important difference is that while you may obtain records from public bodies without having to say why you need it, **when requesting records from private bodies, the record must be 'required for the exercise or protection of any right'**.

The constitutional right and the title of the Act use the word 'information'. However, the Act only legislates a right and the procedures to access records. So if information is not kept in a 'record', the Act cannot be used to obtain it.

The Act also aims to set out the limitations of the right of access to information. These include limitations aimed at protecting other rights like the rights to 'privacy, commercial confidentiality and effective, efficient and good governance'. The Act tries to ensure that the right to access to information, as it is stated in the Bill of Rights, is balanced with other rights. For

instance, the Act must deny a request for information if it would reveal personal information about someone, like his or her HIV status. In this case, the Act must take into account a person's right to privacy which is protected under the Bill of Rights.

The third aim of the Act is to extend the ambit of the previous right of access to information by including public bodies within its definition of a 'requester'. This allows the state to make requests for information from public bodies in fulfilling its obligation to promote 'a human rights culture and social justice'.

The Act also aims to set out what voluntary and mandatory mechanisms can or should be put in place in order to ensure that the right of access to information may be exercised as 'swiftly, inexpensively and effortlessly as is reasonably possible'. This could mean the publishing of minutes of meetings or information about the work that is being done by a body.

Finally, the Act aims to 'promote transparency, accountability and effective governance of all public and private bodies'. This includes ensuring that mechanisms are put in place whereby individuals and organisations can constructively participate in the exercise and protection of their rights. This includes obligations to help people understand their rights under the Act, how public bodies work, and ways in which they may participate in the work of a particular body as these relate to their rights.

The Act may be said to do four things.

- It attempts to give effect to the right of access to information as it is stated in the Constitution, including stating the obligations of the state.
- It attempts to delineate some of the limits of that right.
- It attempts to extend the scope of previous legislation allowing the state to request information from private bodies, by including it within the definition of a 'requester' under the Act.
- It attempts to develop mechanisms to ensure governance based on principles of an open democracy and guided by respect for human rights and social justice.

Who can request information?

In theory, anyone can request information/records. If a private individual, corporation, organisation or even a government body wants information/records held by another entity and makes the request in the prescribed manner, the Act cannot be used to discriminate against the application. While other exemptions may apply depending on the type of information requested, information cannot be refused because of who you are. Minor children require the consent of their parents and persons acting on behalf of companies or non-profit organisations must be properly authorised to request records.

Who does the Act allow you to request information from?

The Act allows individuals and organisations to request information from both public and private bodies. In terms of the Act, a private body is a company or organisation that has no connection with government and is privately controlled or owned.

Public bodies, on the other hand, refer to government departments, bodies created under the Constitution, like Parliament or institutions like universities or parastatals (like Telkom) which are set up within a particular legislative framework and perform a public function. The forthcoming privatisation of Telkom makes it an unsuitable example though.

There are, however, differences in the manner in which the Act deals with information held by public bodies and that held by private bodies. In the case of a private body the record must be required for 'the exercise or protection of any right'. In cases where a private body performs a public function (for instance if a private company is contracted to collect garbage or provide

health services on behalf of a public institution), then some of its records will be treated as those of a public body and some of those of a private body, specifically as they are related to the functions that the body performs.

So, under the Act you can request records/ information from:

- Any department or national or provincial administration or any municipality; or
- Any official or institution when they exercise a power or perform a duty in terms of the Constitution or a provincial constitution; or
- Any official or institution when they exercise a public power or perform a public function in terms of any law; or
- Any private body (note that this does not include a private individual, but only their records as they relate to their business, trade profession, etc. (see Section 1) when required for the exercise or protection of any right

The Act does not apply to:

- The Cabinet
- A committee of Cabinet
- A Member of Parliament
- A member of the provincial legislature
- The judge of a court or the judge of a special tribunal.

This does not mean that the constitutional right of access to information cannot be used to get information from these persons but simply that the Act does not apply to records held by them related to the specified functions.

Reflection and discussion

Do you think the restriction of information from Cabinet and other important intuitions like Parliament reflects the spirit of the aims discussed above?

Can you think of a reason why someone may take a different view?

Requesting information from a public body

Under the Act there are a number of obligations that public bodies must meet in order to ensure that proper systems for accessing records are put in place.

What must public bodies do to ensure that records are made available to the public?

Under the Act the Information Officer is legally defined as the most senior executive officer of the body. The Information Officer is an important functionary within the Act since it is his or her application of the Act that will determine whether access to a record held by a public body will be made available, without going to court. This means that the final responsibility for a request for information falls on the Director General or a Municipal Manager of a particular public body, that is the most senior person of the public body. He or she **must also appoint Deputy Information Officers** depending on the amount or scope of records held. A public body must appoint as many Deputy Information Officers as is necessary to ensure that information is made easily available.

The Information Officer may also pass on his duties and functions to a Deputy Information Officer. This must, however, be done in writing. In spite of this the Information Officer can still exercise his or her function under the Act at any time (because of the likelihood of delegation the text will use the term 'Information Officer' to include his or her deputies as well). It is extremely important that Information Officers have a good knowledge of the Act and its application since the Act allows them a large degree of discretion in processing requests.

Under the Act all contact details of Information Officers must be published in the telephone directory. The costs and responsibility for ensuring that this aspect of the Act is met falls on the National Department of Communication Services (Section 16 of

the Act).

Information Officers also have an obligation to ensure that requesters are given as much assistance as possible when requests for access to records held by public bodies are made. We look at these obligations later in this chapter.

Every public body must also prepare a manual. The information manual of every public body must contain:

- A description of the body;
- Its contact details;
- Details on how to obtain information from it;
- Information about the types of records it holds;
- A description of the records which are automatically available to the public;
- Information about the guide to the Act prepared by the Human Rights Commission and how to obtain it;
- A description of the services of that body and how to get access to these services;
- Information on how the public may get involved in the policy making processes, and functions, of that body;
- The manual must also contain information on how a decision on a request may be taken further. (Section 14 of the Act)

The Ministers of Justice and Constitutional Development may also prescribe what other information should be included in the manual. The information manual of all public bodies must be regularly updated (at least once a year) and published in three official languages.

In cases where two public bodies perform the same, similar or a closely linked function, they may place a request to the Minister of Justice to be allowed to prepare a combined manual. A public body may also request an exemption from the obligation to prepare a manual if there are financial, security or administrative reasons preventing it from doing so.

It is always a good practice for bodies to make as much information as possible automatically available. This not only cuts the administrative burden of dealing with requests, it also encourages democratic and accountable governance. Section 15 of the Act deals with **voluntary disclosure and the automatic availability of records.** Although it does not specify which records must be made automatically available, the Act places an obligation on all public bodies to submit to the Minister of Justice a description of all information that is made automatically available. It must also include which records are available in terms of other legislation as well the costs involved (if any) for purchasing the record. This must be done at least once a year. The Minister will then publish this information and ensure that it is kept updated (Section 15 of the Act).

