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Right to know: Case Study of South Africa

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I hereby declare that I have read and understood the regulations governing the submission of Master of Philosophy in Law (MPhil) dissertations, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations.

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Abbreviations

ACHR-	American Convention of Human Rights
ANC-	African National Congress
ASP-	Afro Shirazi Party
CCM-	Chama Cha Mapinduzi
CESCR-	Committee on Economic, Social and Cultural Rights
CHADEMA-	Chama Cha Demokrasia na Maendeleo
CHC-	Consolidated Holdings Corporations
CODESA-	Conference for a Democratic South Africa
CUF-	Civil United Front
DAC-	Department of Art and Culture
DIO-	Deputy Information Officer
DOD-	Department of Defence
DOJ-	Department of Justice
GCIS-	Government Communication and Information Service
ICCPR-	International Covenant on Civil and Political Rights
LDB-	Legal Deposit Bill, 1997
MCT-	Media Council of Tanzania
MISS-	Minimum Information Security Standards, 1996
MOAT-	Media Owners Association of Tanzania
NARSA-	National Archives and Records Service Act. No. 43, 1996
NIA-	National Intelligence Agency
ODAC-	Open Democracy Advice Centre
PAIA-	Promotion of Access to Information Act
PAJA-	Promotion of Administrative Justice Act
PDA-	Protected Disclosures Act 26, 2000
PEUDA-	Promotion of Equality and Unfair Discrimination Act 4, 2000

PIA-	Protection of Information Act No. 84 of 1982
POAC-	Public Organisations' Accounts Committee
PSC-	Public Service Commission
SAB-	South African Breweries Ltd
SAHA-	South African History Archive
SAHRC-	South African Human Rights Commission
SAPS-	South African Police Service
SARS-	South African Revenue Service
SASS-	South African Secret service
SSC-	State Security Council
TAC-	Treatment Action Campaign
TANU-	Tanganyika African National Union
TRC-	Truth and Reconciliation Commission
UDHR -	Universal Declaration on Human Rights

Dissertation title: Right to know: Case Study of South Africa

Abstract

The Republic of South Africa became democratic after it succeeded to come out of a long time 'scourge' of the apartheid system which violated quite a number of human rights. One of the tools employed during that era was unnecessary secrecy which hampered citizen's right to know. When South Africa held its first election in 1994 it commenced a new South Africa without apartheid; it aimed at embracing human rights and to do away with all bad laws existing before a democratic South Africa. Consequently, the supreme law of the Country, the Constitution of 1996, entrenched human rights law amongst which is the right to access to information held by the State and another person that is required for the 'exercise and protection of human right'. This was underscored in section 32. This right started to appear in the interim constitution of South Africa of 1993, but was amended in the current constitution by the addition of a subsection which directed that 'national legislation must be enacted to give effect to this right...'

The provision of the Constitution was effected by enacting a legislation of the Promotion and Access to Information Act of 2000) (PAIA) which put in practice the directive of the Constitution. This minor dissertation intends to make a follow up of how this right is being implemented in South Africa. In doing so, the right to know will be examined in relation to institutional and cultural secrecy. Briefly, the dissertation will seek to answer the questions: i) what are the legislative norms which have been put in place to promote and safeguard this right? and ii) are there limitations and challenges to this right?

Then at the end of this dissertation, the research will present a comparative study with Tanzania, the country of origin of the present author, where the right to know is recognized by the Constitution of Tanzania but remains ineffective for lack of concrete laws to enforce the right of access to information. In a state where there is no law providing for public access to government information, this work can present a lesson from South Africa. Furthermore, it is hoped that this dissertation can contribute ideas at this moment when Tanzania is in a transitional process of making a new Constitution.

Chapter one: Introduction

1.1 Background

The right to know[1] is one of the basic human rights stipulated in the Universal Declaration on Human Rights (UDHR) which was declared on 10/12/1948. Article 19 of the declaration states that: 'Everyone has a right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, to receive and impart information and ideas through any media regardless of frontiers'. Consequently many other global and regional covenants and treaties followed suit: the Organization of American States through the American Convention of Human Rights,[2] the Council of Europe through its Convention for the Protection of Human Rights and Fundamental Freedoms[3]. The International Covenant on Civil and Political Rights (ICCPR) which was adopted on 16/12/1966 almost repeated the content of the UN declaration in article 19.

The African region to which South Africa and Tanzania belong affirmed the right to know through the African Charter on Human and Peoples' Right. Article 9 of the African Charter stipulated that: '[e]very individual shall have the right to receive information'. Furthermore, it states that '[e]very individual shall have the right to express and disseminate his opinions within the law.'[4] Sweden is said to be the first nation in the World to have a legislation on freedom of information. This was an 'ordinance relating to freedom of writing and of the press'[5] issued on 02/12/1766.

It took 200 years before another major right to know legislation was enacted. In 1966, the United States Congress approved USA's first law of freedom of information.[6] Many nations in the world have ratified these covenants and adopted the right to know in their legislations in different ways. More than 60 nations worldwide have an explicit

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[1] The phrase 'right to know' in this study refers to the 'right of access to information' or 'freedom of information'. The phrases are used in this dissertation interchangeably.

[2] Article 13, the convention was adopted on 22 November 1969; entered into force on 18 July 1978.

[3] Article 10, the convention was adopted on 4 November 1950; entered into force on 3 September 1953. This article differs with the formulations of Article 19 of UDHR adopted in 1948; entered into force on 10 December 1948, and Article 19 of ICCPR adopted on 16 December 1966; entered into force on 23 March 1976 and Article 13 of ACHR by not guaranteeing the right to seek information.

[4] Article 9 sections 1 and 2 African Charter on Human and Peoples' Rights, adopted on 27 June 1981; entered into force on 21 October 1986).

[5] Juha Mustonen (ed.) "The World's First Freedom of Information Act, Anders Chydenius Legacy Today". Available at http://www.access-info.org/documents/Access_Docs/ Thinking/Get_Connected/worlds_first_foia.pdf [accessed 07 January 2012].

[6] Heather Brooke *Your right to know, how to use the Freedom of Information Act and other access laws* (London: Puto Press, 2005) 11.

legislation on the 'right to know' following the call of the World Bank, and other international organisations for more transparency.

Other countries have done so following social campaigns for the right to know.[7] Countries such as UK passed the freedom of information law as a reaction to scandals which emerged within the country.[8] South Africa signed the ICCPR on 3 October 1994 and ratified it on 10 December 1998[9] becoming the first African country to have a legislation of access to information (PAIA) in 2000 followed by other African nations such as Uganda, Ethiopia, Liberia, Niger, Guinea, Nigeria and Tunisia. Furthermore, Kenya and Morocco have enshrined the access to know in their constitutions.[10] The present author's view is that other African countries will follow suit including Tanzania. In October 2006 President Jakaya Mrisho Kikwete of Tanzania promised to ensure that during his tenure 'the omnibus media law would include guarantees for citizens' access to information held by public institutions'.[11]

It is the present author's hope that Kikwete will make sure that his promise materializes before the end of his presidency in October 2015. It is encouraging to note that the African Commission on Human and Peoples' Rights has "passed a resolution authorising the Special Rapporteur on Freedom of Expression and Access to Information in Africa to initiate the process of developing a model [of] access to information in Africa".[12] The first draft of the model is expected to be presented to the African Commission for adoption in April 2012.

1.2. Importance of the right to know

1.2.1 Its importance to democracy and good governance

Importance of the 'right to know' has been explained by different people in different ways. For example, the UN describes freedom of information as a fundamental human right

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[7] Richard Calland "Illuminating the politics and the practice of access to information in South Africa" in (ed) Kate Allan *Paper wars, Access to information in South Africa* (Johannesburg: Wits University Press, 2009) 1.

[8] Heather Brooke *Your right to know, how to use the Freedom of Information Act and other access laws* (London: Puto Press, 2005) at 243.

[9] United Nations Treaty Collection (UNTC) "Status of treaties". Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en [accessed 11 February 2012].

[10] PAIA Civil Society Network 'Shadow report: 2011'. Available at http://cer.org.za/wp-content/uploads/2011/10/PAIA-CSN-Shadow-Report-2011.pdf [accessed 03 October 2011].

[11] Colin Darch and Peter G Underwood *Freedom of Information and the development World the Citizen, the state and the models of openness* (Oxford: Chandos Publishing, 2010) 244.

[12] PAIA Civil Society Network 'Shadow report: 2011', note 10.

and 'the touchstone of all freedom to which the United Nations is consecrated.'[13] It is a right which enables a person to know about information necessary for decision-making and autonomous life. Some authors regard information as the 'oxygen of democracy'.[14] Lack of official information affects the flow of democracy.[15] People cannot be expected to participate meaningfully in their society if they are ignorant of what is going on. People can influence decisions taken by their government if they can give their opinions openly. People cannot discuss alternative solution touching their lives if they cannot access information.

In the same way people cannot elect their leaders considering their best interests, they cannot discuss on policies influencing their daily lives neither can they participate meaningfully in political debates.[16] Good governance takes into consideration the importance of information to its citizens while poor governance does not. The survival of bad governments relies on secrets since they are afraid of being held accountable by their citizens who may be well informed of their actions. Without accessing information held by government citizens cannot question the performance of their government in service delivery. Accessing of information such as annual reports of different activities of the government or policy or making a review of legislation enables the citizenry to monitor the performance of the government. The trust of the government grows when a government is accountable thus allowing for the existence of a healthy relationship between the government and the citizenry.[17] It has been observed that inefficiency, embezzlement of public funds and corruption[18] in governments, and in different societies are fruits of hiding information without justifications.[19]

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[13] UN General Assembly, (1946) Resolution 59 (1), 65th Plenary Meeting, December 14.

[14] ARTICLE 19 'The Public's Right to Know, The Pricinciples on Freedom of Information Legislation.' Available at http://www.article19.org/pdfs/standards/righttoknow.pdf [accessed 12 February 2012]. It is sometimes called the 'oxygen of knowledge' or 'lubricant to democracy' see Marlse Richter 'Affirmation to realization of the right of access to information: some issues on the implementation of PAIA' (2005)9 issue 2 *Law Democracy & Development* 219 at 219. It is sometimes called the 'oxygen of knowledge' or 'lubricant to democracy' see Marlse Richter, 'Affirmation to realization of the right of access to information: some issues on the implementation of PAIA', (2005)9 issue 2 *Law Democracy & Development* 219 at 219.

[15] ARTICLE 19 and MISA 'Media law and practice in southern Africa, Tanzania Mainland' Paper No. 16 (October 2000). Available at http://www.article.org/pdfs/publications/southern-africa-foi-no.-16-.pdf) [accessed 09 February 2012].

[16] Belski, M *Access to Information: An Instrumental Right for Empowerment.* London: Article 19 (available; http://www.article19.org/data/files/pdfs/publications/ati-empowerment-right.pdf) [accessed on 10 February 2012].

[17] Ibid.

[18] Andrew Puddephatt 'Flow of Information empowers ordinary people' in Richard Calland, Alison Tilley (eds) *The right to know, the right to live, access to information and socio-economic justice* (Cape Town: ODAC, 2002) x

[19] ARTICLE 19, note 14.

The right to know is not only 'a noble ideal for an enlightened society; it is thoroughly practical. Freedom of information is the most effective and inexpensive way to stop corruption and waste, and enhance efficiency and good governance'.[20] The late Professor Etienne Mureinik hinted on the importance of justification on any action taken by the government. He stated that the culture of coercion must be changed to a culture of persuasion.[21] Article 19 quotes Amartya Sen, the Nobel Prize winner economist stating: 'there has not been a substantial famine in a country with a democratic form of government and a relatively free press'.[22]

Famine can be avoided because people can exercise the right of information among other things to know what has transpired and thus be able to raise public awareness of food problem. That is a fact which can pressurize politicians to make decisions which can lead to a prevention of famine.[23] This is due to the fact that an informed society can make meaningful decisions. While some governments deny their citizens the right to access public and private information in the pretext of national security, which is not always true, some authors argue that official information is the people's property and that the government has a mere duty of 'holding and maintaining'[24] it on behalf of the people. The tendency nowadays is to move from closed societies like Britain which envisaged that information was the property of the government of open societies like USA where information is the property of the people.[25]

It is further observed that access to information leads to 'open and accountable democracy'.[26] President Lyndon Johnson of the United States once said:

> [D]emocracy works best when the people have all the information that the security of the nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest.[27]

1.2.2 Importance to socio-economic rights

The right to know has as human right has had 'multidimensional value'[28] in the world in such a way that it is not only associated with a right of freedom of expression but it is

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[20] Heather Brooke, note 6 at 243.
[21] Mukelani Dimba, 'The Power of information: implementing the right to information laws' (2009) Issue 30, *SA Crime Quarterly* 21 at 26.
[22] ARTICLE 19, note 14.
[23] Colin Darch and Peter G. Underwood, note 11 at 21.
[24] ARTICLE 19, note 14.
[25] Andrew Puddephatt, note 18 at x.
[26] Nomthandazo Ntlama 'The effectiveness of the Promotion of Access to Information Act 2 of 2000 for the protection of socio-economic rights' (2003)2 Issue 2 *Stellenbosch Law Review* 273 at 273.
[27] President Lyndon Johnson cited in Patrick Matibini, 'The quest for freedom of information law – the Zambian experience' (2009)13, Issue 1, *Law, Democracy &Development* 90 at 90.
[28] Richard Calland, note 7 at 8.

regarded as a leverage right which assists in promotion and protection of other rights, especially socio-economic rights.[29] The UN Committee on Economic, Social and Cultural Rights (CESCR) has stressed the importance of access to information in relation to the right of health. This right concerns the right to seek, receive and impart information about health matters in general.[30]

Furthermore, states have the obligation to submit progress report indicating the implementation of the directives of the CESCR. In the General Comment no. 3, the Committee has indicated that every state has to meet a minimum obligation of socio-economic rights. States also have to indicate in their reports where they have failed to implement the requirements of CESCR based on the shortage of resources based on the minimum core, and it has to show efforts taken in using all the resources available at its disposal.[31] According to the ICESCR, socio-economic rights have to be 'progressively realized'. Socio-economic developments cannot be assessed easily unless information and data are openly accessible.[32]

In South Africa, civil organisations such as the South African History Archive (SAHA) and Open Democracy Advice Centre (ODAC) have assisted some communities to access information which helped them to enjoy their rights of adequate housing, water or health care.[33] ODAC helped the community of Ntambana village in the Province of Kwazulu-Natal to access information related to water access policy which eventually helped the community to get clean water for the first time.[34]

Indeed when budget-related information is available it can help in many aspects. It can make officials in-charge of certain projects implement the projects accordingly since they can be judged as contributors to the failure of the projects. Moreover, information on budget-related information can help people to lobby for a better one. Information, whether readily available or available upon request, can influence social changes which can be beneficial to the poor with regard to the proper use of public resources and enhance service delivery. The right to know is so crucial that some authors describe it has having a "lubricating quality"[35] to

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[29] Ibid.
[30] General Comment No. 14 E/C. 12/2000/4. para. 3 and 11.
[31] General Comment No. 3 UN Doc E/1991/23 para 10.
[32] Human Rights Committee General Comments 28 (2000), '*Equality of Rights between Men and Women*', UN Doc. CCPR/C/21/Rev. add. 10 para 5.
[33] Richard Calland, note 7 at 9.
[34] Ibid.
[35] Marlse Richter, 'Affirmation to realization of the right of access to information: some issues on the implementation of PAIA', (2005)9 issue 2 *Law Democracy & Development* 219 at 219.

accessing other rights. It is a touchstone to all other fundamental freedoms advocated by the United Nations.[36]

The Government of South African is required constitutionally to give information to the South African Human Rights Commission (SAHRC) concerning measures it takes in implementing socio-economic rights.[37] This shows how the right to know is related to socio-economic rights.

