Access to Information and Constitutional Accountability: Ruffling Feathers in South Africa

By *Richard Calland*[*]

Abstract: Recent corruption scandals pivoting around South Africa's President Jacob Zuma have knocked much of the gloss off of the country's rosy constitutional face. But it's democracy is proving to be resilient in the face of severe challenges to public accountability and transparency. Enshrined in its much-admired Constitution, the right of access to information (ATI) is proving to be a valuable tool that equips key users of the enabling legislation, the Promotion of Access to Information Act 2000 (PAIA), such as investigative journalists or opposition political parties to challenge those in power. While there is a good deal of literature on ATI in South Africa, there is a dearth of scholarly writing on the specific relationship between ATI/PAIA and political accountability. This paper aims to help fill this gap and to do so by use of empirical research that draws on the direct experience of members of four categories of 'PAIA protagonists'. The evidence of some of the most prominent sets of users of access to information law in South Africa suggests that while this may present itself as the task of Sisyphus, the results can be politically as well as legally significant, thereby justifying the investment in time and resources. The research and analysis shows that the use of ATI law in South Africa is certainly ruffling feathers and helping to inject additional much-needed sharpness and vigour into the democratic process and to entrenching a new culture of constitutional accountability.

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I. Preamble & Introduction: Ruffling the Feathers of "Number One"

Access to information proved to be a significant companion to attempts to hold South Africa's scandal-ridden former President, Jacob Zuma, to account. South Africa's Public Protector (Ombud) had investigated possible public unlawful expenditure of R260 million (US$20 million) that had been spend on 'security upgrades' to Zuma's private residence, Nkandla. Pursuant to her constitutional powers, the Public Protector decided that the "remedial action" that she required Zuma to take was to pay back a reasonable proportion of the

* Richard Calland is Associate Professor in Public Law at the University of Cape Town and currently a member of the World Bank's Independent Access to Information Appeals Board. The author was assisted greatly in the preparation of this article by his researcher, Mike Law.

money that had unlawfully benefitted Zuma and his family.[1] For more than two years Zuma refused to do so, while Zuma loyalists in and outside parliament sought to intimidate the Public Protector and to obfuscate the issues. But on 31 March 2016, Zuma's conduct in refusing to accept the Public Protector's report and to pay back the money was found by the country's constitutional court to be a violation of Zuma's constitutional duty to "uphold, defend and respect the Constitution".[2] He was ordered to repay around R8m (US$600,000) to the public exchequer.

The Constitutional Court's seminal judgment was preceded by use of South Africa's access to information law. The Nkandla scandal was original exposed by the Mail and Guardian newspaper (M & G) on 4 December 2009.[3] The newspaper had used South Africa's access to information law to get access to documents that enabled its team of investigative journalists to build the case and the story.

The Nkandla case ruffled the feathers of the most powerful man in South Africa and provided ammunition for those calling for him to resign.[4] Access to information played a part in the process of holding a corrupt political leader to account. And in this regard, it is not just that 'information is power', as the cliché goes, but that the act of asking powerful people to disclose information, or their being required to do so, causes discomfiture and may unsettle patterns of entrenched power relations: *feathers may well be ruffled in the process.*[5]

This is the conceptual premise upon which this chapter on access to information (ATI) in South Africa is based. As such, it builds on, and to some extent departs from, my earlier

1 Section 182(1)(c) of the South African Constitution provides the Public Protector with the power to "take remedial action" – a power that the Constitutional Court has confirmed is binding unless subjected to judicial review: Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11.

2 Ibid.

3 Mail and Guardian, Zumas's R65m Nkandla splurge, http://mg.co.za/article/2009-12-04-zumas-r65m-nkandla-splurge (last accessed on 30 April 2016).