While the Act allows for a great deal of flexibility in dealing with requests, it is important that proper structures and systems be created in order to meet the demands placed on public bodies under the Act. **Public bodies should have clear guidelines on how requests are processed which reflect the spirit and aims of the Act.**

Public bodies also need to put in place systems for dealing with internal appeals (see below).

Finally, all public bodies must submit a report to the Human Rights Commission relating to requests made under the Act. This must be done once a year.

Submission of Requests

In relation to public bodies it does not matter why someone needs a particular record. The Act only requires that you complete a prescribed form in order to gain access to records held by the public body.

What do I need to do in order to

access information from a public body?

The first thing needed when requesting records/information from a public body is the prescribed form. Once this form is completed the requester may submit his or her request to the Information Officer of the public body concerned (how the request is sent does not normally matter. A requester can send requests by e-mail, normal post or using a fax machine).

Information Officers of public bodies have an obligation to assist requesters in processing requests. In cases where the requester has not filled out the form correctly or cannot because he or she is illiterate, the Information Officer must assist the requester in submitting the request in the proper fashion.

If a request is going to be denied because the requester did not follow the correct procedures or, filled out the prescribed form incorrectly, the Information Officer must inform the requester of this and assist him or her to correct the mistake and resubmit the request.

The Act also anticipates cases where requests are made to the incorrect public body. Another public body may be in possession of the record or the information contained in the record falls under the operations of another public body. In such cases, the Information Officer must inform the requester and help him to ensure that the request is submitted to the correct public body. This could mean assisting the requester in resubmitting an application to the correct body or else directly transferring it, whichever is quicker. If the Information Officer does transfer an application it must be done within 14 days and he or she must inform the requester why the request was transferred and the timeframe in which the request must be dealt with.

Section 18 of the Act specifies the minimum information that must be supplied when requesting access to a particular record. **When requesting a record under this Act you will need to provide the following information:**

- Personal information that would include your name and identity number;
- Information required to ensure efficient communication between the public body and the requester like his or her postal address, email, telephone number or fax number;
- The requester's preference for the form in which the information is made available and whether a copy is needed (in some cases requesters may not require a copy of the record, which would increase the cost of accessing the record, and may simply want to view it);
- The requester's preference of language in which the record/information should be made available;
- The manner in which the requester should be informed, in addition to the standard written reply about the decision on whether their request has been successful (For instance, a requester may want to be called on the telephone once a decision has been reached rather than wait for the written response).

It is always a good idea to provide as much information to help ensure that requests are dealt with as quickly and efficiently as possible. There needs to be enough information to enable the information officer to identify the record.

How long will it take?

As a general rule requests should be processed as quickly as possible. However, the Act requires that the Information Officer make a decision within 30 days.

A public body can apply for an extension, but only in certain cases:

- If finding the record involves searching through a large amount of infor-

mation and if searching for it within the 30 day time frame would disrupt the activities of the public body;

- If the requester consents in writing to an extension;
- If the request requires searching through records kept in an office that is in another town or city, making it difficult to keep to the standard time-frame;
- If the public body needs to consult with another entity before a decision can be reached and this cannot be done within the standard time-frame.

The Information Officer must, however, inform the requester in writing within 30 days of the request being submitted. The letter must state the new time frame for making a decision and the reasons for the extension. The requester must also be told that he or she can lodge an appeal against the extension and how he or she may go about it.

When a decision is made the requester must be informed immediately. If the request has been granted, the Information Officer must inform the requester of the access, additional costs, and how he or she may appeal these fees.

Does it matter in what form the information is kept?

In most cases it should not. The Act makes clear that information may be accessed regardless of the form in which it is stored. Requesters can, for instance, gain access to records kept on computer, film or paper. If for some reason the requester cannot gain access to a record because of the form in which it is kept (for instance if the requester has a disability like blindness), the Information Officer must take 'reasonable steps' to ensure that the record is made available in the appropriate form.

Where possible a requester should also state his or her preference regarding the form of the record. Although there are cost considerations that will be communicated to the requester, in general, records should be made available in the form that they are requested.

How much will it cost?

Under the Act a public body may charge a fee for records. This fee is divided into three categories: a general fee paid before the record is processed, an access fee for the time it takes for the Information Officer to find and prepare the record, and a fee for making a copy of the record.

The fee structure for public bodies in 2003 was as follows:

Request fee	R35. This is payable before a request is processed.
Access fee	R15 per hour. However, the first hour of the search is free. If the search is likely to take a considerable period of time the Information Officer may ask the requester for a deposit of not more than a third of the total access fee.
Copy of record	This fee differs depending on the form in which the information is given. However,record it will cost 60 cents per page for printed records.

When requesting information about yourself, a public body cannot charge a request fee.

Which records will I not be given access to?

Besides the non-applicability of the Act to certain records mentioned above, such as those of Cabinet, the Act includes numerous categories of information that may or must be denied. Sections 35 to 43 of the Act stipulate records that might not be made available. In general, these limitations are argued as being necessary to ensure that the right of access to information does not infringe on other rights. An obvious example is the conflict between the right to privacy and the right of access to information. Nevertheless, there has already been a huge outcry around the length and scope of these limitations and the final test of the Act will be the extent to which it is shown to reflect the right as it exists in the Constitution. It is important to note that **none of these limitations apply if disclosure of this information would reveal evidence of the contravention of a law, an environmental or safety risk or, if the public interest in making available the record outweighs the potential harm that access to the information could cause.** This is called the public interest override. PAIA provides for the following limitations to the right of access to information:

It is important to be aware of the difference between mandatory and discretionary non-disclosure. Mandatory non-disclosure is indicated by the word "must". In such cases., the Information Officer is not allowed to give the record. Discretionary disclosure is indicated by the word "may" and then the Information Officer can decide to give the record or not. In deciding to refuse or not the Information Officer is exercising a discretion. This exercise must be justifiable as a reasonable decision.

If a request is made that would 'unreasonably' disclose personal information about a 3rd party it must be refused. For instance, if a request for a particular record would disclose a person's medical records it would violate that person's privacy under the Bill of Rights. However, there are exceptions to the limitation. These are:

- If the 3rd party to whom the limitation applies agrees to allow the requester to view the record;
- If the information contained in the record relates to the physical or mental health of a person under the age of 18 who is incapable of understanding the nature of the request. However, the requester must be acting in the best interests of the person and be the legal guardian of the person to whom the record relates;
- If the person to whom the record relates is dead and the requester is the next of kin;
- If the information is about an official of a public body and relates to his or her official functions including title, contact details and responsibilities.