1.2.3 Its important to the protection of other rights

In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* the Supreme Court stressed the importance of accessing information for the protection of rights by deciding that: 'Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right.'[38] This decision based on the condition imposed by section 32(1)(b) of the Constitution of South Africa enacted in section 50(1)(a) of PAIA on requests for privately held information. In general, requests for public information do not have such a condition internationally because public information is regarded as 'your information' thus it does not stress the need to cite reasons or motive for a request. The current author's general point stands that the right to know is a 'leverage right', useful to accessing and enforcing other rights. For example, for some years ODAC assisted prisoners in South Africa to access information documents about their cases so that they could follow up their cases, including preparations of their legal rights to appeal.

The policy of the Department of Justice allows prisoners to access their documents pertaining to their cases but poor prisoners could not afford expenses incurred in accessing those documents such photocopying. In this regard, ODAC assisted the poor prisoners who would like to pursue their legal rights but failed due to lack of finances and legal expertise.[39]

Moreover, the right of access to information has been used to access health services like Anti-retroviral medication for HIV/AIDS and housings.[40] In *Minister of Health v. TAC (2002)*[41], the Treatment Action Campaign (TAC) argued that it was the responsibility of the Health Ministry to provide medicine such as Nevirapine to HIV- Positive pregnant women so as to prevent mother-to-child transmission of HIV during delivery. The government policy at

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[36] ARTICLE 19 and MISA, note 14.
[37] Constitution of the Republic of South Africa, Act no. 108 of 1996, section 184(3).
[38] *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 (3) SA 1013 (SCA) 1026.
[39] Mukelani Dimba, note 21 at 23.
[40] Ibid.
[41] *The Minister of Health and Others v Treatment Action Campaign and Others*, CCT 08/02.

that time forbade the provision of Nevirapine to hospitals and clinics. Nevirapine was allowed for research only by medical doctors. Pursuant to that policy were prohibited to be prescribed to HIV- positive mothers.

The government of South Africa had approved this policy on the basis that it did not have enough finances to support provision of Nevirapine to HIV positive women. However, during the litigation process the court found that the government did not have a plan in implementing its policy, and without a plan it would not be possible to find the resources because '*the plan creates the necessity to find the resources* (emphasis added)'.[42] Whilst TAC could give evidence that provision of the drugs was safe, suitable, cost-effective and beneficial to patients, government documents indicated that the government could not get at least one expert to support its claim. Furthermore, provincial health officials produced affidavits concerning available resources. Documents produced by the government indicated dishonesty due to their inconsistencies. The court decided that the state was to act reasonably in providing Nevirapine to all hospitals and clinics. This example illustrates how the right to know empowers socio-economic rights.

1.2.4 Its importance for human rights in general

The question of the accused being entitled to access documents in police files for the preparation of defence was dealt with in *Shabalala v Attorney-General of the Transvaal.*[43] The Constitutional Court held that the right to a fair trial requires disclosure of information contained in the police documents. This decision rejected a blanket privilege which was granted in the case of *Styn*,[44] where a blanket privilege was granted to protect all documents in police documents from being disclosed to the accused. It was emphasized that it is a right of an accused to access to information held in police documents if they are required for a fair trial.

In the case study conducted by the Centre for Environmental Rights, Khulumani Support Group, ODAC and SAHA from 1August 2010 to 30 July 2011 it was revealed that there was an increase in the number of people who used PAIA in South Africa to acquire information for advocacy work for exercising other human rights.[45] For instance, in the

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[42] Ibid.
[43] *Shabalala v Attorney-General of the Transvaal* 1995 12 BCLR 1593.
[44] *R v Steyn* 1954 1 SA 324.
[45] Chantal Kisson, "Ten years of access to information in South Africa: Some challenges to the effective implementation of PAIA". Available at: http: *http://www. opendemocracy.org.za/wp-content/uploads/2010 /10/Ten-Years-of-Access-to-Information-in-South-Africa-Some-challenges-to-the-effective-implementation-of-PAIA-by-Chantal-Kisoon.pdf* [accessed 25 January 2012].

mentioned period many people requested to access information from the National Archives, the Department of Mineral Resources and the Department of Home affairs.[46]

1.3 Historical background

South Africa became democratic in 1994 following a 'scourge' of apartheid system which infringed a number of human rights, a fact which received opposition and criticism from all over the world. Before 1994, there was no effective legal system which could promote and protect human rights.[47] South Africa was governed by the 1909 union constitution which created a parliament representing a white minority. This parliament was sovereign, while the black citizens were governed by the executive. At that time the black South African citizens did not have a right to vote.[48]

The prevailing situation led to the approval of unpopular and repressive measures. The parliament was sovereign to such an extent that courts could only declare "an act invalid if it had not been laid down in the constitution".[49] While the common law could protect individual human rights, the parliament could pass legislations amending the common law in whatever way it deemed fit. Security and discriminatory legislations were put in place to counter movements against the apartheid system. Laws of state of emergency became the usual practice while civil liberties were suppressed.[50]

The situation on ground continued that way until 1980 when the government realized that it was not easy to use repressive strategies to achieve stability. Likewise, liberation movements realized that armed struggle and economic sanctions were not enough to bring rapid changes in South Africa. This led to secret negotiations which started in 1985 between the National Party government in power and the then imprisoned Nelson Mandela. The secret negotiations went on until 1990 when the state President F W de Klerk released Mandela.[51]

On 20 December 1991, a Conference for a Democratic South Africa (CODESA), an all-party negotiation, was convened. CODESA agreed on a formation of an Interim government under the agreed Interim constitution.[52] The Interim constitution prevailed until the current constitution was adopted in 1996. This constitution was signed into law by

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[46] Ibid.
[47] De Waal, Johan; et al *The Bill of Rights Handbook* (Lansdowne: Juta & Co., 2005) 2.
[48] Ibid. at 3
[49] Ibid.
[50] Ibid.
[51] Ibid. at 4
[52] Ibid.

President Mandela on 4 February 1997 'bringing to a close a long and bitter struggle to establish a constitutional democracy in South Africa'.[53]

The final constitution conformed to 34 constitutional principles agreed on during the 1991-1993 political negotiations. The constitutional principles were a framework for the creation of a democratic state which ensured protection of the fundamental rights and freedom of all citizens.[54] The basic principles in the new constitutional order were, *inter alia*, 'constitutionalism, the rule of law, democracy and accountability'. These are entrenched in the constitution of South Africa and it is obviously seen that they are very closely linked to the right to know. This right to know has a special place in South Africa because of these principles. It is the constitution which recognizes the right as we shall see. It is this constitution which created a foundation of a right to know, which is of interest to the present study in this dissertation.

1.4 Chapter Conclusion

Having seen the importance of the right to know, the author is motivated to make a case study of South Africa because it is a country which is currently known in the world as having a very progressive constitution.[55] The right to know helps to build a firm foundation for democracy and good governance, greater autonomy to individuals. The right to know is helpful in the implementation of socio-economic rights and other rights. The dark side of the history of South Africa has helped the country to make a good constitution in which the right to know is enshrined. The following chapter will examine the PAIA as a legislation which has been put in place to ensure that the right to know is realised in South Africa. The study will provide the legal provision of PAIA, its actual implementation and the challenges facing its implementation.

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[53] Ibid. at 6

[54] Ibid.

[55] Jonathan Klaaren "A right to a cell phone? The rightness of access to information" in Richard Calland, Alison Tilley (eds) *The right to know, the right to live, access to information and socio-economic justice Cape Town: ODAC*, 2002) 18.

Chapter Two: Using the Promotion of Access to Information Act (PAIA)

2.1 Section 32 and the Protection of Access to Information Act

The right of access to information in South Africa is guaranteed by section 32 of the Constitution of South Africa of 1996. The right of access to information stipulated by section 32 began to operate in South Africa after three years of suspension as it was directed by the transitional provision of the interim constitution, item 23 of the sixth schedule. The period of three years was allocated so as to give chance for the enactment of a specific national legislation concerning access to information.[56] The specific national legislation makes South Africa's Constitution very unique. Most Constitutions in the world contain a right of information but in a general way not as specific as it is the case of South Africa. The Parliament performed its duty by enacting the Promotion of Access to Information Act, Act 2 of 2000 (PAIA) on February 2000, and most of its sections came into effect on 9 March 2001.[57]

Historically, the process of drafting the promotion of access to information act began with the appointment of Mbeki, the deputy President to head a task team in 1994 on open democracy. The team 'reported in its Provisional Policy Framework (28 October 1994) that an Open Democracy Act was needed to give effect to the constitutional idea of an open and democratic society, and a transparent and accountable government'.[58]

The idea of having an Open Democracy Act had in mind having a constitution which could actually be a vehicle for transparency, and which could help South Africans to participate in the building of their country in contradistinction to the situation which existed during the apartheid era when the majority of South Africans were not aware of what was going on concerning their own country. Secrecy was a big tool employed by the apartheid regime.[59] The new South Africa sought to be different by having a constitution which could be open for public participation. Mbeki's team came up with a draft of Open Democracy Bill in 1996 which had four principal parts.[60] The four principal parts were:

1. A Freedom of Information Act applicable to information held by government bodies.

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[56] Johan De Waal et al., p. 527

[57] Hannes Britz and Marius Ackermann, *Information, ethics & the law*, (2006) Pretoria, Van Schaik Publishers, p. 22.

[58] Johan De Waal et al., note 46 at 52.

[59] Kate Allan, Iain Currie "Enforcing access to information and privacy rights: evaluating proposals for an information protection regulator for South Africa: current developments" (2007)23, issue 3, *South African Journal on Human Rights: Sexuality and the Law* 570 at 572.

[60] Ibid.

2. A Privacy Act providing for correction of and protection against unauthorized use of personal information held by both government and private bodies.
3. An open Meeting Act required requiring government meetings to be open to the public.
4. A whistleblower protection Act which protected persons who disclosed evidence of a contravention of the law or maladministration from civil or criminal liability, or from disciplinary procedures.[61]

The South African Parliament, having worked with opinions from Mbeki's team, amended the recommendations and came up with the Promotion of Access to Information Act, Act 2 of 2000. The following subsection will try to examine the connection between this Act and the constitutional provision of section 32.

2.2 The Connection between PAIA and Section 32

As stated above, PAIA is the fruit of section 32 of the constitution, which directed its legislation so as to give 'effect' to the constitutional right of access to information.[62] The objective of PAIA *inter alia* is to promote a 'culture of transparency' in public and private bodies by giving effect to the right of access to information and ...[t]o actively promote a society in which South Africans have effective access to information to enable them to more fully exercise the protection of all their rights.'[63]

2.3 Promotion of Access to Information Act no. 2, 2000 (PAIA)

PAIA was enacted in February 2000 and entered into force in March 2001, seven years after the dawn of democracy in South Africa.[64] This Act was enacted simultaneously with the Promotion of Administrative Justice Act (PAJA) 'laying an obligation on the state to provide written reasons for Government action. The two laws are intended to work together to provide the citizen with tools for political participation: information records and reasons for action.'[65]

This Act though dealing with the access to information, is in fact dealing with recorded information alone and not all information in general. PAIA defines information held by public and private bodies available in different forms or media which are printed, photographed, filmed, recorded sounds, computer information and other forms which are not yet invented.

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[61] Ibid.
[62] PAIA, section 9.
[63] Nomthandazo Ntlama, note 26 at 276.
[64] Collin Darch, and Peter Underwood 'Freedom of information Legislation, State Compliance and the Discourse of knowledge: The South African Experience' (2005) 37 *International Information and Library Review* at 79.
[65] Ibid.

2.3.1 Objectives of PAIA

The objective of the Act is to give effect to the constitutional right of access to information including promoting a culture of transparency and accountability in public and private bodies. This involves getting rid of unreasonable limitations to the right of access to information.[66] In its preamble, PAIA explains the context in which it was developed. In addition PAIA states that its specific aims include empowering and educating everyone so that one understands his or her right according to PAIA, to understand operation of public and private bodies and to enable an individual to participate in the decision-making of public bodies which affect his or her rights.

2.3.2 Accessibility

This Act requires the public and private bodies to disseminate information on their own initiatives. It further directs SAHRC to prepare rules concerning this Act in at least three official languages of South Africa; rules which can help individuals who would like to exercise this right of access to information. Likewise, the Act requires public and private bodies to prepare manuals with details explaining the ways in which individuals or interested parties could get information from their respective institutions. [67]

In February 2002, manual guidelines were issued which instructed public and private bodies to prepare manuals within six months.[68] In order to guarantee accessibility of public and private bodies, PAIA directs the Department of Communication to ensure that contact details of the person in-charge of this Department is available in every telephone directory.[69]

Furthermore, all public bodies are obliged to submit to the Minister of Justice a list of all records which are automatically available publicly without a need of requesting in accordance to PAIA. The Minister is also required to update these records in the Government Gazette every year.[70]

2.3.3 Right of Access

Any person who believes that a public body has information which he or she needs may request that Information provided he or she observes the requirements of PAIA.[71] This Act does not oblige one to mention the reason of the request for access to information,

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[66] PAIA section 9
[67] See PAIA section 10, 14 and 51.
[68] Alison Tilley and Victoria Mayer "Access to information law and the challenge of effective implementation: The South African case" in Richard Calland, Alison Tilley (eds) *The right to know, the right to live, access to information and socio-economic justice* (Cape Town, 2002) 73.
[69] PAIA section 16.
[70] PAIA Section 15.
[71] PAIA Section 11.

provided he/she abides by the procedural requirements of the Act. The concerned public body is required to reply a requester. Legally, the information officer of a public body is the head of the body, but due to many obligations, the head of the public body must delegate in writing this duty to one or several individuals who may assist him or her in this regard.[72]

While for the public body a requester is not obliged to state a reason for the request, for private bodies a requester can be granted access to records if the reasons are indicated that the request is for the exercise of protection of any right.[73] One has to comply with procedural requirements and if there are no reasons spelt out by PAIA for denial. Thus, motivation of the request is a requirement for consideration of the request.[74] Public bodies may have a right of access to records of private bodies if there are public interests.[75] Darch and Underwood[76] observe that in many countries such services as telephones or the post office which traditionally were being provided by public bodies are now being undertaken by private bodies. Many of these bodies do not observe standards of transparency normally required for public bodies hence hiding their weakness of not having enough resources to carry out their obligation of service delivery to the public, or those which have enough resource do not fulfil their obligations sufficiently. In South Africa, PAIA in this case can assist citizens to know what is transpiring in the private bodies which provide services to the public and thus pressurize them to offer quality service.

2.3.4 Mode of requesting information

When requesting for information held by a public or private body, PAIA makes provision for requesting forms which are supposed to be filled by the requester.[77] The form, according to PAIA, must have important details which may help in getting communication with the public body. For example the identity of a requester, contact details of the requester and the type or form of information requested. To ensure the exercise of the right of access to information, disabled persons must be assisted, others might even request orally and the information officer may assist them to translate the request in a written form.[78]

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[72] PAIA Section 17.