4 As a result of the Nkandla scandal, one of the two opposition parties that had brought the case to court – the Democratic Alliance (DA) – tabled a resolution in parliament calling for the 'impeachment' of President Zuma. In the event, the impeachment vote failed because Zuma's party, the ruling African National Congress (ANC), which the iconic global statesman Nelson Mandela had to led into power in the country's first democratic election in 1994, decided to defend its leader, preferring to contain him rather than be seen to remove him at the behest of the opposition, notwithstanding the gravity of the constitutional court's finding against him. Nonetheless, it cost the ANC dearly: there was a huge public outrage over the scandal, which threw ANC into a downward spiral – it suffered major setbacks in the August 2016 local government elections, losing control of three major cities including the economic center of the country, Johannesburg.

5 The idiom 'ruffling feathers' strictly means to 'annoy or upset' (see https://dictionary.cambridge.org/dictionary/english/ruffle-sb-s-feathers (last accessed on 14 November 2017)). But, it can also mean to 'unsettle' or 'discomfort'. So, in the context of this paper, the author uses the phrase to mean 'agitate a person or people (or institution or organization) with power'.

attempts to add fresh theoretical perspective to the modern understanding of ATI.[6] In the first,[7] ATI's multi-dimensional character and, in particular, its multi-rationality was explored. Various motive forces in favour of ATI were identified, including: good public administration; political accountability, as a companion to freedom of expression and media freedom; and, lastly, as a 'leverage' right in support of socio-economic rights and justice.

The other one[8] explored the liberal genealogy of ATI in the context of the changing praxis – namely, that in the developing world especially, it is ATI's relationship with socio-economic rights such as the right to access to adequate housing or health care or education that is of greatest interest and concern, because as a "power right" (to employ the terminology of Hohfeld's classic typology) ATI has the capacity to give marginalized communities greater power to claim rights from duty holders and service providers in government and the private sector (drawing on the iconic, ground-breaking approach of the Mazdoor Kisan Shakti Sangathan [MKSS], an Indian social movement in Rajasthan).[9]

This paper focuses more on political accountability – what one might call the classic rationale for ATI – by reference to the experience of four regular users of the Promotion of Access to Information Act 2000 (PAIA), who are, by definition, 'feather rufflers'. Namely: the Mail & Guardian newspaper (M & G) and, specifically, its AmaBhungane centre for investigative journalism; the Democratic Alliance (DA), South Africa's largest opposition party; the Open Democracy Advice Centre (ODAC), a law centre founded in 2001 to provide advocacy and legal support in relation to the implementation and enforcement of PAIA; and, Dario Milo, a partner at Webber Wentzel, who is a leading attorney in the field of public interest litigation and freedom of expression/access to information law specifically.[10]

6 *Richard Calland/Patricia Jonason*, Global Climate Finance, Accountable Public Policy, Addressing The Multi-Dimensional Transparency Challenge, The Georgetown Public Policy Review 18 (2013); *Richard Calland*, Exploring the Liberal Genealogy and the Changing Praxis of the Right of Access to Information, Towards an Egalitarian Realisation, Theoria A Journal of Social and Political Theory 61 (2014).

7 *Calland*, note 6.

8 *Calland*/Jonason, note 6.

9 *Kristina Bentley/Richard Calland*, Access to Information, A Theory of Change in Practice, in: Malcolm

Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi (eds.), Strategies for Socio-Economic Rights in South Africa: Symbols or Substances, Cambridge 2014.

10 In terms of methodology, interviews were conducted with representatives of these protagonists: Stefaans Brümmer, a highly regarded investigative journalist and director of AmaBhungane; and, James Selfe, a lawyer, who is a long-standing member of the leadership of the DA (and a former Chairman of the party); Alison Tilley, senior advocacy officer and former Executive Director of ODAC; and, Milo. The following questions/topics were covered in the interviews: 1. Thinking back to the legal origins of the right of access to information in South Africa (the constitutional enshrinement in section 32 and the passing of PAIA), how would you describe the purpose of ATI in South Africa? And, has it lived up to expectations? 2. If it has, what are the 'gains' or 'victories' that you would identify? 3. If not, what have been the chief obstacles? 4. Can you/would you point to any particular court decisions that have been important? 5. Would you say that PAIA requests