The second limitation is aimed at protecting records held by the **South African Revenue Services (SARS).** Information relating to the collection of taxes must be denied. However, if the record requested from SARS relates to the requester it cannot be refused.

The Act also protects **'commercial information'.** Requests for records that would reveal trade secrets, financial or scientific information relating to a 3rd party must be refused. This includes information supplied in confidence and/or would place a 3rd party at disadvantage in commercial competition. However, if the 3rd party agrees to allow the requester access to the information, the limitation does not apply. This is also the case if the information is already publicly available.

The Act also protects records containing information that carries a **duty of confidentiality.** For instance, if providing access to particular information would infringe on a confidentiality agreement with a 3rd party, the request must be denied. In cases where information was supplied in confidence, although no formal confidentiality

agreement existed, and it would prejudice the further supply of such information (deemed to be in the public interest), the information may also be refused. The South African Police Services (SAPS) may, under this limitation, deny access about a particular crime if it would compromise their ability to gather information from a particular informer. Again, where the 3rd party agrees to allow the information to be disclosed, or if it has already been made publicly available, the limitation will not apply.

If granting access to particular record/information could threaten the life or physical safety of a person, a request for that record/information must be denied. Information that, if disclosed could threaten the safety and security of building or other property, may be denied. Information may also be denied if it would compromise the effectiveness of a system or plan aimed at protecting the public or property.

The Act also aims at ensuring the integrity and effectiveness of the criminal justice system. Requests for information/records that criminal procedure laws deny access to must be refused under the Act. The Act also provides grounds for refusal of information when it would possibly hamper or compromise the operation of the criminal justice system.

The Act may also be used to deny access to information relating to systems and methods of crime prevention and law enforcement if this information could potentially be used to undermine these systems.

It may be used to protect information that if disclosed, would make more difficult the prosecution of a person. This does not, however, apply to normal principals of discovery in legal proceeding.

If the requested information could possibly prejudice the outcome of a criminal investigation, a request may also be denied.

Where information can be used to break the law or compromise the integrity of a particular trial, that information may be refused.

The Act also allows public bodies the right not to comment on a record. The rationale here is that it may prove that such a record exists. However the Information Officer must stipulate clearly which aspect of the Act is being used and ensure that a requester may lodge an appeal or, if unhappy with the outcome of an appeal, may take the matter to court.

Privileged information must also be refused. For instance, the records of correspondence between a public body and a lawyer during a court case must be refused because the laws governing court proceedings treat such information as privileged. However, if the person that the record relates to consents to its usage, the Information Officer can give a requester access to the information.

The Act may also be used by government departments to deny access to records that are deemed to be in conflict with the **defense, security and international relations of South Africa.** A public body may therefore refuse access to a record if it can be shown to fall within these categories (However, records older than 20 years cannot be refused on the basis that they would compromise the international relations of the Republic). This section of the Act allows records to be refused if they contain information that:

- Was supplied in confidence on behalf of another state or international organisation;
- Was supplied by the Republic to another state or international organisation in terms of an arrangement or international agreement;
- Was required to remain confidential under international law and Sections 231 and 232 of the Constitution. This would include records containing information on:

I. Military tactics, operations and exercises;

II. Weapons;

III. The abilities of military personnel and security agencies;

IV. The state's activities in preventing, suppressing, and curtailing subversive and hostile activities against the state. For instance, information relating to activities of particular government institutions to prevent attempts to change the constitutional order by force may be refused;

V. Intelligence aimed at the defence of the Republic;

VI. Another country or international organisation in so far as the information is necessary for the state to use within the international affairs of the Republic;

VII. Spying techniques;

VIII. Identification of confidential sources

IX. The government's position on particular matters in international negotiations; and

X. Diplomatic correspondence.

Information that would likely compromise the **economic interests, financial welfare or the commercial activities of a public body** may be refused. Such records would contain information on:

a) Policies that affect money;

b) The regulation of interest rates and the activities of banks, government borrowing or policies affecting the regulation of the prices of certain goods. Such records could also include information that relates to taxes;

c) The sale or purchasing of property by a public body or details of international trade agreements.

Within this section, the Act also provides for the denial of records which contain trade secrets or, which would weaken the public body's position in trade negotiations and other forms of commercial activity. Again, in such cases the Information Officer may ignore these restrictions if another public body consents to making the record available, if the record has already been made publicly available or, if a public interest override can be shown to be apply.

The Act also protects **research information being conducted by a 3rd party** if disclosure of the information would compromise the research or the activities of the 3rd party. In such cases, public bodies must refuse access to the information. Where the research is being done by a public body the Information Officer may, for the same reasons, deny the public access to the record.

Access to a record that is a contribution in an ongoing internal process of a public body may be refused. For instance, a report submitted to the policy-making process of the public body may be refused. More generally, the Information Officer may refuse access to records which, if disclosed, would frustrate the public body's deliberations on a particular matter, or would compromise the success of a particular policy being implemented.

The Act may also be used to deny access to records in cases where the request is deemed to be **'manifestly frivolous or vexatious'** or the work involved in **processing the request would unreasonably divert the resources of the public body.**

Another category of information protected under the Act are records relating to a person's health. In some cases, the disclosure of information about a person's health may cause harm. In such cases, the Information Officer may, before making a record available, consult a doctor nominated by the requester. If the person is younger than sixteen or legally unable to take care of him or herself, then the guardian of that person will nominate a doctor. If it is then deemed by the doctor that the information would cause harm, the request must be denied unless the requester makes arrangements to engage in appropriate counselling or some other mechanism that would prevent

the anticipated harm. In such cases, the record must first be given to the person who will be responsible for the counselling.

The Act does not apply to records for current legal proceedings. If legal proceedings are already taking place and there is an existing legal mechanism to obtain the records the Act cannot be used to obtain such records for those legal proceedings. Records that fall into this category will not be allowed to be considered in court proceedings unless it is determined by the presiding judge to be in the interest of justice that they be looked at (Section 7 of the Act).

It may turn out that only some information protected by the Act is contained in a particular record. If it is possible to reasonably separate this information from the body of the record, the requester may be given access to the amended record. In such cases, however, the requester will only pay for the parts of the record to which he or she has been given access. The Information Officer must also clearly explain the reason for the denial of access to the complete record, as well as explain to the requester what procedures need to be followed if he or she wishes to appeal against the decision.

What happens when a 3rd party is affected by the content of a record?

Sections 47 to 49 of the Act stipulate that where a record contains information that relates to a 3rd party, the Information Officer must notify the 3rd party within 21 days of the request being made. The Information Officer must inform the 3rd party in writing about the nature of the request, the content of the record and the name of the person making the request. If a public interest override does apply, the Information Officer must communicate this to the 3rd party, as well as his or her reasoning in making this determination.