[73] For example in the case of *Clutchco (PTY) Ltd v Davis*, 2005(3) SA 486 (SCA), Court required the requester to prove to court that information required was for the protection of rights. The court upheld the decision of the company of denying information to the requester who was a shareholder in that company. The requester wanted detailed access to the books of the company so that he could know the value of his shares in the company. The company did not want to disclose the requested record because it would endanger its commercial interests.

[74] PAIA Section 51.

[75] PAIA Section 9(c) and 50(2).

[76] Collin Darch, and Peter Underwood, note 64 at 78.

[77] PAIA Section 18 (1) and (2), for a private body section 53 (1).

[78] PAIA Section 18 (3).

The information officer is required to assist an individual who requests for information reasonably without asking for any fee. The individual requesting for information cannot be denied access to information if he or she does not meet the requirements of the law without being informed. The reason for this is so that an amendment can be made in order to conform to the law in case that is required.[79] After that, the information officer must process the request and ensure that the information requested is not lost or destroyed in case they would be required for internal appeal or further litigation in court.[80] According to PAIA, destroying information with an intention of denying an individual a right of access to information is an offence which may lead to not more than two years imprisonment or fine.[81]

2.3.5 Time limit

The Information officer upon receiving a request, he or she has to act as soon as possible since 'justice delayed is justice denied.'[82] Normally the processing time should not exceed 30 days, though the Information officer can extend other 30 days pending on the availability of record requested.[83] The difficulty of availability may be due to the abundance of records, the distance of the records from the reach of the Information officer and the need to consult another person which requires more time. By any means, the person requesting information must be informed about the extension of time, he or she must consent to the extension of time. Otherwise, if the person requesting information does not get feedback within 30 days he or she should understand that the request is denied.[84]

2.3.6 Fee requirement

If person requesting information is granted his or her request, he or she will be notified and be informed of the fees (if any) which are supposed to be paid. PAIA distinguishes between 'personal requesters' and 'requesters'. A personal requester is an individual who requests for information concerning himself or herself. A person of this

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[79] PAIA Section 19 (2).
[80] PAIA Section 21. There are also other mechanisms to take recourse in case a requester wishes to take further measures. A requester may appeal according to internal appeal mechanism which is used in the public bodies only. Alternatively the requester may approach the High Court after exhausting the internal appeal mechanisms according to section 78-82. The Public Protector or the Human Rights Commission can also be approached or see a Member of Parliament or a local newspaper editor (see Hannes Britz and Marius Ackermann, at 38).
[81] PAIA Section 90.
[82] Hannes Britz and Marius Ackermann, note 57 at 26.
[83] PAIA Section 26.
[84] PAIA Section 27, for private bodies section 57 and 58.

category is required to pay a fee[85] of R 35 if he or she requests access to records from a public body.

On the other hand, if access to records is requested from a private body one has to pay R 50. When access is granted, there are three more types of fees which a requester has to pay. The fees required to cover the expenses of photocopying, computer services, and search for information, postage and preparation fee. This fee is R 15 per hour for a public body and R 30 for a private body. It is noteworthy that the Information Officer has to take care of the special needs of disabled persons[86] by issuing records which a disabled person can access in his or her condition. When possible, that record has to be granted in a language preferred by the requester.[87]

2.3.7 Refusal of access to records

Access to records can be denied if it is unreasonably aim to access personal information of a third person including records of deceased persons.[88] Also, records of the South Africa Revenue Service (SARS) can be denied if they do not concern the requester himself or herself.[89] Likewise access to records can be denied if they involve violation of confidence owed to a third party though with permission of a third party, a record can be accessed.[90] Other grounds for denial include records which can be dangerous to the safety of the life of an individual,[91] and records which are privileged from production in legal proceedings[92] and disclosure of police information which form part of bail proceedings.[93]

Furthermore PAIA states that the Information Officer can refuse to grant an individual to access records if the record was obtained in-confidence by a third party and its disclosure could endanger future supply; the disclosure which reasonably could affect future supply of a similar information from the source. Normally that record must have a public interest.[94] The Information officer may also deny access to information if a record requested has trade secrets of the state or public body, and the public body has its copyright.[95] Access to certain

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[85] For current prescribed fees see PAIA Manual section 7.2 available at http://www.dhs.gov .za/Content /PAIA/paia _ manual.htm [accessed on 14 January 2012].
[86] PAIA Section 29 (5).
[87] PAIA Section 31.
[88] PAIA Section 34 (1) and Section 63 for a private body.
[89] PAIA Section 35.
[90] PAIA Section 37.
[91] PAIA Section 33.
[92] PAIA Section 40.
[93] PAIA Section 39.
[94] PAIA Section 37(1)(b).
[95] PAIA Section 42(3) and Section 64 for private bodies.

records may also be denied if it is a record concerning a research of a public body whose disclosure may lead to a serious disadvantage.[96]

Concerning the operation of public bodies, the Information Officer of the public body may decline a request of information regarding ideas obtained by consultation or some decisions including minutes of meetings whose disclosure may frustrate success of the operation.[97] He or she may also refuse to grant information relating to records concerning the security of property.[98] Access to information may also be restricted when disclosure of information may jeopardize a police investigation or if it is anything which may frustrate law enforcement.[99]

The Information Officer may also deny a record which may endanger security or international relations,[100] or national economy, or financial welfare of the Republic.[101] Information pertaining to national security or internal operation of the Republic cannot be denied to a record which came into existence 20 years prior to the request.[102] If the refused record does not concern the whole record, the requester can be granted that part of the record which is not denied by law. At this stage, a requester has to be informed why he or she cannot be granted the whole record.[103]

2.3.8 Un-traceable records

After the Information Officer has satisfied himself or herself that all reasonable ways have been used to find records but the records are still not traceable, he or she must under oath notify the requester about the situation and measures which have been taken.[104] This step is important because access to information is a right, thus notification of unavailability of records if given can enable a requester to appeal or to take any legal action if he or she wants.

2.3.9 Mandatory disclosure for public interest

The Information officer complying with other provisions of PAIA must grant a request for access to a record of a public body according to aforementioned provisions except when a disclosure of the record will amount to violations of law, or the disclosure will affect

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[96] PAIA Section 43(2) and for private bodies section 69(1).
[97] PAIA Section 44(1).
[98] PAIA Section 38(b) and for private bodies section 66.
[99] PAIA Section 39(1)(b).
[100] PAIA Section 41.
[101] PAIA Section 42.
[102] PAIA Section 41(3).
[103] PAIA Section 28 and for private bodies section 59.
[104] PAIA Section 23 and for private bodies section 55.

public or environmental safety. The public interest outweighs reasons given above.[105] This provision of PAIA indicates how seriously the Government of South Africa intends to make sure that the right of access to information is not arbitrarily denied without substantial reasons.

2.3.10 Third party involvement

If the information officer receives a request to grant access to record of third party and records of SARS, trade secrets and records which can breach a duty of confidence the third party has to be notified the soonest possible within 21 days from the time the request is received.[106] The third party after receiving the request is required to reply in writing or orally why the record cannot be disclosed or otherwise an access to the record will be granted.

After the Information officer has notified every third party according to PAIA and obtain a representation of the third party can now decide to grant the requested record or otherwise. But if the information officer will grant access to record contrary to the will of the third part, s/he must notify the third party.[107] The third party can appeal internally or in court of law if not satisfied with the decision of the Information officer. If the request to access records is granted, the Information officer will inform a requester about the fee which has to be paid, the form of the record, right to appeal against fee or form in which to access the record. Otherwise, if the request is refused, requester has to be informed grounds for refusal and the requester's right to appeal as has been mentioned above.

2.4 Actual Implementation of PAIA

Mothusi Lepheana asserts that each department of the Government of South Africa submits its report annually indicating the amount of money allocated in its budget for the implementation of PAIA. He notes interestingly that the department of police leads in implementation of the Act. In 2003-04, the Department of Police service received 14,000 requests, of which 11,000 requests were granted full access to records.

Provision of a proactive disclosure clause compels the government to prepare a list of all information that is freely available. People are afraid of this law therefore they indicate all information which is freely available.[108] The South African Police Service (SAPS) is the leading public body in the implementation of PAIA according to a case study conducted by

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[105] PAIA Section 46.
[106] PAIA Section 47 for private bodies section 71.
[107] PAIA Section 49(1).
[108] Frontline 'The South African experience, Interview with Mothusi Lepheana'. Available at http://hindu.com/fline/f1 2212/stories/20 05 06170 03 702700.htm [accessed on 15 June 2011].

the Centre for Environmental Rights, Khulumani Support Group, ODAC and SAHA in the period between 1 August 2010 and 30 July 2011.[109]

SAPS has been in the forefront in replying requests which are sent to it and to give information compared to most of public bodies of South Africa. The good performance of SAPS is attributed to its establishment of a unit dedicated solely for disclosing information and inculcating a culture of transparency. Additionally, preparations of staff who work in the information unit are mentioned by SAHA a reason behind the success of SAPS.[110]

On the other hand, the case study has revealed poor performance in some of the public bodies such as the Department of Mineral Resources to which many requests were sent. Of 30 requests sent to it, 15 requests did not receive any reply. Even when internal appeal was launched against 13 requests which were denied, no reply was given despite the expiry of the time frame.[111] The failure of the Department of Mineral Resources to reply to requests reveals clearly denial of access to information and ignorance or intentional refusal to implement the constitutional right to know.

Also an experience of PAIA Civil Society Network indicates that even when the Department of Mineral Resources responds uses standardized letter which shows partial disclosure of information. The basis of denying access to information relies on section 36(1) of PAIA which stipulates that access to information may denied if it cause commercial harm or financial interests to a third person or if that information is related to policy making or it touches decision making according to section 44(1)(a) of PAIA. Replies are given in standardised letter implying that the Department does not concentrate in the individual requestor as PAIA directs.[112]

The experience of the present author after testing the mechanism provided by PAIA in South Africa has shown that it is easier to get information which is automatically available especially on the internet. A requester will be answered promptly and be directed to the website with records of information. Obviously this is due to the fact that the Information Officer does not need to pass through the hurdles of PAIA. The problem, as we shall see, will be encountered when information required will have to be retrieved from archives or from files, and they are not automatically available on websites.

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[109] PAIA Civil Society Network, note 10.
[110] Ibid.
[111] Ibid.
[112] Ibid.

Additionally it has been observed that the implementation of PAIA is very slow. For instance the general requirement by PAIA for public and private bodies to prepare information manuals and submit it to the Minister of Justice and Constitutional Development is implemented very slowly.[113] The government discovered that many public and private bodies had not yet implemented the requirement of PAIA to prepare and submit manuals in the due date; it was obliged to extend the date to 28 February 2003 by giving a blanket exemption to the public and private bodies.[114]

For example in 2003 the Minister of Justice and Constitutional Development gave exemption for the period between 1 March 2003 and 31 August 2003. The South African Secret service (SASS) and National Intelligence Agency (NIA) were exempted from submitting information manuals for the period between 2003 and 2008.[115] But even after the expiry of the exemption in 2008, the leadership of the intelligence service did neither attempt to prepare the manual nor did they ask for extension of the exemption from the Ministry of Justice.[116]

On 30 December 2011, the Minister of Justice and Constitutional Development has extended again exemption of preparing the manuals under section 51 of PAIA for private bodies up to 31 December 2015.[117] This exemption does not apply to a company which has more than 50 employees who works in a sector which has more than annual income specified by the Government notice.[118]

Furthermore, Sandy gives examples of PAIA non-compliance within the intelligence services. She notes that the leadership of the intelligence services in implementing PAIA are not strong and consistent. For instance, by 2005 SASS had not yet appointed a Deputy Information Officer (DIO) as required by PAIA.[119] This case study has indeed indicated that implementation of PAIA has long way to go within public bodies.

An assessment of the Public Service Commission (PSC) released in 2007 on the implementation of the PAIA in the Public Service revealed some setbacks behind the

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[113] Sandy Africa *Well-kept secrets, the right of access to information and the South African intelligence services* (Johannesburg: Institute for Global Dialogue, Friedrich-Ebert-Stiftung, 2009) 110.
[114] Ibid.
[115] Ibid.
[116] Ibid. at 153.
[117] Government notice number 34914 (South Africa).
[118] Ibid.
[119] Sandy Africa, note 113 at 153.

implementation of PAIA in the national and provincial departments.[120] PSC revealed that though section 17 of PAIA requires public bodies to appoint Deputy Information Officers (DIOs), very few departments implemented this requirement. For example only 23% of those interviewed in the assessment had appointed DIOs. Therefore despite that five year had lapsed up to 2007, still very few departments had implemented the directive of PAIA relating to the appointment of DIOs. The obligation of implementing PAIA remained under heads of departments who have remained with a lot of obligation which 'compromises the many other competing responsibilities that require the attention of the Head of the Department'.[121] PSC further revealed that information manuals which every public and private body is required to prepare by PAIA was implemented by only 54% of the departments studied.[122] Information manuals facilitate the right to know to citizens short of which citizens are denied the right to know.

Section 32 of PAIA requires each public body to submit to SAHRC a report to the Minister of Justice and Constitutional Affairs concerning the implementation of PAIA. However, PSC has revealed that up to 2007, 73% of the respondents had not yet submitted reports to the Minister. According to PSC, failure of public department to comply with the directive of PAIA "affects the ability of the SAHRC to undertake some of the oversight activities within its mandate due to a lack of accurate and credible information. Problems that might have been identified are not timeously addressed."[123]

The implementation of PAIA by the private bodies is also not encouraging. Research reveals that 11% only of those interviewed in the private sector implement PAIA. It was observed that PAIA is not widely used in the Private sector in South Africa,[124] in comparison to the public sector. The research has also shown that 46% of the people interviewed in the public sector were aware of PAIA while 54% were not completely aware of PAIA. Of 65% of those who were aware of PAIA, 65% were implementing PAIA. It can thus be deduced from this research that more than half of the people interviewed were not aware of PAIA. Obviously with this ignorance they could not be expected to implement the Act. Individuals in the public sector are normally expected to be more aware of laws, but if those who are

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[120] The Public Service Commission (PSC), 'Implementation of the Promotion of Access to Information Act, (Act 2 of 2000) in the Public Service August 2007'. Available at: http://www.info.gov.za/view/ Download FileAction?id=72530 [Accessed 21 January 2012].
[121] Ibid.
[122] Ibid.
[123] Ibid.
[124] Alison Tilley and Victoria Mayer, note 68 at 74.

exposed to know more are not that knowledgeable, then the situation of others could be even worse.[125] Furthermore, research conducted by Open Society of Justice Initiative (OSJI) has revealed that there are difficulties in the implementation of PAIA despite the presence of this legislation.[126]

It is further observed that though PAIA is recognized in the world as exemplary and 'gold-standard' for the right to know, a bitter truth is that a normal demand from the party of citizens 'remains low and bureaucratic compliance inadequate: South African's citizens simply do not seem to be making significant use of their right to know.'[127] This truth is also confirmed by ODAC of which objectives among other thing is to promote open and transparent democracy and to help south Africans to realize their human rights through studies it has conducted.[128]

For example in 2003 ODAC tested the PAIA compliance. ODAC sent 100 requests on behalf of different groups requesting for accessing information in different public institutions. Results indicated very poor compliance compared to at least two countries of Armenia and Macedonia which have similar legislation of access to information. ODAC learnt that there was hesitancy on the party of bureaucrats to release information.[129] Of 100 requests, only 23 requests were replied. 52 requests were either rejected or received mute answers, 6 percent refused verbal replies, and 2 percent received written refusals. Due to that, in 2004 ODAC complained to the Public Protector about mute refusals[130]

During PAIA's ten year anniversary, SAHA observes that despite the effort of SAHRC and different civil societies in promoting PAIA, the knowledge of PAIA among South Africans is still very low. A study conducted by ODAC in 2007 revealed that more than 10 percent of South Africans who were interviewed still believe that South Africans have no right to ask their government for information.[131]

2.5 Application of PAIA in the Courts of Law

Generally different stakeholders are using PAIA in courts. Courts have received some cases relying on PAIA though most users are politicians or political parties. For

[125] Ibid., at 75.
[126] Marlse Richter, note 35 at 221.
[127] Colin Darch, and Peter G. Underwood, note 11 at 237.
[128] Ibid. at 241.
[129] Ibid.
[130] Colin Darch, and Peter G. Underwood, note 11 at 241.
[131] South African History Archive (SAHA), 'THE PROMOTION OF ACCESS TO INFORMATION BILL 2011, Submission to the Department of Justice and Constitutional Development 28 February 2011'. (Available: http://www.mediamonitoringafrica.org/images/uploads/20110228Submission.pdf) [accessed 21 January 2012].

example on 21 January 2010, leader of Independent Democrats, Patricia de Lille, wanted to access information concerning travelling expenses of some members of Parliament.[132] Likewise many journalists are trying to use PAIA but because of the length of time required for waiting courts' litigations they have failed to benefit much.[133]

However, TAC used PAIA successfully when there was a problem of accessing information concerning a prisoner from the Department of Correctional Services. The Department of Correctional Services refused to grant that information. Nonetheless, in a more successful the Court ordered the Department to grant the Judicial Inspectorate of Prisons' report about the death of a prisoner who died of AIDS related disease to TAC.[134]

A case which saddened some of the proponents for the promotion of access to information was the case of *Institute for Democracy in South Africa & others v African National Congress &others*[135] (the IDASA Case) which was decided by Griesel J on April 2005 in the Cape High Court; the case used PAIA and section 32 of the Constitution of South Africa. The case emerged amidst corrupt allegations involving politicians of four big parties in South Africa. The purpose of IDASA, a civil society, was to test the practicability of PAIA in promoting openness and transparency.

According to Shannon Bosch PAIA failed to be helpful in this aspect due to its technical demands.[136] The Court was approached so that it could give decision which could help to obtain a disclosure of records of private donation exceeding R 50000 given to political parties between January 2003 and May 2004. The applicants wanted to identify donors and conditions lying behind the donations. The purpose was to limit potential corruption which could be behind donations.

All four big political parties, the African Nation Congress, the Democratic Alliance, the Inkatha Freedom Party and the New National Party were not ready to grant access of records disclosing their private donors.[137] Access to information was denied on the basis of parties interpreted as private bodies and thus the disclosure would not be accepted for the

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[132] Jonathan Klaaren, 'PAIA through the courts: Case law and important developments in PAIA litigation'. Available at http://www.opendemocracy.org.za/wp.content/uploads/2010/10/PAIA-through-the-courts-case-law-and-Important-Development-in-PAIA-Litigation-by-Jonathan-Klaaren1.pdf [accessed on 16 January 2012].
[133] Jonathan Klaaren, note 55.
[134] *Treatment Action Campaign v Minister of Correctional Services and the Judicial Inspectorate of Prisons*, 18379/2008, 30 January 2009.
[135] *Institute for Democracy in South Africa & others v African National Congress &others* 2005 (5) SA 39 (C).
[136] Shannon Bosch, 'IDASA v ANC - an opportunity lost for truly promoting access to information: notes' (2006)123 Issue 4, *South African Law Journal* 615 at 615.
[137] Ibid.

protection of the confidentiality of the third party. The danger of the protection of this nature according to Shannon can allow corrupt dealings to exist and deny citizens to exercise other rights such as informed choices, transparency, democracy, freedom of expression and other constitutional rights.[138]

PAIA was used for the first time by a private individual to request information from a private body after filing a case in the court. In 2003, PAIA was used successfully against Nedbank, a private body.[139] Mr Pretorius was a staff member of the South African National Defence Force (SANDF) and one of his duties was to implement PAIA. Mr Pretorius was fortunate since he was very aware of the use of PAIA, and so it was easy for him to use it.

When his application for loan was refused by Nedbank he resorted to section 53[140] of PAIA to inquire the basis for the denial of the loan. Nedbank refused to disclose information relying on sections 68(1) (b) and (c) of PAIA which allows denial of access to information in a situation where the disclosure of information may harm financial or commercial interest of Nedbank, that the information requested was confidential and if the disclosure of the information could place the bank at a disadvantageous position in relation to its contracts and commercial competitions. Pretorius was not satisfied with Nedbank's reply regarding his request and filed a case against it. Following a series of legal correspondence, eventually, Nedbank withdrew the case and agreed to grant Pretorius the access to information he requested.[141]

PAIA was also used in *CCII System Pty Ltd v Fakie and others*[142] when CCII Systems, a computer company was not awarded a tender to supply computers to the South African Defence Force. This company wanted to know why it was excluded in the process supplying computers to the force. Thus the company wanted to access documents which were related to the process which lead to the decision which excluded the company. The defence force denied access to information requested by the company arguing that the number of requested documents was too vast and that the force had no enough staff to deal with the documents requested.

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[138] Ibid.
[139] *Pretorius v Nedcor*, Case No 14881/03 WLD.
[140] The section provides the manner of which an individual may request an access to information from a private body.
[141] Open Society Foundation for South Africa "The promotion of access to Information Act: Best Practice Handbook for Information Officers and Requesters". Available at: http://www.osf.org.za/File_Uploads/docs/PAIAMANUALinsidepages.pdf [accessed on 29 January 2012].
[142] NNO 2003 (20) SA 325 T.

Also the force argued that it feared to breach the confidentiality of third parties and that the disclosure of information would jeopardize the national security. The court did not agree with this defence, and instead it ordered the information officer to list information which s/he would withhold and the reasons of withholding the information. The information officer was not supposed to give a blanket refusal of denying information. The court also ordered the force to increase more staff who could deal with a vast number of documents requested.

A case of SAHA against the Department of Defence (DOD) is another example of the use of PAIA in court litigation. In 2001 SAHA discovered that there were 38 groups of military intelligence records were not given to TRC by the DOD. This fact raised suspicion that some intelligence files were purposely hidden from TRC so that they could not be accessed by TRC officials. When SAHA requested to access these records and the information therein, emerged disputes related to an interpretation of PAIA's provision and intersecting operation of the Protection of Information Act No. 84 of 1982 (PIA). The records were accessed only after court litigation where the notion of national security was challenged.[143]

2.6 Challenges facing the implementation of PAIA

2.6.1 PAIA deals with recorded information only

In the previous section it has been shown that PAIA as an enactment of the constitutional provision of section 32 helps to promote access to information. Since the enactment of this legislation, several challenges have been observed. While PAIA's objective is to promote access to information, the Act only deals with recorded information held by public and private bodies. This limits the intention of section 32 of the Constitution of South Africa which states that 'everyone has the right of access to information'. The broad notion of information is reduced into recorded information only. This bars the full realization of the right to know.[144]

2.6.2 Request driven Act

Additionally, PAIA is seen by some authors as a 'request driven' act which does not give an absolute right to an individual to access information.[145] This makes the efficiency of

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[143] Kate Allan 'Applying PAIA: Legal, Political and Context Issues' *in (ed) Kate Allan Paper wars, Access to information in South Africa* (Johanesburg: Wits University Press, 2009) 144 at 144.

[144] Dale T. McKinley (Dr), The State of Access to Information in South Africa. Available at http://www.csvr.org.za/docs/trc/stateofaccess.pdf [accessed on 03 January 2012].

[145] Nomthandazo Ntlama, note 26 at 277.

information granted to depend on the information holder. This reduces the quality of the information received. In our views, PAIA is not an only 'request driven' document, but it has provided for automatic information to be released as well. Unfortunately, the determination of whether given information is or is not in the category of automatic information lies with the discretion of the Minister for Administration of Justice.[146]

2.6.3 Exemptions

Another challenge lies in the fact that PAIA has a number of exemptions. The Act allows private and public bodies to withhold some records of information legitimately. These records of information include records which protect privacy of a third person[147], security of individuals and properties.[148] In the author's view, the exemptions have to be there in order to protect other rights. In case of abuse, PAIA has given some mechanism to review some denial of access to information. Internal appeal mechanisms and courts have been used to rectify violations of the right to access information. However, it is noted that exemptions of these sort were "mostly frequently utilised in requests for apartheid era records".[149] It has been observed that in certain circumstances access of information has been denied relying on exemptions unreasonably. For example exemptions have been granted to all records regardless that such records had passed through public hearing in other ways such as the testimony which was given during a public hearing of Cradock 4 relating to amnesty application. Privacy exemption is provided here by section 34(2) of PAIA "and it is arguable that where information is already in the public domain, it is not reasonable to expect that disclosure could endanger the life or physical safety of an individual."[150] It is further observed that government offices have used privacy exemption incorrectly as a reason for non-disclosure of information.[151]

The confidentiality exemption provided by section 37(2) of PAIA denies disclosure of information agreed by two parties or information obtained in confidence or information which is not in public domain. This provision has been abused to deny access to information when it was used without regarding substantive content of information.

Nevertheless it can be argued that to strike a balance between right of information and another right is not always easy. But it remains a challenge. Moreover, some bodies are

[146] For example provision of section 15.
[147] PAIA Section 34(1).
[148] PAIA Section 38(1).
[149] Kate Allan, note 143 at 150.
[150] Ibid.
[151] Jonathan Klaaren 'Three waves of administration justice in South Africa' (2006) *Acta Juridica* 370 at 375.

exempted from granting access to information for example 'the cabinet and its committees'.[152] Nomthandazo Ntlama has the view that exemptions 'if used at the expense of the public, this could make a mockery of the protection of the right to access information'.[153] Cabinet and its committee make policies which affect the public. How can the government be accountable to its people if major policies are done in secrecy? The current author believes that transparency and openness is needed even in policy-making bodies.[154]

Likewise grounds for refusal of granting information by 'the mandatory protection of commercial information of third party'[155] as provided by PAIA may hinder the exercise of the right of information. For example in the realization of socio-economic rights, a private body which offers services to the public in partnership with the government has to be accountable to the public (for example in the area of housing and water). But if access to information is denied on the basis of 'commercial information of third party', this may violate the right of information.[156]

Section 41 of PAIA provides for discretionary exemptions to information relating to defence, national security and international relations. Kate Allan argues that these exemptions have been used to protect activities of the current and the collaborators of the apartheid system. She notes for example the National Archives refused to release classified information on the basis that the information was being transferred in an operation which touched the national security, individuals and assets although "the application of this and a number of exemptions over the course of the dispute ultimately appeared to be a tactic to avoid disclosure during a period in which relations with the National Archives were particularly fraught".[157] This example illustrates how the exercise of the right to know is challenged despite the legislation of PAIA.

Moreover, section 43 of PAIA prohibits research information conducted on behalf of third parties to be disclosed if its disclosure may expose the third party or an individual who works for the third party to a disadvantaged position. The Act protects also research conducted by a public body. In 2004, SAHA requested to access information from the South African Breweries Ltd (SAB) related to staff members of SAB who were HIV/AIDS positive.

[152] PAIA Section 12.
[153] Nomthandazo Ntlama, note 26 at 278.
[154] See also Dale T. McKinley, note 144.
[155] PAIA Section 36 and 64.
[156] Dale T. McKinley, note 144.
[157] Kate Allan, note 143 at 159.

SAB outsourced a third party health service and counselling to keep confidentiality among workers and the company. The company refused to disclose information on the grounds that the requested information could prejudice credibility of the company concerning confidentiality of workers and their families and the research information and the results of the research would disadvantage the third party, the workers of the company and their families.[158] Certainly this argument is legitimate and also an issue which is very sensitive but to refuse to disclose information on a ground of protection of research and information of the third party is doubtful. SAHA was requesting to access information relating to HIV/AIDS screening and counselling of SAB's workers who were still alive and those who had died of the disease and the income of workers who were HIV/AIDS positive. Therefore the requested information was not the information which was obtained in the research but a normal record which SAB was supposed to keep in a bid of implementing SAB's policy on HIV/AIDS. Furthermore, the information being requested had no commercial value. It is argued that an information which is commercial valuable but which is not intended for publication cannot have a disadvantage in the type of interest protected by this exemption.[159] Thus this PAIA exemption is sometimes being used inappropriately.

2.6.4 Enforcement Mechanism

Another challenge is the provision for an enforcement mechanism "that is accessible, affordable, specialist and speedy.[160] The extant mechanism that is in operation is argued to be weak, both the internal mechanisms and the courts. In internal appeals, the very same officials who process a request in the first instance review the appeal.[161] It is like a judge judging on oneself! Furthermore, the enforcement mechanism is expensive and slow.[162] For example some journalists whose 'raw materials' for their job is information have failed to use the court mechanism since a lot of time is required for the court to decide.[163]

In this regard, it is argued that 'Disclosure of information can hardly be effective if an appeal against a non-disclosure succeeds only several months after the initial request'.[164] Courts' expenses are huge since they involve paying lawyers and other fee related costs. Moreover PAIA does not provide for penalties in case the right to know is violated; this has been left to the discretional power of the courts. These reasons pose a huge obstacle to the

[158] Ibid. at 163.
[159] Ibid. at 164.
[160] Marlse Richter, note 35 at 229.
[161] Dale T. McKinley, note 144.
[162] Nomthandazo Ntlama, note 26 at 278.
[163] Jonathan Klaaren, note 55.
[164] Marlse Richter, note 35 at 230.

poor and the disadvantaged or other people who without other free legal aids they cannot access information.

Due to a lack of efficient mechanism to implement PAIA, ODAC is recommending for the establishment of an independent Information Commissioner who is empowered to deal with information cases, while SAHRC completes this task by continuing to be a champion, a trainer and an educator of information. ODAC has the view that this alternative can be a relief to disappointed requestors who will get an alternative more expeditious mechanism than courts, though ODAC is aware that the proposed mechanism can only be successful if the proposed Commissioner is empowered by expertise to access of information laws, he or she must have a political weight and independence to make decisions.[165]

2.6.5 Lack of adequate infrastructure and trained staff

In addition, lack of infrastructure, especially in the rural areas has contributed to the failure of the rural people to use PAIA. Most people who are poor have some socio-economic problems such as land and housing. Access to information could help in solving their problems. Lack of trained staff of the public and private bodies worsens the situation.[166] Training will enable the information staff and other stake-holders to see the importance, to know the technical-know-how of applying PAIA, and hence speed the promotion of the right of access to information contrary to the existing situation. Training will inculcate in the private and public officials the fact that access to information is a right and not a mere privilege since "there have been instances where officials have discouraged applicants from filing formal PAIA requests for information and advised them to "just ask nicely" for it'.[167]

2.6.6 Lack of political will

It has been noted that sometimes government official hesitate to disclose information because they believe that information may be used at the detriment of the government. Openness is still not regarded as a friend by some of the South African bureaucracy. [168] It has been observed in South Africa that some information which deals with violations of human rights is being protected by public officials under the influence of some politicians who do not want the information to be revealed.[169]

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[165] Marlse Richter, note 35 at 229.
[166] Nomthandazo Ntlama, note 26 at 279; see also Dale T. McKinley, note 144.
[167] Mukelani Dimba, note 21 at 24.
[168] Richard Calland 'The right to know is the right to live' in Richard Calland, Alison Tilley (Eds) '*The right to know, the right to live, access to information and socio-economic justice*', 2002 p. xviii.
[169] Dale T. McKinley, note 144.