The Information Officer must also communicate to the 3rd party that he or she may comment on whether or not access to the information should be granted within 21 days. Representations made by the 3rd party must then be considered before making the final decision on whether to grant the request. This must all be done within 30 days of the 3rd party being made aware of the request. The Information Officer must also communicate the final decision to the 3rd party.

If the request is granted, the Information Officer must communicate the reason for doing so to the 3rd party, including the section of the Act that was used. If, however, the 3rd party cannot be contacted, this must be considered when making a decision on whether or not to grant access to the record.

Where a record is made available in spite of the 3rd party's objection, he or she may still lodge an internal appeal or court application, within 30 days, to reverse the decision. The information officer must ensure that this option is communicated to the 3rd party. Only after all appeal processes have been concluded in his or her favour, will the requester be able to gain access to the record.

Can I appeal against the decision of a public body?

Yes. Certain public bodies (government departments at all three tiers of government) must set up mechanisms for dealing with appeals where a request for access to a record has been denied, or a 3rd party wants to prevent a requester from gaining access to a record by which he or she is affected. This allows people to lodge an internal appeal on a decision made by the Information Officer.

The Act requires all government departments to create a system of internal appeals. This does not, however, apply to public bodies like universities (created by legislation) or Parliament (constitutional bodies).

The Act allows for appeals to be made directly to the 'relevant authority' of a par-

ticular department where:

- A person wants to challenge the decision to refuse his or her request for access to a record;
- A 3rd party wants to appeal the granting of a particular record to a requester;
- A requester wants to appeal the fees he or she is being charged;
- A requester wants to challenge the timeframe of the search for a particular record;
- There has been a refusal to give information to a requester in the form in which it was requested.

In terms of the Act, the relevant authority may differ depending on the kind of government department. For instance, the relevant authority in submitting an appeal to the Department of Education would be the Minister of Education. However, in most cases, this duty will be delegated to some other person as long as that person is not also the Information Officer (or one of his or her deputies).

During an internal appeal the relevant authority must consider the requester's reasons for lodging an appeal against the decision of the Information Officer, and the reasons given by the Information Officer for his or her decision.

Where a 3rd party is making an appeal against a record being disclosed, his or her representations must also be looked at. If a 3rd party is affected by the record but could not be contacted to be informed about the appeal, the relevant authority must also take this into consideration when making its decision.

Lodging an appeal

When lodging an appeal against the decision of the Information Officer, you will need to obtain the prescribed form. The form must be completed and submitted to the Information Officer within 30 days of being informed of the decision of the public body.

The form must include information about:

- The decision that is being appealed;
- The reason for appealing the decision;
- The form in which the person prefers to be informed about the decision of the appeal process;
- All personal information.

People lodging internal appeals also have to pay an appeal fee. Details of this fee will be communicated to the person by the Information Officer. If this fee is not paid, the relevant authority may decide to postpone their decision until the fee is paid.

Once the Information Officer receives the form requesting an internal appeal he or she must submit the appeal to the relevant authority within 10 days. He or she must also give the relevant authority the reasons for making a particular decision. If a 3rd party is also affected by the record, all information relating to this person must also be forwarded to the relevant authority.

Once the relevant authority makes its decision all parties affected by the appeal must be informed. They must also be given a reasonable explanation for the decision and the section of the Act that was used. The notice must also explain to all parties that the matter may still be re-considered in court and provide them with information about the procedures for such court applications.

Timeframes for internal appeals

As a general rule, the relevant authority must make a decision as soon as possible. However, without clear guidelines a public body may/might delay or frustrate an appeal process. The Act therefore sets out clear timeframes in terms of which the relevant authority must make a decision.

When a requester appeals against the refusal of a record and no 3rd party is af-

fected, the relevant authority has 30 days from the lodging of the appeal to make its decision.

When a requester appeals the refusal of a record and a 3rd party is affected, the relevant authority has 30 days after the notification of the 3rd party to make its decision.

When a 3rd party lodges an appeal against the granting of a record, the relevant authority has 30 days after the requester is informed of the appeal, or five days after the requester has made a written submission to the relevant authority, to make its decision.

Except where a 3rd party is affected by the record, if the internal appeal decides in favour of the requester's appeal, he or she must be given access to the record immediately. If, however, a 3rd party is affected by the record, access must only be given after 30 days of the decision of the internal appeal process. This allows 3rd parties to request the court to reconsider the granting of the record. Then, until the court proceeding is concluded access, to the record must be withheld.

Any decision taken by an internal appeal may still be challenged in court.

Lost records

The Act also anticipates cases in which records are lost or missing. If a request is received and a record cannot be found (after a proper search has taken place) the Information Officer must tell the person that he or she will not be able to access the record. The Information Officer is also required to provide an affidavit explaining the steps taken to try and find the record and what interactions were held with people who wanted access to the record. If a requester receives such an affidavit, he or she may treat it as a refusal of the request.

If the record is later found, and no reason exists to deny a requester access to the record, the requester must be given access to the record immediately.

Requesting information from private bodies

Who can ask for records?

Anyone can make requests to private bodies for access to records held by them. However, while the Act cannot be used to deny access to information because of who you are, the Act (in the sprit of the constitutional right) only allows people who need the record for the protection or exercise of any right to gain access to information. This means that when you request information from a private body, you will need to demonstrate which of your rights the record relates to and why access to the record is necessary for the protection or exercise of that right.

What must private bodies do under the Act?

While private bodies need to put in place mechanisms for dealing with requests, these are not of the same scope as public bodies. For instance, private bodies do not need to put in place systems for internal appeals.

Under the Act private bodies must/may do the following:

All private bodies must compile an information manual. Private body manuals must contain:

a) A description of the body;

b) Its contact details;

c) Information on how to obtain records held by the body;

d) A catalogue of the information it has;

e) Information about the manual prepared by the Human Rights Commission and how to get access to it;

f) A description of which records are automatically available.

Private bodies must publish this manual within six months of the commencement of the Act and it must be regularly updated.

There may, however, be reasons why a private body cannot compile a manual. In such cases the body may make a request to the Minister of Justice to exempt the body from publishing a manual. For instance, if the private body is a small or new business that does not have the financial resources to compile the manual, the body may apply for an exemption. The Act lists security and administrative obstacles as other possible reasons for submitting an application for an exemption.

A private body may want to make certain records automatically available. In this case, the private body can submit a description of what records are automatically available, how to get access to them, and the possible costs that are involved in purchasing a record. If information must be published because it is required by another law, the submission to the Minister must also contain information about these records.

Public bodies, however, are not required to make information automatically available. Instead, this is done on a voluntary basis.

Private bodies must also take steps to ensure the correction of personal information that it holds. For instance, a company must ensure that its debtor records are updated so that they do not compromise an individual's credit record.