Sandy observes that Government officials such as officials of the intelligence services have a positive attitude in disclosing information as it is evidenced by their voluntary disclosure of information in "promotional material, website and responses to public queries via the media and the parliament."[170] However, heads of the intelligence services have been weak and inconsistent in the implementation of PAIA.

2.6.8 Lack of state capacity

It has been further observed that lack of state capacity prevents the implementation of PAIA. Implementation of PAIA is promoted more by NGO's and civil societies at their expenses. Low levels of literacy in South Africa adds to the challenges of the implementation of PAIA indicating that it will take a long time before the act is full used by members of the public.[171]

Whereas there is a significant amount of information of different bodies on the Department of Justice Website, yet the challenge remains of the availability of the information to normal citizens. This is due to the fact that most South Africans do not have the internet connectivity. Worse still some materials posted at the internet are not updated and they do not have a useful search engine to access automatic materials available such as the bulk material of the TRC's hearings available at the Department of Justice website.[172]

2.6.8 PAIA's use is challenging

The experience of SAHA has indicated that 'although PAIA is supposed to allow any citizen the right to seek and obtain documents of relevance to themselves or work they are doing, the process can be cumbersome, time-consuming, expensive and very often frustrating'.[173] For instance it was not easy for SAHA to make a follow up of the documentary of the TRC process. 34 boxes containing information related to the TRC process simply disappeared. TRC officials claimed that all these boxes were supposed to be taken to National Archives, but it was not the case.[174] Fortunately, the contents and the general nature of the files which disappeared had been catalogued. Hence it could be deduced that there was a file related to the death of Mziwonke, an ANC activist, who was murdered in 1991. Access of the files could lead to a discovery of the reasons and perpetrators of Mziwonke's death.[175] It was later realised that "the documents were

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[170] Sandy Africa, note 113 at 152.
[171] Ibid.
[172] Ibid.
[173] Ibid. at 23.
[174] Ibid.
[175] Ibid.

(illegally) in the custody of NIA; that they have undergone a classification process that appears not to have been properly authorised; that senior officials deliberately misled the media and the public; and that no satisfactory explanations have ever been given".[176] This example shows the challenge of applying PAIA in a situation where information-holders do not intend to let information be accessible.

This is also exemplified by problems encountered by SAHA when it was denied to access information relating to Chemical and Biological Warfare (CBW) programme concerning production and use of substances, and information of individuals who were involved in the Project Coast such as the murder of Dulcie September, Pro Jacks and Alan Kidger information relating to its military tribunals.[177] Most of these contested documents were available at the TRC Archive under the supervision of the National Archive. SAHA succeeded to access to more than 60% of the contested documents after-a-three year battle.

The success of SAHA to access some of the documents earlier restricted for access indicates 'that government departments could not unilaterally impose blanket restrictions on access in terms of PAIA, it [SAHA] has forced them to employ a transparent process that ultimately compelled disclosure'.[178] Though SAHA has not succeeded to ensure that all government's departments such as Department of Justice (DOJ) and the Department of Art and Culture (DAC) implement PAIA, at least it has set precedence for others to start their enquiries. SAHA in accessing the TRC documents it has successes to use PAIA albeit through 'unnecessary lengthy, hostile and litigious engagements.'[179]

Pigou observes that though SAHA succeeded to achieve positive settlements which forced DOJ and DAC to release information which was previously denied, still DOJ has remained a problem to such an extent that SAHA had to launch an official complaint to SAHRC in July 2007.[180] The DOJ is not competent to deal with all sorts of information. For example DOJ has a special obligation of supervising access to TRC records.[181] But it can fulfil this obligation alone because it depends on NIA and the National Archive for guidance and backing.

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[176] Ibid. at 25.
[177] Ibid. at 34.
[178] Ibid.
[179] Ibid. at 52.
[180] Ibid.
[181] Ibid. at 52.

Consequently, SAHA suggests that this obligation of managing access to TRC records be transferred to the National Archives which is the custodian of TRC records.[182] Otherwise if the National Archives is not given a clear mandate to deal with the management of access of TRC records it will be left in a parlous state. Currently, the National Archives experiences a problem of the management of documents.[183] It is suggested that the National Archives should be provided with enough resources for this task, and a construction of a new building which will cater for improved access regime.[184]

2.6.9 Distinction between a public body and private body

Another challenge which limits the exercise of the right to know is the interpretation of a distinction between a public body and a private body. There is a tendency of thinking that the notion of 'public' and 'private' bodies as 'mutually exclusive, as contrasting, as opposite.'[185] While PAIA was enacted to respond to structural changes in government and society, the fact that it still has to deal with bodies which were hitherto public but which subsequently became private or vice versa, to some extent it has blurred the public-private divide. The distinction has been distorted by the development of privatised utilities and contracted services. This interpretation confuses PAIA users.[186]

For instance, in 2002 SAHA assisted Mondli Hlatshwayo, a student of the University of the Witwatersrand to access minutes of the meeting convened between 1965 and 1973 in the Iscor's steel manufacturing plant. Iscor did not want to release the minutes arguing that the form which was used to request the minutes was for a public body whereas Iscor was a private body.[187] When the Wits Law Clinic responded on behalf of the student that the minutes required was of the period which Iscor was a public body, Iscor responded the following day that the minutes were not available.

The Wits Law Clinic was not satisfied with the reply and filed a case in the High Court for relief. In the High Court Hlatshwayo was represented by ODAC.[188] Judge Van der Westhuizen decided that because the minutes of the meetings in question were held when Iscor was a public body, Iscor had to release the minutes as requested without regarding that

[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] Ibid.
[187] Ibid.
[188] Ibid.

it had been privatized.[189] Iscor appealed against this decision in the Supreme Court[190], where it lost again. Kate gives this example to show how the interpretation of private and public bodies accorded by PAIA can be a challenge in the implementation of the right to know especially when it is employed to block an access to information.

2.6.10 Non-compliance

Section 90 of PAIA provides for steps which have to be taken against a person who purposely hinders a right of access to information under PAIA, be it in terms of destroying or manipulating records, be it by hiding or falsifying records, such a person shall have committed an offence and he or she shall be liable to a penalty of a fine or imprisonment of a period not exceeding two years. Despite the PAIA's provision of non-compliance, Dalley T. McKinley observes that:

> [T]he actions of the NIA (and possibly those of DoJ and NA as well) certainly would constitute 'intent' to conceal. And yet, the contempt shown to PAIA, not to mention for the principles that inform the constitutional right of access, have gone completely unpunished. Rather they seem to be embraced and celebrated. Failure to confront the wilful violation of the intent and purpose of PAIA will only contribute to catalysing further acts of impunity. It is no good having a wonderful law if it cannot be enforced.[191]

2.6.11 Failure of the Public Protector and SAHRC

The Public Protector and SAHRC have obligations stipulated by PAIA. The Public Protector has to investigate and mediate complaints raised due to maladministration of public bodies.[192] The SAHRC deals with, *inter alia*, monitoring, provision of education, receiving information manuals of public and private bodies and s/he has to receive statistical reports on the implementation of PAIA and to assist requestors to exercise their right to know through access of information.[193] While SAHRC is given the power to mediate any dispute or to rectify any act or omission related to fundamental right though the intervention of SAHRC does not bind public or private bodies.[194]

In 2003, SAHA was requested to conduct research on the performance of SAHRC in facilitating the right of access to information. The research revealed that SAHRC did not

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[189] Ibid.
[190] *Mittal Steel SA Ltd v. Hlatshwayo* 2007 (1) SA 66 (SCA).
[191] Dale T. McKinley, note 144.
[192] Constitution of the Republic of South Africa, Act no. 108 of 1996, section 182 and Public Protector Act no. 23 of 1994, section 6.
[193] PAIA section 32 and section 83.
[194] Human Rights Commission Act no. 54 of 1994, section 8.

succeed in making South Africa utilize PAIA to develop a culture of transparency.[195] The research indicated also that SAHRC had failed 'to take a proactive role in complaints investigation and mediation. The SAHRC failed, until 2007 to follow up on any SAHA complaints in any meaningful way'.[196]

Similarly, the Public Protector whose obligation is to see to it that PAIA is enforced has been weak. For example according to PAIA, the Public Protector is required to report to SAHRC, but the research revealed that there was little communication between the two regarding PAIA cases. Two reasons are behind SAHRC's failure to fulfil its task accordingly. The reasons are a small budget allocated to it and the weakness of the enforcement mechanism provided by PAIA.[197] The weakness of the enforcement of PAIA is contributed by its provision which requires SAHRC to recommend to public or private body to make changes according to what SAHRC deem as, and depending on the availability of resources. This caveat of PAIA makes the enforcement less powerful when it asserts that: '[I]f appropriate, and if financial and other resources are available, an official of a public body must afford the Human Rights Commission reasonable assistance for the effective performance of its function in terms of this Act'.[198]

2.6.12 Intentional Destruction of Records

PAIA which enables the right to know depends on recorded information for it to be effective. However it has been observed that the situation prevailing during the apartheid era of hiding truth about human rights violations by destroying still prevail in the post-apartheid era. Allan Kate notes that different actors during the political transition are blamed for destroying documents purposely with the intention of hiding some information from falling into the hands of the new democratic government. Much of the blame is directed to 'the State Archive service, the director of Archives, the African National Congress (ANC), NIA (and its predecessor, NIS, incumbent heads of state, the cabinet, the South African Police and the State Security Council.'[199] Destruction of records poses a great challenge to the implementation of PAIA. It is unfortunate that there is no way the information officer is accountable when records are missing or destroyed because it suffices for him or her to explain in the affidavit steps taken in searching for missing records. Indeed, this situation

[195] Kate Allan, note 143, at 169.
[196] Ibid.
[197] Ibid. at 170.
[198] PAIA Section 83(5).
[199] Kate Allan, note 143, at 182.

poses a limitation to the access of information especially when the information holder cannot be implicated for being negligent or wilful destroying records.[200]

2.6.13 Records Management

Poor Records management is cited as a major problem in the facilitation of the right to know. Lack of records management policies and good practices of record keeping affects the capacity of information officers in finding requested or needed information. Furthermore compliance audits have revealed that many information holders do not have enough expertise in the use of Information and Communication Technology advantageously. The situation is worsened by the inheritance of records management system of the apartheid era combined or changed within the new democratic government.[201] SAPS as a public body which leads in implementing PAIA in South Africa is not spared in the weakness of records management. For example when SAHA requested to access information related to 'Operation Crackdown' from SAPS it was replied that such information could not be found despite that the information was created in 2005.[202]

In 2001, the National Archives issued guidelines regarding electronic records in collaboration with the State Information Technology Agency.[203] Furthermore a meeting of regional archivist which convened in Dar es Salaam in June 2007 recommended for policies on electronic records standards. Nevertheless South Africa has implemented very little concerning the above recommendations.[204]

2.6.14 Public Awareness of PAIA

PAIA is in its tenth anniversary at the time of writing this dissertation yet it is noted that one of its greatest impediment is that PAIA is not very well known in some areas of South Africa especially at grassroots.[205] As a result, very few South Africans use PAIA. PAIA is used by 'specialist' organisations due to their awareness.

2.7 Chapter conclusion

This chapter has tried to show the connection between section 32 and PAIA. It is noted that PAIA was enacted to put into effect the provision of the Constitution of South Africa. PAIA is analyzed, and the chapter has briefly shown how it works and how it has been implemented. Finally the chapter has outlined in a nutshell some challenges facing the

[200] Ibid., at 185.
[201] Chantal Kisson, note 45.
[202] Kate Allan, note 143 at 188.
[203] Ibid.
[204] Ibid.
[205] South African History Archive (SAHA), note 131.

implementation of PAIA. Regarding the implementation of PAIA in South Africa, different information stake-holders, such as ODAC, SAHA and academicians, have pointed out that this needs improvement.[206] The next chapter considers the relationship between the 'right to know' and secrecy.

[206] Richard Calland, note 7 at 14.

Chapter Three: The Right to Know in Relation to Secrecy

3.1 Introduction

The previous chapter has shown that PAIA safeguards the right to know but that within the same Act there are provisions for secrecy indicating that the right to know is not absolute. This chapter intends to show the dynamics of the right to know in relation to secrecy. Accordingly, the notion of secrecy and its importance will be studied. Additionally, some examples of laws which limit the right to know will be given.

3.2 The Notion of Secrecy

There could be different interpretations of the notion of secrecy but Pozen describes secrets as 'items of information that one party, the secret keeper, intentionally conceals from another party, the 'target"'.[207] He explains that sometimes a 'target' of secrecy knows that some information has been concealed from him or her. This information will be a 'deep secret' if one is not even aware of its existence but it will be a 'shallow secret' if one knows that there is a secret about some facts though he or she does not know the content of the hidden information.

While the present author agrees with the Pozen's description secrecy, Yacoob J adds that 'secrecy is in a sense a matter of degree. Nothing is ever completely secret. Information is always known to somebody. Information impinging on national security is no exception.'[208] Thus, secrecy may be concealed for any reason but the fact remains that no secret is ever an absolute secret. Having said this, the question arises as to whether there could be reasons in favour of secrecy.

3.3 Arguments in Favour of Secrecy

While on the one hand, as has been argued previously, information is vital in democratic societies, on the other, it is also argued that:

> [S]ocial welfare might be enhanced if the government sometimes withholds its enforcement policies from the public, like the algorithm for selecting income tax returns for audits or the pattern of police patrols. Restricted information flow can therefore enhance government efficacy and prevent commercial or personal injury to private parties.[209]

Little wonder PAIA has some provisions pursuant to which information held by public and private bodies are restricted from disclosure. We have mentioned some of these

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[207] David E Pozen 'Deep secrecy' (2010) 62 *Stanford Law Review* 257 at 262.

[208] *Independent Newspapers v Minister for Intelligence Services: in re Masetlha v President of the Republic of South Africa & another* 2008 (5) SA 31 (CC) para 41.

[209] Adam M Samaha, 'Government secrets, constitutional law, and platform for judicial intervention' (April, 2006)53, *UCLA Law Review* 909 at 922.

areas in the present work as including trade secrets, confidential information about a third person, information about the security of properties and individuals, police dockets concerning bail proceedings and information held by the South African Revenue Services. There are several arguments advanced by secrecy proponents.[210] Firstly, secrecy may prevent individuals from abusing held information to jeopardize 'national interests'. This is the primary reason that is often given to justify state secrecy. Some information may be concealed in order to create a disadvantage on the part of the enemies of the nation. Secrecy safeguards integrity of 'lotteries, market interventions, and other government functions that rely on anonymity or timing'.[211]

Secondly, secrecy enhances the quality of government's decision. When information is kept secret, policy-makers become free to discuss different alternatives and thus they can dare to change their decisions pending the advice of experts. It provides an opportunity whereby few people can discuss is likely to be more successful than when such discussion is open to the entire public.[212]

Thirdly, secrecy safeguards the privacy of other individuals and entities. Disclosure of information of some individuals may cause 'psychic, reputational, and tangible harm to concerned.'[213] The reason of secrecy for privacy, which is a human right, is also used by courts when it conducts its sessions of some cases *in camera*. For instance, the Districts Courts in the United States of America, in addition to upholding secrecy for privacy in its grand jury hearings, have used secrecy because 'disclosure of pre-indictment proceedings would make many prospective witnesses hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of the testimony'.[214]

Moreover, it is argued that witnesses would be hesitant to voluntarily avail themselves for testimony; some witnesses may even fail to testify sincerely and frankly. There would also be 'the risk that those about to be indicted would flee or would try to influence individual grand jurors to vote against indictment.'[215] Furthermore, different societies such as South Africa justify secrecy for social, political, legal or ethical reasons. Some reasons are universal and they have been in use worldwide for a long time. Medical secrets such as the

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[210] David E Pozen, note 207 at 277.
[211] Ibid.
[212] Ibid.
[213] Ibid.
[214] *In re* North, 16 F.3d 1234, 1242 (D.C. Cir. 1994) (quoting *Douglas Oil,* 441 U.S. at 218-19).
[215] Note 8.

Hippocratic Oath require medical doctors to keep the secrets of their patients. The legal profession and journalism also require secrecy in their practice.[216]

Finally, proponents of secrets argue that secrecy may be cheaper compared to openness since the latter involves a process of determining which information should be disclosed. Briefly, the argument contends that the exercise of disclosing information is more expensive than secrecy.[217] The present author's opinion on the above matter is that there is no right that is cheap to exercise. Even then, secrecy may look cheap but this is not always the case since in the long run, if the information is concealed without a grave reason it may lead to more losses than earlier thought. One can consider the consequences of vices like corruption in the nation. To avoid corruption is cheaper than bearing the consequences of corruption. Sandy Africa notes: 'there are costs to this [government secrecy] including that of physically protecting secrets, the danger of losing public confidence through non-disclosure, and the input and debate limitations. Furthermore, secrets are vulnerable to leaks which can have untold consequences.'[218]

3.4 The Apartheid System and the Culture of Secrecy

As was stated earlier in chapter one, South Africa began to think seriously about the right to know when the Bill of Rights was entrenched in the Constitution of South Africa of 1996. During the apartheid era, a 'culture of secrecy'[219] was developed and right to information was regarded as a luxury which could jeopardize the apartheid system. The system through the State Security Council (SSC) employed secrecy to suppress the anti-apartheid resistance by overlooking the governance of law. Due to its way of acting, some authors have depicted the SSC as 'a secret junta of military, police and government officials'.[220] The South African Defence Force (SADF) employed the same tactics by:

> [T]raining some of the Inkantha "death squad" at secret military encampments on the Caprivi Strip in north-eastern Namibia, military intelligence units were reportedly "associated" with the assassination and destabilization activities of the so called "Hammer Units" in certain particular volatile areas of South Africa, and testimony before the Truth Commission has suggested that SADF special forces and intelligence operatives helped police officials select targets for "elimination.[221]

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[216] Sandy Africa, note 113 at 31.
[217] David E Pozen, note 207 at 277.
[218] Sandy Africa, note 113 at 158.
[219] ARTICLE 19 and MISA, note 15.
[220] Christopher A Ford, 'Watching the watchdog: Security oversight law in the new South Africa' (Fall 1997)3, *Michigan Journal of Race and Law* 59 at 63.
[221] Ibid. at 66.

The "culture of secrecy" characterized the apartheid regime in the day to day life of its existence. A right to know, especially regarding public records, was a privilege[222] granted at pleasure by government officials, and not a right as argued in the previous first two chapters. Consequently, corruption, maladministration, lack of public participation, lack of accountability and the like defined the civil service of the time.[223]

In the Apartheid governance, "the security establishment" was the number one offender which violated the right to know by destroying records illegally. For instance, massive records portraying violations of human rights were destroyed in order to conceal the truth from the new democratic Government.[224] The situation also prevailed among members of the police who dealt extensively with the enforcement of criminal law. Despite the fact that the common law granted a blanket disclosure of all statements contained in the police dockets with a few exceptions, members of the police were not ready to grant access to these dockets.[225]

Furthermore, access to information even in private bodies during the apartheid era was defective. Some private bodies issued decisions which affected the general public life but they were not disclosing information about those decisions which were affecting the people. For example:

> [D]espite holding information regarding the health risks of mining asbestos, some South African mining companies decided to continue the practice. The lack of social accountability and information disclosure of such private bodies led the Constitutional Assembly to extend the right of access to information to cover private bodies.[226]

Contrary to the situation prior to the enactment of PAIA, the culture of secrecy has started to decrease.[227] The presence of the Government Communication and Information Service (GCIS) as a government communication agency working not as the Ministry of Information is a sign that the Government of South Africa is trying to enforce the exercise of the 'right to know'.

This brings to mind a field exercise when testing the system. We tried to access information from the government through the Government's official website and noticed the existence of this agency whereby we could launch our query to it about the pertinent

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[222] Ibid.
[223] Ibid.
[224] Ibid.
[225] Ibid.
[226] Jonathan Klaaren, note 151 at 373.
[227] Ibid. at 374.

information of the Government. We then realized that through a mechanism set up by the agency, one can access information which is readily available, and which does not form part of the so called 'sensitive information' or the classified ones. One can now note that most government offices have websites availing information to the public. Different initiatives being undertaken in South Africa has helped to do away with the culture of secrecy such as the initiative of 'Batho Pele', meaning 'people first'. This has used the right to know to bury the culture of secrecy.[228]

The right to know in South Africa is not only enhanced by PAIA alone. It does not work in isolation but works in tandem with other laws. Some other laws impact on PAIA and sometimes even create confusion[229] among them, and thus restrict the right to know. Laws which have an impact on PAIA may be divided into two categories: 'Acts that control information across all public structures or in relation to specific public structures; and ... Acts that relate to specific information held by specific sectors or structures.'[230] Below are some examples of those laws.

3.5 Examples of Legislation limiting the right to know in South Africa

3.5.1 Protection of Information Act 84 of 1982 (PIA)

PIA is one of the legislation inherited from the apartheid regime. The legislation limits the right to know by bearing provisions with 'classification and declassification of government information'.[231] Mc Kinley sees this piece of legislation as a hindrance to the:

> [G]rain of the openness and transparency of such information that informs PAIA. As long as PIA remains a law, there will be constant conflict between its "regime" of information protection and PAIA's "regime" for information disclosure and accessibility despite the stated intention of the override clause in PAIA. Such conflict is only made more difficult to deal with given that the main reasons informing classification /declassification in PIA rests on highly contested grounds such as 'national security' that are also contained in PAIA (as ground for refusal) but under a wholly different information "regime" informed by notions of democratic accountability and access.[232]

In the apartheid era, national security was used to conceal information. Unfortunately, the same ground can be used to justify secrecy while in fact hiding human rights violations.

Kate Allan notes that classification of information which is said to be embraced for national security is provided for by PIA and other legislation to muzzle the right to know. This occurs through providing for draconian punishments to whistle blowers who disclose

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[228] Ibid.
[229] Kate Allan, note 143 at 174.
[230] Ibid. at 144.
[231] Dale T. McKinley, note 144.
[232] Ibid.

information concerning matters of national interest. The law has a negative impact on the PAIA because declassification of files in the archives is done after making requests to access information. On this point, due to the absence of an information audit, very little has been done to declassify files. Consequently, requests to access information such as military and intelligence information are delayed until declassification is done.[233]

Moreover, PIA has been used to prevent the disclosure of information by invoking a reason of classification as it was the case when the National Archives and NIA denied SAHA to access TRC records on the ground that the records were classified as 'confidential'. This Act has been used inappropriately to deny the disclosure of information even in respect of information which traditionally was not defined in relation to national security. [234]

Fortunately, the problem of the apartheid regime was identified and South Africa is in the process of introducing another law in its place known as 'Protection of State Information Bill'. Hence, the preamble of the stated Bill stipulates that it aims: 'to promote the free flow of information within an open and democratic society without compromising the security of the Republic'.[235] The following is a sub-section of this bill:

3.5.1.1 Protection of State Information Bill

The preamble of the Bill acknowledges the 'the harm of excessive secrecy'.[236] This indicates that South Africa is struggling to do away with the culture of secrecy, while acknowledging justification for some secrecy. While the Bill is under discussion, there are several observations that have been given regarding the Bill. It is said that PAIA is supreme over other information legislation but that the draft of the Bill of protection of information which began to be discussed in 2010 'is [the] equivalent of an Official Secrets Act protecting military and police secrets'.[237]

Many people criticize this Bill as being in opposition to PAIA, in particular for opposing the right to access information and for classifying documents. According to the Bill, classified information can be termed confidential, secret, or top secret.[238] The present author's view is that the Bill has to be very well defined or otherwise a mere stamping of

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[233] Kate Allan, note 143.
[234] Ibid. at 178.
[235] Protection of State Information Bill, 2010 (South Africa).
[236] Ibid.
[237] Tilley Alison 'Active and passive resistance to openness: The transparency model for freedom of information Acts in Africa – Three case studies'. Available at: http://docs.google.com/viwer?a=v&q=cache:W6ZaMZQGvYoJ:www.africafoicenter.org. [accessed 20 June 2011].
[238] Protection of State Information Bill, 2010, Section 15.

documents with marks of 'confidential, secret or top secret' may lead to legal action against people who are innocent and sometimes to people who want to help the nation against corrupt and evil undertakings.

Furthermore, stakeholders are champing to see that the Government of South Africa comes out with a good Bill which will respect the Constitution, with no draconian secrecy clauses as well as provisions stipulating imprisonments or fines for persons found with secret records and apartheid-like secret laws.[239] It is observed that the definition of 'state secret' in the Bill is so broad in such a way that it can allow the Government to hinder the media from reporting information which might embarrass the government when some of its officials involves in corruption and maladministration.[240]

Due to the importance of the right to know, secrets have to be as few as possible since concealment of information is dangerous and difficult to keep as recently revealed by wikiLeaks.[241] Regarding security and intelligence, Tilley is quoted as saying secrets should only be kept when lives are at risk.[242] She further says:

> Governments do have secrets that they should legitimately keep. They keep those secrets in the interest of their citizens. They generally relate only to narrow security issues. If we have undercover policemen for example, working in gangs to try and end gang violence or trying to end organized crime, we would accept that those identities need to be kept secret. This would benefit the public, in that criminal activity would be stopped.[243]

During the time of writing this work, South Africa is still discussing the Bill. It is the author's hope that the spirit and letter of the Bill will consider the views of the stakeholders and the demand the intrinsic value of the right to know as it should be.

3.5.2 The National Archives and Records Service Act No. 43 of 1996 (NARSA)

The Acts provides that 'only archival information that is more than twenty years old can be made automatically available to the public'.[244] This implies that records held by the National Archives which are older than 20 years are not subjected to PAIA and are accordingly supposed to be freely accessible to the public. These include cabinet records.

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[239] News24 'Right2know applauds ANC's info bill move.' Available at: http://www.news24.com/SouthAfrica/News/Right2Know-applauds-ANC-info-bill-move-20110625 [accessed 29 January 2012].

[240] Voice of America "Wikileaks concern for South African freedom of Information activists." Available at *http://www.voanews.com/english/news/africa/WikiLeaks-Concern-for-South-African-Freedom-of-Information-Activists-111748349.html.* [Accessed 30 January 2012].

[241] This is a group founded by an Australian Julian Assange and established a website on which leaked materials are posted. From its foundation, millions of secret documents have been leaked to the public involving scandalous activities of states. History of Wikileaks and its activities are well illustrated by David Leigh and Luke Harding '*WikiLeaks, inside Julian Assange's war on secrecy*' (New York: Public Affairs, 2011).

[242] Voice of America, note 240.

[243] Ibid.

[244] Dale T. McKinley, note 144.

However, records which are under 20 years old can be requested under PAIA, except for Cabinet records which can be accessed with a special permission of the National Archivist.[245]

The Act gives discretional power to national archivists to decide the kind of information which can be available sooner to the public while observing the right to privacy. Unfortunately, PAIA does not state a time limitation for disclosure of information. PAIA leaves public and private bodies to determine which information can be automatically available to the access of the public.[246] This raises a contradiction between PAIA which does not state time and NARSA which states time before information can be disclosed automatically to the public. This contradiction poses a problem to information holders on how they are to judge availability of sensitive information when matching the respective provisions of PAIA and NARSA.[247]

Furthermore, powers provided for by the two pieces of legislation to public officials from specific departments cause ambiguity in implementing the two Acts. NARSA empowers the National Archives housed under the Department of Arts and Culture, Science and Technology to approve:

> [M]anagement systems of government bodies and authorise the disposal of records – Sections 11(2) and 13(2)(a) of PAIA (which is 'housed' under the Department of Justice and Constitutional Development – (DACST) privileges the role of DACST in overseeing South Africa's information 'regime'. This presents clear problems of inter-departmental cooperation in enforcing legal provisions relating to information access as well as respective accountability for decisions taken.[248]

In addition to the problem of inter-departmental cooperation, mentioned above, NASA was audited by SAHA it proved to entertain secrecy. The National Archivist was less active in ensuring that apartheid records are transferred to the National Archives and in facilitating a request of SAHA to access information. In this case, the National Archivist simply defended himself by saying that 'there was a lack of clarity between two pieces of legislation'. [249] In the present author's view, if the problem is not solved then the right to know will be jeopardized in the name of secrecy.

3.5.3 Minimum Information Security Standards of 1996 (MISS)

MISS is a government's policy approved by the Cabinet of South Africa concerning information security. MISS gives information standards of security to be observed by all

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[245] Ibid.
[246] PAIA Section 14, 15.
[247] Dale T. McKinley, note 144.
[248] Ibid.
[249] Kate Allan 'Applying PAIA: Legal, Political and Context Issues' *in (ed) Kate Allan Paper wars, Access to information in South Africa* (Johanesburg: Wits University Press, 2009) 175.

government institutions in handling 'sensitive and classified material for the protection of the national interests.'[250] MISS lists four types of secrets as 'restricted, confidential, secret and top secret'[251] which must be handled as sensitive information. The problem that arises concerns the application of PAIA and this policy. This is because PAIA's intention of transparency might be jeopardized especially when 'MISS policies and the work of... inter-departmental committee set up to deal with issues of classification/declassification, will coincide or contradict each other.'[252]

3.5.4 Legal Deposit Bill, 1997 (LDB)

In exercising the right to know, the source of information is obviously important. As stated in the previous Chapter, PAIA deals with records held by public and private bodies, and thus for the Act to be useful it requires records kept. Thus we find that the Legal Deposit Bill of 1997 is important when studying the right to know in South Africa.

The Bill concerns all government published materials deposited in the City Library Services, Bloemfontein, the Library of Parliament, Cape Town, the Natal Society Library, Pietermaritzburg, the South African Library, Cape Town, the State Library, Pretoria, the National Film, Video and Sound Archives, Pretoria and other libraries or documents directed by the Minister of Arts, Culture, Science and Technology.[253] While this Deposit Bill is important because of archiving some information, it contains some provisions which some critics think may lead to 'unfounded secrecy'.