Private bodies must devise systems for dealing with requests for records. This could include the appointment of a Deputy Information Officer (as in public bodies the Information Officer is defined as the most senior employee of the body). It is also important that private bodies have clear guidelines for making decisions that are informed by a clear understanding of the Act on whether or not to grant access to a record. Information officers will often be called upon to make a decision about whether to grant access to a record where there are complicated legal considerations.

Requesting information

As in the case of public bodies, there is a prescribed form for requesting access to records held by private bodies. In this form the requester will need to give the following information:

- Contact details of the requester.
- The requester's preference with regard to the manner in which he or she will be informed about the outcome of the request. In addition to a written response, a requester may want to be phoned as soon as a decision is reached;
- If the request is being made on behalf of someone else, the requester must give information about the capacity in which he or she is acting;
- The preferred form in which access to the record should be given (for instance the requester may want an electronic copy of the record on a stiffy disk);
- The right which the requester seeks to exercise or protect and the reason why this record is necessary for the protection and exercise of that right.

How long will it take?

As a rule, the Information Officer must inform the requester as soon as a decision is reached. The Act, however, allows the Information Officer 30 days in which to inform the requester of the outcome of his or her request in writing. This notice must also inform the requester of the cost involved and that he or she can challenge the extent of the charges in court. If the request is denied, the notice must inform the requester that he or she can request reconsideration of the decision in court and the date by which this must be done.

In some cases, the Information Officer may require an extension. The Information Officer may send a letter to the requester informing him about the extension, the period of the extension, and the reason for the extension. The letter must also inform the requester that he or she may make an

appeal against the extension in court. The Act lists the following possible reasons for extensions:

- If the finding of the record involves searching through large amounts of information and finding the record within the 30 days would disrupt the activities of the private body;
- If the private body needs to consult internally or with another body before making a decision and this cannot be done within 30 days;
- If the search involves collecting records from an office in another city or town and this cannot be done within 30 days;
- If no reply is received from the private body within 30 days, the requester can take this to mean that the request has been denied. The requester can then choose whether or not to go to court.

How much should it cost?

Under the Act a private body may charge a fee for records. This fee is divided into three categories: a general fee paid before the record is processed, an access fee for the time it takes for the information officer to find the record, and a fee for making a copy of the record.

The fee structure for private bodies in 2003 was as follows:

Request fee	R50. This is payable before a request is processed.
Access fee	R30 per hour. However, the first hour of search is free. If the search is likely to take a considerable period of time the Information Officer may ask the requester for a deposit of not more than a third of the total access fee.
Copy of record	This fee differs depending on the form in which the information is given.

Which records will I not be able to gain access to?

The Act also sets out numerous instances when access to a record either may or must be denied. These are:

- If the information contained in a record would disclose personal information about a 3rd party, it must be refused. As in the case of public bodies there are exceptions to this rule:
- If the 3rd party to whom the limitation applies agrees to allow the requester to view the record;
- If the information contained in the record relates to the physical or mental health of a person under the age of 18 who is incapable of understanding the nature of the request. However, the requester must be acting in the best interests of the person and be the legal guardian of the person to

whom the record relates.

- If the person to whom the record relates is dead and the requester is the next of kin.
- If the information is about an official of a private body and relates to his or her official functions including title, contact details and responsibilities.

The Act also protects 'commercial information' relating to a 3rd party. Requests for records that would reveal trade secrets, financial or scientific information relating to a 3rd party must be refused. This includes information supplied in confidence and/or would place a 3rd party at a disadvantage in commercial competition. However, if the 3rd party agrees to allow the requester access to the information, this limitation does not apply.

If granting access to particular information could threaten the life or physical safety of a person, a request for that information must by denied. Information that, if disclosed, could threaten the safety and security of a building or other property, may be denied. Information may also be denied if it would compromise the effectiveness of a system or plan aimed at protecting people or property.

Privileged information must also be refused. For instance, the records of correspondence between a private body and a lawyer during a court case must be refused because the laws governing court proceedings treat such information as privileged. However, if the person that the record relates to consents to its usage, the Information Officer can give a requester access to the information.

Records that contain commercial information relating to a private body may be refused. This includes trade secrets, financial, technical and scientific information. It also includes information that would place the body at a disadvantage in negotiations and commercial competition if disclosed.

The Act also protects **research information being conducted by a 3rd party** if disclosure of the information would compromise the research or the activities of the 3rd party. In such cases, private bodies must refuse access to the information. Where the research is being done by a private body, the Information Officer may, for the same reasons, deny the public access to the record.

Another category of information protected under the Act **is records relating to a person's health.** In some cases, the disclosure of information about a person's health may cause harm. In such cases, the Information Officer may, before making a record available, consult a doctor nominated by the requester. If the person is younger than sixteen or legally unable to take care of him or herself, then the guardian of that person will nominate a doctor. If the doctor decides that the information would cause harm, the request must be denied unless the requester makes arrangements to engage in appropriate counselling or some other mechanism that would prevent the anticipated harm. In such cases, the record must first be given to the person who will be responsible for the counselling.

As with records held by public bodies, it may turn out that a record contains some information that can be disclosed and some that cannot. If it is possible to reasonably separate these categories of information, a requester may be given access to the amended record. In such a case, the Information Officer must inform the requester why he or she cannot be given full access to the record (according to the Act) and how to go about appealing the decision.

None of these limitations, except the limitation relating to health records, applies if disclosure of this information would reveal evidence of the contravention of a law, and environmental or safety risks, or if the public interest in making available the record outweighs the potential harm that access to the information could cause.

The Act does not apply to records for current legal proceedings. If legal proceedings are already taking place and there is an existing legal mechanism to obtain the records, the Act cannot be used to obtain records for those legal proceedings. Records that fall into this category will not be allowed to be considered in court proceedings unless it is determined by the presiding judge to be in the interest of justice that they be looked at (Section 7 of the Act).

What if a 3rd party is affected by a record?

If a requester wants access to a record that contains information that affects a 3rd party, the private body must inform the person of the request within 21 days after the request has been received. The 3rd party must be allowed to make a representation whether to grant access to the record before a decision is made. The 3rd party must also be informed of the final outcome of the request. If the request is granted, the record will not be given to the requester immediately. The 3rd party has 30 days to lodge a court application to challenge the decision.

Can I challenge the decision of a private body?

Yes, if a requester or a 3rd party is unhappy about a decision to refuse or grant access to a particular record he or she may take the matter to court. This must be done within 30 days of the decision being communicated to the requester or the 3rd party.

Lost records

If a record cannot be found in spite of the fact that a reasonable search has taken place, the record will be treated as lost or non-existent. In such cases the Information Officer needs to complete an affidavit explaining what steps were taken to find the record. The affidavit must also include all information about communications between the body and people seeking access to the record.

If a requester receives such an affidavit he or she may treat it a refusal to grant access to the record and can take the body to court.