For example McKinley asserts that the Bill allows the head of Legal Deposit to 'dispose, omit from catalogues, inventories and a national bibliography or impose restrictions on access to certain categories of documents'.[254] This might give room for destruction of records held by a public body under the discretionary power of an individual who might abuse this mandate of keeping the records for the intention of hiding information which could be useful in terms of PAIA's intent.[255] Hence, while the right to know in South Africa is safeguarded by PAIA, LDB illustrates examples of cases whereby not all information held by the public body may be accessed.

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[250] Dale T. McKinley, note 144.
[251] Ibid.
[252] Ibid.
[253] LDB Section 6(1).
[254] LDB Section 7(5).
[255] Dale T. McKinley, note 144.

3.5.5 Protected Disclosures Act 26 of 2000 (PDA)

This is one of the products of the Constitution of South Africa of 1996 in its bid to instil the culture of openness, transparency and accountability. PDA provides for the protection of employees of public and private bodies who disclose information regarding maladministration of employers and employees without fearing reprisals or disciplinary actions against them for doing so. The Act also outlines procedures which employees should follow internally before disclosing information of irregularities elsewhere. The Act also requires an employee disclosing the bad behaviour of his or her employer to exhaust internal means first before resorting to external means.

At this juncture, it is apparent that secrecy which jeopardizes public interest is not entertained. We find the intention of this piece of legislation to be good. Positively, 'whistle blowers' may divulge information for the interest of the nation. For example, in the case of *Tshishonga v Minister of Justice & Constitutional Development & another,*[256] Tshishonga who was working in the High Court was disciplined for having divulged information to the media about misconducts regarding appointments of liquidators in the unit where he was working. Upon seeing that no action was taken in respect of this misconduct even after him giving information to the concerned officers he disclosed the relevant information to the media. Subsequently, he was disciplined for having disclosed the information to the media. The Court, basing on PDA found that Tshishonga did well to disclose that information in the 'public interest'. The Court also found that Tshishonga's intention was valid since he was fighting corruption and the bad behaviour of the employer.[257]

Unfortunately, despite the positive aspect of the Act, the disclosure of information given by a 'whistleblower' is left under the discretionary power of officials in charge of the bodies who may abuse it. There is no PAIA provision which may assist the disclosure of the information in case it is required.[258]

3.5.6 Promotion of Equality and Unfair Discrimination Act 4 of 2000 (PEUDA)

PEUDA gives effect to section 9 of the South African Constitution on equality. Its preamble states that the Act: 'endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principle of equality, fairness, equity, social progress, justice, human dignity

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[256] *Tshishonga v Minister of Justice & Constitutional Development& another* [2007] 4 BLLR 327 (LC).
[257] *Tshishonga v Minister of Justice & Constitutional Development& another* at 373.
[258] Dale T. McKinley, note 144.

and freedom...'[259] The Act prohibits dissemination of any information for the purpose of discriminating any person unfairly, 'provided bona fide engagement in artistic creativity, academic and scientific enquiry... is not precluded'.[260]

According to McKinley, section 12 of PEUDA 'contradicts the provision of with the provisions of PAIA arises though, if for example, someone researching discrimination disseminates such information. According to PEUDA, this person would be committing an offence but should that person not disclose the information then PAIA is rendered useless'.[261] The present author's opinion is that this provision is valid since it emphasizes on the fact that there should be no unfair discrimination using information. The section very well refers to Section 16 of the Constitution of South Africa which concerns the right to freedom of expression. However, the problem here lies with the intention of the party disseminating that information. If the intention is to unfairly discriminate another person, it cannot be justified. This is the area where concealment of information can be justified pending the intention of the person who conceals the information.

3.6 Chapter conclusion

It can be concluded from this study that there is a public interest in non-disclosure and that any non-disclosures should be set up as exemptions to the duty to disclose and carefully attached to the public interest that is being served by the non-disclosure. Secrecy is important for different reasons such as privacy, commercial reasons, national security, the protection of whistleblowers and the protection of witnesses. Unfortunately, secrecy is abused for oppressing people as it was the case during the apartheid era. It can further conceal maladministration and corrupt practices.[262]

The post-apartheid era came up with a constitution entrenched with the Bill of Human Rights of which the right to know is recognized. Subsequently, PAIA was enacted for the promotion and protection of this right. Unfortunately, the study has discovered that there are a number of laws in South Africa which pose challenges to PAIA and its advocacy of transparency. PIA, NARSA, MISS, LDB and PDA are examples of such laws which have some provisions which need to be revisited carefully in order for PAIA to work properly and achieve the

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[259] PEUDA.
[260] PEUDA Section 12.
[261] Dale T. McKinley, note 143.
[262] Practices such as that reported by the City Press (Sunday 19 February 2012) illustrate how PIA is being used to intimidate an NIA whistleblower who wishes to blow the whistle on corruption in the NIA. (See Mandy Rossouw 'Spy boss warns lawyer' *City Press* 19 (February 2012). Available at http://m.news24.com/ citypress/ Politics/ News/Spy- boss- warns -lawyer -20120218 [accessed 24 February 2012].

objective of enabling South Africans to exercise their right to know. This chapter should provide a lesson for Tanzania to scrutinize its laws so that a culture of transparency is advocated for and secrecy should not be entertained unless it is necessary and justifiable.

Chapter four: Conclusion

4.1 Introduction

Tanzania is a signatory of the ICCPR and its provisions are entrenched in article 19 of the Covenant in the two constitutions for the Union and also for Zanzibar. Article 19 of the Covenant recognizes the right to know. However, the constitutional provision of the right to know is toothless for lack of a specific enabling legislation as the PAIA of South Africa which can enable people to access information held by public and private bodies. This chapter concludes this dissertation by briefly introducing the situation on ground regarding the right to know in Tanzania and the lessons Tanzania can draw from South Africa vis-à-vis the right to know.

4.2 Brief history of Tanzania

The Republic of Tanzania (Tanzania) is a union of two states: Tanganyika and Zanzibar. Although Tanzania is one state there are two constitutions: one for the union and another for Zanzibar itself. There are 22 matters for the union and matters for Zanzibar itself.[263] The union which took place on 26 April 1964 was later followed by the merger of two political parties, namely Tanganyika African National Union (TANU) and Afro Shirazi Party (ASP) from Tanganyika and Zanzibar respectively. The two parties formed Chama Cha Mapinduzi (CCM) on 5 February 1977 which remained constitutionally as the ruling party. A Bill of human rights was entrenched in the Constitution of Tanzania in 1984, and subsequently political parties were legalized in 1992.[264] Thus, while considering the right to know in Tanzania the two legal systems have to born in mind: one for the Mainland and the other for Zanzibar.

During the one-party political system, Tanzania had a very secretive government which implemented its policies through one Party which was the sole owner of all information held by the Government. The situation was worsened by the one-party Government which controlled the mass media and thus '[m]ost citizens were uninformed or ill informed and those who were informed lacked avenues for expression and participation in the policy process.'[265] Worse still there was no media freedom. Privately-owned newspapers

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[263] Article 19 and The Media Institute of Southern Africa (MISA), 'A report by Article 19 and the Media Institute of Southern Africa (MISA), No. 13 April 2000'. Available at: http://www.article19.org/pdfs/publications/tanzania-media-law-and-practice-in-southern-africa.pdf. [Accessed 15 June 2011].

[264] Ibid.

[265] Ernest T Mallya, 'The political economy of Democracy in Tanzania', (June 2007)6, Issue 1, *Journal of African Elections* 174 at 177.

and periodicals were muzzled. It was unthinkable for the media to publish sensitive information. Journalists were forced to act as 'public relation officers' of the government and CCM, the ruling party, if they wanted to maintain their jobs. A culture of censorship prevailed in all levels of the media profession.[266] Indeed, the 'the culture of secrecy' prevailed.

The situation prevailed because Tanganyika and Zanzibar formed an independent state which *ab initio* did not have the Bill of Rights in their constitutions. Following pressure from different stake holders of human rights, in 1984 the Bill of rights was entrenched in both constitutions of Tanzania and that of Zanzibar.[267] Among the human rights that were entrenched is the right to know. The constitution of Tanzania stipulates that:

> 1. Without prejudice of the relevant law of the land, every person has the right to freedom...and to receive and impart or disseminate information and ideas through any media regardless of national frontiers and also has the right of freedom from interference with his communications
> 2. Every citizen has the right to be informed at all times of various events in the country and in the world at large which are of importance to the lives and activities of the people and also of issues of importance to society.[268]

The above cited constitutional provision concerns both the Main Land and Zanzibar. The legislation looks marvellous but unfortunately the law is tarnished by the phrase "without prejudice of the relevant law of the land" which restricts the right it gives. So one can imagine any other law of the land can easily take away this constitutional right.

Among the recommendations given by the late Chief Justice Francis Nyalali's Constitutional Commission touched on the right to know. The Commission recommended the 'repeal or amendment of forty pieces of legislation which considered unduly to restrict fundamental rights and freedoms. Among the laws recommended for repeal or amendment were those which hindered the smooth and effective collection and dissemination of information by the mass media in Tanzania.'[269]

4.3 Tanzania Mainland and Freedom of Information

4.3.1 National Security Act (1970)

This Act binds both Zanzibar and the Mainland. It is one of the legislations which have been criticized by many stakeholders of the right to know. Some critics recommend to

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[266] ARTICLE 19 and MISA, note 263.
[267] Ibid.
[268] Constitution of United Republic of Tanzania of 1977, Section 18.
[269] Legal and Human Rights Centre (LHRC) "Tanzania Human Rights Reports 2009, incorporating specific part on Zanzibar." Available at http://www.humanrights.or.tz/wp-content/uploads/2010/10/Tanzania-Human-Rights-Report-2009.pdf [accessed 21 February 2012].

the Government of the Union of Tanzania to repeal it *in toto* and to replace it by a 'legislation which is in line with international standards.'[270] This is a draconian rule which empowers the government to define and to determine whether the information held by the government is to be disclosed or withheld. According to the Act 'Classified matter means any information or thing declared to be classified by an authorized officer'.[271] Anyone found with classified information may be prosecuted for espionage and sabotage.[272] Without authorization, any person who might be found with or deemed to be a source of any classified information might be prosecuted. Penalties for these offences may be an imprisonment not exceeding 20 years.[273]

As was noted in the previous Chapter, stake-holders of the right to know are concerned with classified the laws concerning information like that of Tanzania lest it becomes a draconian rule and muzzles freedom of expression, right to know and democracy. This fact is being discussed in South Africa regarding the Bill of Information as was pointed out in the previous chapter. Regarding classified information, Article 19 states that:

> [B]elieves that any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security objective. A state may not categorically deny access to all information related to national security.[274]

For example, restriction may not be valid if the purpose for concealment of information for hiding evils of administrators or maladministration. Heather Brooke notes that 'national security has become a completely devalued term, trotted out whenever someone in authority wants to avoid potentially embarrassing material reaching the public.'[275] Tanzania needs to learn from different incidents where the Government resorted to 'national security' to forbid peaceful demonstration of Chama Cha Maendeleo (CHADEMA) in Arusha. The consequences of the ban of demonstration resulted in the death of three people. The demonstrators were not convinced by reasons given by the Government in the last minutes before their planned demonstrations.

Likewise there was a general dissatisfaction from the public when the Government denied permission to demonstrators in Dar es Salaam on the basis that national security was

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[270] ARTICLE 19 "Zanzibar democracy on shaky oundations." Available at: http://www.article19.org/pdfs /publications /tanzania-zanzibar-democracy-on-shaky-foundatio.pdf [Accessed 21 July 2012]"
[271] National Security Act (1970) (Tanzania), Section 29(1).
[272] National Security Act (1970) (Tanzania), Section 3(c).
[273] National Security Act (1970) (Tanzania), Section 5 (1).
[274] ARTICLE 19, note 270.
[275] Heather Brooke, note 6 at 73.

at stake after having received threats from Al-Shabaab,[276] as if Tanzania was in war with the latter. In using the excuse of 'national security' the government of Tanzania stated that all gatherings could be attacked by Islamists of Al-Shabab and because of that demonstrations were not allowed. But at the same time there was a football match in the national stadium at Dar es Salaam where naturally there was a big gathering, yet the threat of al-Shabaab was not invoked for the national security. In the view of the present author, the reasons for 'national security' do not hold water today in Tanzania, unless convincing arguments are given to the public because Tanzanians have the right to know what influences their daily lives.

Fortunately, South Africa, as has been shown, in this study has the PDA which protects employees who reveal the maladministration of their employers. The present author recommends that Tanzania should in general emulate South Africa by having legislation like the PDA. Moreover the National Security Act threatens right to know by forbidding Tanzanians to meet with international news agents and different international institutions. The Act presumes that any citizen who will be communicating with international agencies threatens national security, unless it is proven otherwise. Moreover, the burden of proof lies with the suspect.[277] This is a bad legal provision because it reverses the burden of proof giving the defendant the duty to prove his or her innocence. This Act also grants a blanket power of inspecting, arresting and detaining with or without warrant a person for even some mere suspicion. Furthermore, properties of a suspect caught under this law may be forfeited on the ground of 'national security' even if a suspect is acquitted.[278]

Article 19 believes 'national security' should not be used to force the media to reveal their secret informers. Journalists have the obligation of helping the society to know by exercising their right of professional secrecy when publishing information unless, according to the present author's, view the information published is demonstrably dangerous to the national security. Likewise, there are many other bad provisions of the Act but it suffices to show few examples to illustrate how the Act limits the right to know without legitimate reasons.

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[276] This is a militant Islamist terrorist group based in Somalia. It is fighting for the Islamization of Somalia, and currently it is fighting against Transitional Federal Government (TFG) and its allies the African Union Peace Keepers, and Non-Governmental Aids organisations. (See: National Counter Terrorism Centre (NCTC) "Al-Shabaab". Available at *http://www.nctc.gov/site/groups/al_shabaab.html* [Accessed 12 February 2012].

[277] National Security Act (1970) (Tanzania), Section 12(1).

[278] National Security Act (1970) (Tanzania), Section 13(1).

4.4.2 The Newspaper Act, 1976

This Act is only applicable in the Mainland. The Act requires all newspapers operating in the Mainland to be registered with the Registrar of Newspapers.[279] This is one of the problematic laws regarding the right to know because it provides for the Minister of Information to exclude a newspaper from operations for reasons he or she deems fit. [280] This law has been abused by the government to silence journalists who expose the evils of the government or civil workers, and thus prevents the citizens from knowing the truth about the government and its workers. Moreover, policemen may seize a newspaper printed or published on grounds of mere suspicion of a violation of this Act without having a warrant.[281] People can get an opportunity to know and exercise the right to know if there is a good freedom of media law, which currently is non-existent in Tanzania.

4.3.3 The 1945 Tanganyika Penal Code

This law operates in Tanzania Mainland and was inherited from the colonial era. The law criminalizes a person who uses insulting language as well as defamation (art. 89/1a). This law is a threat to the freedom of information because it has been used to provide for severe fines which make some media outlets face bankruptcy. Some cases concerning this law have been dealt by Media Council of Tanzania (MCT) and Media Owners Association of Tanzania (MOAT) and they have been "criticized for their arbitrary verdicts and excessive fines that forced some media outlets to close."[282] For example, the Swahili newspaper 'Mwanahalisi' faced bankruptcy when it was ordered to pay USD 2.2 Million for defamation. Fortunately for the newspaper the court overturned this verdict following an appeal.[283] However, according to the present author's knowledge the above-mentioned newspaper and others papers are often threatened with charges relying on this Act.