If the record is later found and a reason does not exist to deny the request, it must be made available immediately.

Role of the South African Human Rights Commission (SAHRC)

Under the Act the SAHRC has a number of duties in helping to promote and ensure the effective working of the Act.

The SAHRC must compile an easy-to-use guide to the Act containing:

A. A description of the functions of the Act.

B. The contact details of all Information Officers.

C. Information about private bodies.

D. Information on the procedures for requesting records from public and private bodies.

E. Information on what help the Information Officers of public bodies must give to requesters.

F. Information on what help is provided by the SAHRC in using the Act.á

G. Information about people's rights under the Act and how to go about exercising these rights.

H. Information about what manuals bodies need to compile.

I. Information about parts of the law that make possible automatically available records.

J. Information about the cost involved in requesting information.

K. Information about the forms prescribed by the Act and the rules that need to be followed when using the Act.

The guide developed by the SAHRC must be available in all official languages and must be regularly updated. The SAHRC must also collect reports from Information Officers relating to the requests that they have dealt with under the Act. The SAHRC

will use this information to submit annual reports to the National Assembly. These reports may include ways to improve the workings of the Act and access to information in general.

These reports must also contain the number of complaints received by the Public Protector regarding the Act and the manner in which the matter was dealt with.

The SAHRC will also need to conduct a series of education programs to improve people's understanding of the Act and their rights and to encourage a broader process of popularisation of the Act.

The SAHRC must also monitor the extent of the implementation of the Act, as well as offer support in the training of Information Oficers and assist in solving problems related to the implementation of the Act. The money required for these duties will come from the budget allocated to the commission by Parliament for its general operation.

Other legislation
If another piece of legislation is in conflict with this Act, PAIA takes precedence. According to the Act, if another piece of legislation is 'materially inconsistent' with the Act and used to deny access to a particular record, the PAIA overrides the other piece of legislation.

No person is criminally or civilly liable for anything done in good faith in terms of the Act.

Chapter 4

Evaluating Access to Information from Civil Society Perspectives

This chapter is divided into three sections. These concentrate on the relationship of the Act to different sectors of society. The first section looks at labour, the second at the media, and the third looks at civil society broadly.

Access to Information and the Labour Movement: Why Is Access to Information Important for Workers?

The Promotion of Access to Information Act & Labour

The South African labour movement welcomed the Open Democracy Bill, precursor to the Promotion of Access to Information Act, as significant legislation contributing to securing the constitutional right tof access to information for South Africans. In particular, COSATU7 emphasised the need to 'uproot' the 'culture of secrecy' in the private and public sectors 'cultivated by apartheid' in the attainment of the 'vision of an open and participatory democracy'.

However, the problem noted with the Open Democracy Bill relating to the lack of proactive mechanisms for the dissemination of information to the most disadvantaged, persisted. COSATU criticised the Bill for dealing with access to publicly held information only 'upon request' or as 'freedom of information', because such an approach did not consider resource disparities and would result in the main beneficiaries being the 'rich and the powerful, thus deepening the uneven balance between commercial and non-commercial information seekers' (COSATU's submission, March 1999).

While a legal framework for effecting the right of access to information was put in place, labour argued that there were still problems with the Bill in that it did not put in place sufficient mechanisms to ensure that all people enjoyed equal access to knowledge of the law itself.

'People require accurate and accessible information for meaningful participation in decision-making. In addition, they need information to make informed choices, and exercise and protect their rights. Further, information is required to hold the state and private corporations accountable.' (COSATU's Submission on the Open De-

mocracy Bill, March 1999).

Recognising the need to prevent the re-emergence of the apartheid-like 'culture of secrecy entrenched in the private and public sector', it is in the interests of labour that every effort be made to build an 'open and participatory democracy' for those who were deprived of their education, freedom of movement and freedom of expression under apartheid. To this end, several obstacles to access to information need to be fought for by workers:

Literacy

The fact that many South African workers cannot read is a major obstacle in the provision of information in the written form (almost 50 per cent of adult South Africans are illiterate and some 20 per cent have had any form of schooling.

Language

Although English is the language of communication in most of the labour movement, it is not the most easily or best understood most workers do not speak English as their first language. COSATU contends that 'the majority of our members cannot easily understand the information we provide, and struggle to interact meaningfully with it'.

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7 COSATU is the largest trade union federation in South Africa. Many of the aspect of this section are built on their submissions in respect of the Act. While COSATU cannot be said to represent the labour movement as a whole, the significance of is place within the labour movement makes it an important starting point for understanding labour in South Africa. COSATU was also one of the most vocal non-governmental institutions who contributed to the debate on the nature and shape of the Act.

Technology

The rapid growth in the use of more efficient technology (even by the union movement), is viewed as another obstacle in the provision of information to workers. New technologies like the Internet, which allow for a greater circulation of ideas, is extremely costly and unavailable to most people in South Africa. Labour does, however, see this as a challenge to face through investment in new, different, as well as informal forms of information dissemination.

In promoting the building of 'an open democracy', access to information is particularly important in the process of collective bargaining and in relation to the attainment of socio-economic rights as knowledge expands the choices open to workers, individuals and communities in the processes of decision-making and struggle. For example, a casual woman worker in a textile factory in Cape Town might decide to take a fulltime job that pays slightly less if she knows that changes in trade agreements could result in the closure of the factory in a few months time. With the intention to give effect to the right of access to information in the context of the above obstacles and in the knowledge that few South Africans have had access to information around the law and rights in the past, COSATU argues that access to information for the majority of South Africans can only be guaranteed in the context of 'The Right to Know'. In this context, the state must put in place mechanisms to provide information to the poor in order to empower them to participate in decision-making processes.

'In our view, information is not just a check and balance against the state, but a necessary condition to empower people's participation in decision-making' (COSATU's Submission, March 1999).

To this end, any mechanisms for taking access to information forward must incorporate 'a right to know paradigm', which would recognise certain categories of information as so important that government would be compelled to actively disseminate them to the public without the need for special requests.

In addition, trade unions should commit

themselves to building democracy through providing access to information on their own internal practices and structures. Most trade unions have already begun attempts at disseminating information and encouraging debate through newsletters, websites and press releases and conferences. How a trade union approaches its own internal promotion of access to information could provide examples for how best giving effect to the right of access to information can be achieved.

Positive Aspects of the Act

Workers now have a legal framework within which to argue for access to information from both public and private bodies in different situations.

With regard to public bodies, the Act provides for mandatory disclosure of government records indicating a threat to public safety or to the environment. It also directs government departments to proactively disseminate certain basic information about their functions. There is no stipulation as to the need to prove the protection of a right when requesting information from a public body.

With regard to private bodies, access to certain information may be requested if it can be shown to be necessary for the protection or exercise of certain rights. For more on this see Chapter 3 of this handbook.

Problems with the Act

The Absence of Mechanisms for Proactive Disclosure

The absence of stronger stipulations on the need for both private and public bodies to proactively release information that would affect workers, allows for certain kinds of information that could often prevent their ill health or allow them to make different choices about their lives and work being withheld. For example, the labelling of genetically modified foods could result in different lifestyle choices for individuals and communities.

This, together with the limitations of access to commercial information of both private and public bodies, can work against the interests of workers as the pressures of globalisation insist on the running of bodies providing basic services along the lines of private businesses.

With both private and public bodies having the space to restrict access to information that might jeopardise their 'economic or commercial interests' (see below), workers might find it increasingly difficult to access important information on the policies of utilities formed to provide services, such as water, electricity, housing, and health.

Another critical point to be noted is that outsourcing has major implications for access to information. For instance there is a greater responsibility to provide the requester with records in public bodies than there is for private bodies. For public bodies it does not matter why a record is needed, whereas the opposite applies for private bodies.

The inaccessibility of the Act itself to ordinary people, in terms of its language and the lack of processes to popularise it, as well as the many stipulations it makes in terms of procedures to be followed in accessing information, makes it difficult for workers who are not organised in trade unions to make use of it. The growing inability of labour to organise itself in the traditional ways due to globalisation changing the nature of work (to a more casual, flexible workforce and a growing informal sector) makes this significant.

Access to Information from Public Bodies

Access Fees

The requirement of payment of request and access fees (see Chapter 3) for records from public bodies can work as an obstacle to disadvantaged individuals, unions, and communities gaining access to important

documents and other sources of information. This could hinder the position of a community, union or individual in a dispute or discussion in which access to certain information could change their position or approach in the situation. In some cases, it might even prevent people from taking up a case.

Limitations of Access to Certain Kinds of Information

By the Act allowing public bodies to refuse access to certain kinds of information, such as that which might harm the 'economic interest and financial welfare of the Republic and commercial activities and bodies' and records relating to 'stopping subversive or hostile activities', large numbers of people are excluded from decision-making around issues relating to their socio-economic positions, as well as relating to their rights to protest against this. For example government positions on trade relations (e.g. agreements with regard to the World Trade Organisation) and agreements within the international financial institutions (including the International Monetary Fund and World Bank) are allowed to exclude inputs from workers.

There could also be a situation where the activities of workers are considered 'subversive and hostile' and information relating to their protection is kept from them.

Reflection and discussion

Considering the criticisms of institutions like the IMF, World Bank and WTO, what should happen to these institutions?

Many people argue that they need to be dismantled and the global economy needs to be ordered in a different manner. Do you agree? Why?

Access to Information from Private Bodies

Access Fees

With even higher request and access fees being required for information relating to private bodies (see Chapter 3), disadvantaged people are once again faced with an obstacle in gaining access to information that might be necessary for a case.

The Need to Prove Protection of Rights

With the Act placing the onus on the requester to prove the protection of rights in relation to accessing records from private bodies (see Chapter 3), individuals or communities without the capacity or skills to do this are prevented from exercising this right.

Limitations of Access to Certain Kinds of Information

Where the Act allows private bodies to refuse access to information in the interests of its own economic and commercial interests, it allows the private sector to decide on important key issues which might affect workers, unions or communities negatively.

While many traditional services historically provided by the state are now being provided by the private sector (for example health care, transport, policing, water, etc), a change of ownership has not resulted in a change in the nature of goods, products and services that are provided by these entities. Therefore a substantial degree of power over the lives of people is held by the private sector. Without access to information concerning the provision of these services, individuals and communities are powerless to engage meaningfully in discussions around the provision of services vital to their basic needs. In this way, profitability and the needs of the market are put before the needs of people. For example, an oil refinery might change manufacturing processes to increase productivity that results in an increase in the emission of toxic fumes in the area in which it is situated. Workers and residents might be prevented from gaining access to this information in the interests of the company's profits, preventing the community from taking preventive measures in coun-

tering several health risks. Here a test case would probably be needed in order to test the right to health and safety over the commitment to productivity. Labour could, however, argue that access to all information is a necessary precondition to co-operative governance in South Africa.

Similarly, workers could for example be denied the protection of their health and safety through refusal of access to significant research results. In the interests of competition, new research showing the toxicity of chemicals introduced in a factory could be kept from workers in that factory. Knowledge of this might have resulted in some workers choosing to stop working there.

Reflection and discussion
Consider a scenario in which a particular company holds information that would show that workers might be affected adversely by the chemicals that they are forced to handle as part of their work.

Should the company be able to withhold such information from the workers it employs?

Overriding Other Legislation

It is not entirely clear how the Act will be reconciled with other existing laws such as the Labour Relations Act (LRA) and the Employment Equity Act (EEA). PAIA states, however, that it should override other legislation if there is a conflict. Other laws like the LRA also contain similar clauses relating to their own precedence over other legislation.

It would appear that a test case would be necessary if a conflict arose between protections upheld the LRA and PAIA. For example, access to information relating to the salaries of managers of a company might be central to a fair collective bargaining process protected by the LRA, whilst PAIA would allow the company to withhold such information from the union.

Reflection and discussion
What kinds of information do you think is important for workers?

How can the Act be made to better reflect the information needs of workers?

Access to Information and the Media

The media plays an important role in disseminating information and promoting informed debate and discussion in society, thereby enhancing the promotion of democracy. Legislation should therefore facilitate the fulfilment of this role of the media in society. Media workers have responded with mixed reaction to the PAIA, welcoming its commitment to making real constitutional commitments to access to information, but also raising problems with some of its approaches and prescriptions. What follows is a summary of the main responses to PAIA by media workers.

Positive Aspects of PAIA

Media workers have welcomed the Act for its commitment to giving legal substance to the constitutional rights enshrined in the Bill of Rights, which guarantee the public the right of access to 'any information held by the State' and 'any information that is held by another person and that is required for the exercise or protection of any right'. Many have argued that the Act will give the public unprecedented access to much information that was previously kept from public scrutiny. In particular, media workers have welcomed the new rights given by PAIA to extract information from individual business people, companies, body corporate and other juristic persons, (for example, access to environmental information regarding the impact of industrial activity or pollution on communities, the results of drug safety tests, information used to accept or reject funding applications, etc).

There has also been commendation for the Act's attempts to encourage both government and private sector bodies to voluntarily and publicly disclose as much infor-

mation as possible through the Internet, as well as through print publications. Media workers have argued that this is an important step in the promotion of real transparency in society.

Problems with PAIA

Media workers have raised concerns with Section 7 of the Act which disqualifies requests for information if the information is intended for criminal or court proceedings. They have argued that this exemption is not very clearly worded, making it unclear whether this section could be used to exclude any information that might lead to legal action, or whether it excludes the use of information obtained through the Act as evidence in court. Media workers fear that this vague wording might be used to withhold or limit the use of certain information that could be damaging to either the state or private bodies.