4.3.4 The Civil Service Act, 1989

This Act prohibits civil servants from disclosing information known to them in the course of their service in the government without the written permission of the President.[284] The present author's view is that Tanzania needs to enact a law which protects civil servants who disclose information for national interests. This is a fundamental lesson that should be

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[279] Newspapers Act, 1976, Section 6.
[280] Newspapers Act, 1976, Section 5 and Section 25.
[281] Newspapers Act, 1976, Section 22.
[282] ARTICLE 19's Submission to the UN Universal Periodic Review, for consideration at the twelfth session of the UPR Working Group, October 2011 (United Republic of Tanzania). Available at *http://www.ifex.org/tanzania/2011/03/16/tanzania-upr-submission.pdf*. [accessed 23 June 2011].
[283] Freedom House "Freedom of the Press 2011". Available at http://freedomhouse.org/report/freedom-press/2011/tanzania [accessed 21 January 2012].
[284] Civil Service Act, 1989, Section 13.

drawn from the PDA in South Africa which protects civil servants who disclose information for national interest.

4.3.5 Other Acts which violate the right to know in Tanzania Mainland

ARTICLE 19 in its global campaigns mentions other Acts which violate the right to know. The 1945 Tanganyika Penal Code which is applicable in the Mainland is criticized for criminalizing the use of insulting language which may cause a breach of peace and defamation. Fines for these offences are very severe and it may lead a newspaper into bankruptcy. ARTICLE 19 further mentions the Prison Act of 1967,[285] the 1970 Film and Stage Act, and the 1965 Public Leadership Code of Ethics Act[286] for containing provisions which violate the right to know.[287]

4.4 Zanzibar and Freedom of Information

For many years Zanzibar did not have a good record of human rights vis-à-vis the freedom of expression. For example in 1995 the opposition party, Civil United Front (CUF) and the media faced harassment when they tried to exercise their right of 'freedom of expression, association and assembly'.[288] The Government applied 'bad laws' to detain CUF leaders on charges of 'sedition, defamation, subversion, possession of classified documents and treason'.[289] The public and private media found themselves in problems when they tried to cover the opposition's view. Papers such as Majira were banned in Zanzibar for questioning the conduct of the then President of Zanzibar, Salmin Amour, following the disputed election. The papers condemned the detention of opposition political leaders without charges amongst other human rights related stories.[290]

In spite of having laws concerning right of information, these laws lack teeth because they have a 'host of "claw-back" [clauses] in constitutional and legal provisions...e.g right of

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[285] This Act prohibits entrance to prisons and dissemination of information relating to prisons' conditions of Tanzania, consequently to publish investigative story concerning prisons and prisoners is not allowed. For example section 93 of the Act prohibits a prisoner's official to release information relating to prisons to the press or other people without the permission of Prisons Commissioner. A person who contravenes this provision is liable to paying a fine or imprisonment. This prohibition is against the UN Minimum Rules for Treatment of Prisoners which require prisons to be transparent and allow the people to know what is transpiring in prisons.

[286] The Act prohibits publication of information relating to properties of public leaders. This provision is not good because it gives room for public leaders to embezzle public funds and involve themselves in corruption dealings. People have the right to know that their leaders are moral and worthy to stay in power.

[287] ARTICLE 19, note 282.

[288] ARTICLE 19, note 270.

[289] Ibid.

[290] Ibid.

expression and information s. 18'.[291] It is no wonder as has been shown above, in South Africa as it is for other countries, the restriction of some of information is a normal practice but it is essential to observe certain conditions. The first condition for restriction is that the restricted information must be based on established laws. It is not acceptable to have a restriction of information which has no legal basis. Also those restrictions must be 'accessible and foreseeable'[292] so that individuals may know how they should behave without violating a law they are not aware of.

Secondly, restrictions have to be for legitimate objectives which warrant overriding rights which are constitutionally protected.[293] Article 19 of the ICCPR lists legitimate reasons for restricting the right to know as 'respect of the rights or reputations of others, national security or of public order, or of public health or morals. Thirdly, the restrictions must be 'reasonable, necessary or justifiable in a democratic society.'[294] Unfortunately the legislation of Zanzibar concerning the right to know does not meet the three tests described above.[295] It is highly recommended as it is the case of South Africa that Zanzibar and Tanzania in general should have in place a legislation enabling the people to access information held by public and private bodies because this is missing.[296] When Tanzania is thinking of making a new constitution, it is recommended that these missing aspects as mentioned above should be entrenched therein. The challenges facing the implementation of PAIA in South Africa can help Tanzania to come up with a much more improved legislation which can protect the right to know. The following are some legislation in Zanzibar which are related to the right to know.

4.4.1 The Constitution of Zanzibar (1984)

The constitution of Zanzibar provides clauses which justify 'national interest' as an exception to the observance of human rights. ARTICLE 19[297] believes that 'such vague and subjective terms give excessively wide powers to the Union and Zanzibar governments to act

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[291] Ibid.
[292] Ibid.
[293] Ibid.
[294] Ibid.
[295] Ibid.
[296] Ibid.
[297] This is an international Non-governmental organization which works around the World to protect and promote the freedom of expression and information. It has observer status with ECOSOC. (See http://www.ifex.org/tanzania/2011/03/16/tanzania-upr-submission.pdf [accessed 21 June 2011].

in arbitrary or politically-motivated ways'.[298] The present author concurs with this observation and recommends for amendments.

4.4.2 The Registration of News Agents, Newspapers and Books Act (1988)

It is further argued that Zanzibar has other legislation which violates the right to know. The Registration of News Agents, Newspapers and Books Act (1988) with its several amendments empower the Minister for Information to deny registering media outlets without a right to appeal.[299] Comparatively, Tanzania can have an example to emulate from South Africa's PAIA which provides for mechanisms of appeal. Additionally, the Act 'provides for licensing of journalists and the establishment of a government-controlled "advisory board" to oversee the private print media'.[300] Because of the rigidity of this Act Zanzibar has only one privately-owned newspaper. It has been reported that journalists have been detained or threatened for covering activities of the opposition parties and often get their cameras confiscated and the photos taken in the pretext that they are 'sensitive documents'. Reporters of Nipashe, The Guardian and the Dar es Salaam Television (DTV) and British Broadcasting Corporation are examples of the victims of the restrictive nature of this Act.[301] Consequently the vailability of information through media rely on the media from Main Land and government owned media, ie, the daily paper 'Zanzibar Leo', the Television Zanzibar and the radio station 'Sauti ya Zanzibar-Zanzibar'. 'Zanzibar wiki hii' is the sole privately owned newspaper and unfortunately it has no guts to criticize the Government.[302]

This Act has a defamation provision which does not march with the recent development of international jurisprudence. For example, this provision prohibits criticizing a government Executive. The provision of the Act denies the public the right to know behaviours of public officials and thus fails to assess the accuracy of information given in meetings or other places. Criticism of public officials has the advantage of enabling citizens to know the suitability of their leaders and their performance. The people's right to know about the public officials is limited if defamation law is used 'to prevent legitimate criticism of public officials or exposure of officials wrongdoing or corruption'.[303] The present author's view is that there is no justification for defamation law when an individual is disclosing information for public interest.

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[298] Ibid.
[299] Ibid.
[300] ARTICLE 19, note 282.
[301] ARTICLE 19, note 270.
[302] ARTICLE 19, note 282.
[303] ARTICLE 19, note 270.

4.4.3 Film and Stage Plays Act (1976)

This Act forbids any person to make films without explicit permission from the Director of Information.[304] Authorities have discretionary power to accept or deny request to make a film basing on the criterion of meeting film standards which require that the respective film does not offend the people of Zanzibar and their culture. Owners of premises are forbidden to allow anybody to film in their places without permission of the Censorship Board. In the view of the present author, in addition to the fact that this Act contravenes international standards on the right to know because it is outdated, if it is strictly followed many people will be said to have violated the law because of the advancement of technology nowadays. A person can film with only a phone hand set! The same law is outdated when it requires persons to have permits from the Ministry of Information.[305]

4.5 Lessons for Tanzania

Tanzania can learn a lesson from South Africa regarding how the right to know is being exercised. Tanzania can learn positively by emulating what South Africa has achieved in this regard or learn negatively by avoiding the shortcomings experienced by South Africa in the implementation of the right to know.

South Africa has one of the most progressive constitutions in the world. The right to know is entrenched in this constitution in the section of the Bill of Rights. Section 32 of the Constitution of South Africa directed for the enactment of legislation and policies which could ensure the realisation of the right to know. PAIA as the present author has tried to show in this dissertation is the fruit of section 32. Tanzania too has a provision for the freedom of expression but it lacks a specific provision as that of section 32 of PAIA, and thus the constitutional right remains ineffective. The present author recommends that at this time when Tanzania is in the process of making a new constitution it is imperative to ensure that the right to know is directly specified in the prospective new constitution as it is the case of South Africa. The specific provision of the right to know has to lead to an enactment which facilitates access to information held by public and private bodies.

The proposed legislation has to allow individuals to access information from both public and private bodies regardless of the form of information (documents, electronic, tapes and so forth). The refusal of access to such information has to consider international standards regarding the right of information. The proposed law should avoid problems of

[304] Film and Stage Plays Act (1976) (Zanzibar), amended in 1997, Section 63.
[305] Film and Stage Plays Act (1976) (Zanzibar), amended in 1997, Section 65.

classified information experienced in South Africa as a challenge to PAIA as was shown in chapter two and three. The abuse of the right to know experienced in the implementation of PAIA in South Africa in relation to classification of information should not be tolerated once the legislation is in place. It has been shown in this dissertation that some information holders in South Africa purposely abused the provision of PAIA to mislead the public in order to hide maladministration of public leaders and weakness of the government.

It is also important that the new legislation has to have a penalty provision on those who abuse the classification of information. Moreover, there should be political will behind the legislation, so that the legislation is implemented. Draconian punishments proposed by the Protection of Information Bill in South Africa for the whistleblowers who reveal the classified information for national interests. Instead, whistleblowers should be protected rather than being harassed by the government and its agents. The burden of keeping classified information has to be borne by public officials in charge of keeping the information and not the whistleblowers who are found with classified information.

The case of exemptions has featured as one of the challenges which influenced the implementation of PAIA and other legislation in South Africa which enhance the right to know. Tanzania has to enact laws which should have as few exemptions as possible so that the right to know is implemented in accordance with international standards. Exemptions should not be given according to the will of information holders but they should be guided by regulations which consider explicit harm test and demonstrable public override.[306] The bodies which require exemptions will have to provide compelling reasons for that.

The problem of language understood to normal citizens contributed to the poor implementation of PAIA in South Africa. The present author recommends that apart from being written in English the constitution of Tanzania should also be written in Kiswahili, a language which is understood and spoken by most Tanzanians. It would be useless to have good laws which are not understood by citizens. Additionally, it has been shown from the South African experience that access to information is expensive to the poor. Tanzania should enact information laws which must consider the poor, and thus fix low access fees. Fees should not be a barrier to the exercise of the right to know.

Furthermore, PAIA is used by very few people because requests under PAIA take long to engender replies regardless the urgency of the requests. Tanzania must have laws

[306] John M. Ackerman and Irma E. Sandoval-Ballesteros, 'The global explosion of freedom of information laws' (2006)58 *Administrative Law Review* 85-130 at 101.

which consider the urgency of the person requesting; otherwise the laws will be ineffective in helping those who require information. There should be a provision of urgency and non-urgency because "shorter time frames prioritise the right of access to information over other duties and tasks which public officials have to carry out".[307]

The enforcement mechanism of PAIA has proved to be very expensive and slow. This study has shown that the implementation of PAIA has relied heavily on court litigations, which more often ordinary people cannot use. The present author concurs with the recommendations of Kisson concerning the implementation of PAIA in South Africa. The same recommendations can apply to the proposed laws on the right to know in Tanzania by provisions of enforcement mechanisms within the "office of an information Commissioner or an information ombuds".[308] This provision may reduce the over-dependence on court litigations which are unduly "complex, expensive and lengthy".[309]

Furthermore, the present author suggests that apart from having an effective constitutional provision for the right to know, Tanzania has to repeal all bad laws such as those mentioned above which stifle the right to know and to inculcate a culture of transparency and good governance. Freedom of information which facilitates the right to know should be looked as a friend to the government and not a foe. Therefore, the new legislation and other related laws should assist in the advancement of the mass media rather discouraging investigative journalism by the arbitrary and unjustified closure of the media under the pretext of national security.

Tanzania must aim at getting rid of the culture of secrecy. Secrecy should not be used as a tool of hiding the evil of the government, as it prevailed in the apartheid era. The present author is saddened by a law which denied Hon. Zitto Zuberi Kabwe, the Member of Parliament of Kigoma North, access to documents of the Cabinet of Tanzania relating to Consolidated Holdings Corporations (CHC) although he is one of the representatives of the people in Parliament and a Chairman of a Public Organisations' Accounts Committee (POAC) of the Parliament of Tanzania. It is pity when a Member of Parliament is refused access to documents pertaining to the public property in the name of secrecy and worse still when he required them for defence of an allegation he raised in Parliament that the Cabinet of

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[307] Marlse Richter, note 35 at 231.
[308] Chantal Kisson, note 45.
[309] Ibid.

Tanzania was influenced by some people to dissolve the Corporation.[310] Secrecy laws of this nature are not suitable for the good of the Country.

Furthermore, information education should be given to the information holders and the people once the legislation is in place. It has to explain the purpose of freedom of information, procedures of accessing information, management of information, the purpose of protecting whistle blowers, the importance and purpose of freedom of information, procedures of accessing information, and the type of information to be published.[311] The new legislation for promoting and protecting the right to know in Tanzania has to ensure that all requests are granted unless the denial demonstrable and justifiable. The present author recommends the suggestions of a three-part test to be employed before denying the disclosure of information contained in Article 19. Article 19 suggests that information can be denied if it meets a three-part test:

- The information must relate to a legitimate aim listed in the law;
- Disclosure must threaten to cause substantial harm to that aim: and
- The harm to the aim must be greater than the public interest in having the information.[312]

Tanzania now faces pressure to join the growing number of countries that have legislation on the right to know since the trend now is towards greater transparency. In countries where the possibility of freedom of information is far from reality, leakage of documents is attractive and seen as an alternative solution. If the government cannot allow people to access its documents showing its criminality or its own corruption whistle blowers can leak the documents of the government and make the government be hated by its own citizens. Networks such as wikiLeaks ensure that the right to know is implemented and it claims that its objective is to 'reveal unethical behaviour in ... governments and corporations. We aim for maximum political impact [...] over 1.2 million documents so far from dissident communities and anonymous source'.[313] The right to know is no longer a luxury but a must.

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[310] Kizitto Noya na Boniface Meena 'Spika amvutia pumzi Zitto'. Available at http:www.mwananchi.co.tz/habari/49-uchaguzi-mkuu/13250-spika-amvutia-pumzi-zitto [accessed on 30 January 2012].
[311] ARTICLE 19, note 14.
[312] Ibid.
[313] WikiLeaks website available at http://www.wikileaks.org.

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