Media workers have argued that the Act allows for the exemption of government and private sector officials from releasing information or reports used in the discussions by decision-making structures such as executive councils or boards of directors. It also does not state the length of time after documents and reports have been finalised, before which they need to become available to the public. Media workers have stated that, while they understand the need to keep draft documents and reports confidential while they are being discussed, there is a need for the public and the media to have access to these documents once they are finalised. They argue that the reports, minutes, opinions, and recommendations of institutional processes are vital to ensuring accountability of persons in official positions both in the private and public sectors.

The fact that fees need to be paid by all those requesting information from government, has proved a problem for the media. Media workers have argued that the fees, in particular the request fees, work to discourage ordinary and largely poor members of the public from even considering requests for information. Journalists working within smaller community media have registered their concerns that the fees will negatively affect their dealings with government. Journalists register numerous information requests with government on a daily basis and it is unlikely that smaller media organisations and under-resourced media workers will be able to afford to pay for all this information. Many media workers believe that basic information requests should not require fees, especially if requests are intended for wider public dissemination.

In many cases, particularly in rural areas, media workers provide an indirect service to government by publicising or distributing information about its activities and services. Some media workers have also expressed their fear at the are fees being used as a means of discouraging and preventing access to potentially damaging information by allowing officials to set exorbitantly high 'research' or 'access' fees for certain sensitive kinds of information.

Reflection and discussion

Can media workers collectively address the problem of fees for information they required?

How?

The absence of mechanisms open to media workers to appeal against government's possible The The absence of mechanisms for open media workers to appeal against government's possible rejection of specific information requests, has been another problem raised in relation to the Act. The Act stipulates that information requests are approved or declined by internal departmental or institutional Information Officers. Provisions for a special Information Court or Information Commission have been discarded due to budgetary constraints and, at present, all appeals against rejections are handled internally by the relevant departments.

If the media or public remain unhappy with the internal rulings on their appeals, they are forced to take the matter to the High Court at their own expense. This effectively ensures that it is only the wealthy that are able to enforce their rights of access to information and that people based in rural community media organisations and poorer individuals and groups are prevented from enjoying this right. In effect it prevents poorer, rural, community-based media from enjoying the same degree of access to information as the mainstream media.

The Act applies only to formal government and private sector records. This means that it applies only to information that has been recorded on paper or in electronic form. Media workers fear that this will allow for officials, politicians or companies to destroy potentially embarrassing information or to deliberately neglect to record such information.

One of the main concerns raised by media workers is the fact that the Act is extremely complicated, has very complex and often open-ended mechanisms for determining what information may not be requested, and has created a new set of bureaucratic measures which have to be carefully navigated. This may hamper the use of the Act by media workers. Tight and often inflexible deadlines, rapidly changing situations, and breaking news are not conditions under which journalists would find it easy to stand in queues, fill out forms, fight court battles and so on.

Despite these problems, we need to find ways of making the process of accessing information through the Act easier for media workers. Media workers could, for example, lobby for greater proactive disclosure of important information by institutions. Media groups could also come together with other organisations in civil society to argue that these problems to be addressed to ensure that the commitment to access to information is a reality and not just on paper.

Reflection and discussion
How can the impact of PAIA be maximised in the face of the problems raised by media workers?

Access to Information and the Civil Society[8]

In the first chapter of this Handbook, the Act was represented as both a challenge and opportunity for the transformation of South Africa into a truly open and democratic society. This is most keenly felt in relation to organised parts of civil society. Most theorists see civil society as performing a dual function in society. On the one hand civil society is seen as a 'watchdog' for government practices. On the other hand, it is the field in which non-governmental actors make direct interventions in extending democracy and development. In order for civil society to fulfil these roles clear guidelines on how information is collected and circulated needs to exist. PAIA attempts to offer such a framework.

Reflection and discussion
How effective do you think the Act is in meeting this goal?

The advantage of having such an Act is that it lays out clear guidelines for how non-government institutions may solicit information from government and private bodies. In spite of the bureaucratic nature of the Act, it may be usefully applied in broadening the extent of information about the practices of private and public bodies circulating in society. In this manner, civil society can use the Act to ensure that people are aware of what is going on in society, how those circumstances affect them, and how they may constructively interact with the processes that define their lives. For instance, the Act may be used by a community to gain access to information about the emissions and spills of substances that may effect the health of members of such a community. Having this information would allow the community to

begin thinking about steps to ensure that institutions responsible for pollution are held accountable.

On the other hand, there are a number of broad criticisms of the Act and its usefulness to civil society.

One such criticism emerges from the gender movement. Webster, in a paper on the Act argues that gender, and information related to gender inequality, is often ignored in legislation like PAIA. In order for groups fighting against gender inequality to be more effective, the collection of information needs to focus more directly on the situation of women in South Africa. This means that information related to gender inequality or violence against women needs to be prioritised. This goes beyond the 'record-centric' nature of the Act, and moves towards the circulation of information needed for consolidating and strengthening campaigns in which civil society is involved.

8 Although there are different views as to what constitutes civil society, for the purposes of this Handbook we will treat civil society as that section of society that is not directly linked to either the state or the market. Many of the points made with respect to the media and the Act and labour and the act, mentioned avove, are also relevant for this section

The 'mainstreaming' of information necessary for civil society to engage in various campaigns and ensure that government is made accountable, as is argued in relation to gender, is a necessary intervention for civil society. A possible strategy in this regard is for different groups to pool their resources and information when submitting requests.

Civil society should also collate information around departments and private bodies that regularly and systematically deny people access to records so that appropriate measures can be taken against these bodies.

Another important intervention in relation to access to information is the need to broaden the extent of voluntary disclosure of information held by the state and private bodies. As in the case of labour, the creation of a framework which facilitates greater accountability and an open democracy requires clear guidelines for information to be made automatically available based on a principle of the 'right to know'.

Reflection and discussion

What types of information do you think should be made automatically available?

What strategies may be used to ensure that more information is made automatically available?

Another important task for civil society is to ensure that the Act works better. This does not only mean holding governments and private bodies to their obligations under the Act but, more importantly, it means asking how the Act can be made to better represent the constitutional right of access to information. This could entail legal challenges of aspects of the Act (like the fee structure) or broader campaigns that are aimed at 'de-bureaucratising' systems for accessing information.

Beyond the Act

The Act is just one moment in the creation of an open and democratic society. Rights activists need to understand how to use the Act and its limitations. Legislation alone will not ensure the free circulation of ideas and information. It is only when people use and extend the framework for access to information that we begin to move closer to this goal. The challenge presented by the Act is to remove the bureaucratic obstacles created by such legislation and create new systems that ensure that all people are able to contribute to the shaping of their world.