A substantial amount of literature does exist in South Africa concerning the right of ATI and its enforcement through PAIA. Essentially, this literature consists of four categories. The first considers the conceptual rationale and the historical development of the right of ATI in South Africa.[11] The second discusses the use of ATI as a tool for the realization of other rights in the Bill of Rights, with specific emphasis on socio-economic rights.[12] The third category evaluates the technical aspects of PAIA, including the many shortcomings and difficulties contained in the PAIA procedure which compromise its effective operation.[13] Finally, the fourth category point out the tension between the right of ATI and the right to privacy, as well as the need for some information to be kept confidential in order to safeguard national security.[14] Hence, while there is a good deal of ATI literature in South Africa, there is a dearth of scholarly writing on the specific relationship between ATI/PAIA

and/or enforcement of the right have 'ruffled the feathers' of those with power (in both public and private sectors)? 6. What, now, is the direction of travel? 7. And, relatedly, how important do you foresee the role of the new Information Regulator will be in the future?

11 *Albert Arko-Cobbah*, The right of access to information: Civil society and good governance in South Africa, Durban 2007, discusses the transition from a culture of secrecy under apartheid to one of greater openness, and the potential for PAIA to be used to ensure good governance (available at: https://archive.ifla.org/IV/ifla73/papers/135-Arko-Cobbah-en.pdf).

12 *Jonathan Klaaren*, A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socio-economic Rights, Human Rights Quarterly 27 (2005), pp 539-561 considers the use of access to information for the purpose of promoting socio-economic rights. In particular, it envisages South Africa's Human Rights Commission utilizing PAIA as a means to perform its monitoring duties. *Jagwanth* speaks of the right of access to information as a "leverage right" and a "component part" of the realisation of other rights in the Bill of Rights – in particular socio-economic rights. See *Saras Jagwanth*, The Right to Information as a Leverage Right, in: Richard Calland/Alison Tilley (eds), The Right to Know, the Right to Live: Access to Information and socio-economic justice, Cape Town 2002, pp. 3-16. *Johannes Britz/Peter Lor*, The right to be information literate: the core foundation of the knowledge society, Innovation 41 (2010), pp. 8-24, discuss the role of ATI and participation and freedom of expression.

13 The deficiencies in South Africa's ATI legislation have been well documented (such as *Van Heerden et al*., The Constitutionality of the Statutory Limitation of the Right to Access to Information held by the State in South Africa, Spectrum Juris 1 [2014], pp 27-54), including problems with compliance and implementation (see *Marlise Richter*, Affirmation to Realisation of the Right of Access to Information: Some issues on the implementation of PAIA, Law, Democracy and Development 9 [2005] pp. 219-234) and the inaccessibility of the PAIA procedure to the poor owing to illiteracy, lack of knowledge of the law and the lack of internet access (see *M. Manamela/ R. Rambuda*, Provision of Information in South Africa: Issues of Bias, Transparency and Accountability, SAAPAM Limpopo Chapter 5th Annual Conference Proceedings 2016, pp. 141-149 and B Sikhakhane, S Lubbe and R Klopper. 2005. The Digital Divide and Access to Information Communication Technologies: an Investigation into Some Problems in Rural Local Communities in Kwazulu-Natal, South Africa. SA Journal of Information Management vol. 7 no. 3).

14 *Kate Allan/Iain Currie*, Enforcing Access to Information and Privacy Rights: Evaluating Proposals for an Information Protection Regulator for South Africa, South African Journal on Human Rights 23 (2007), pp. 563-579, evaluate the tensions between the right of ATI and the right to privacy; *Mukelani Dimba*, Freedom of information and national security in South Africa, in: Thenjiwe Meyiwa et al (eds.), State of the Nation: South Africa 1994-2014A twenty-year review of freedom and democracy, 2014, discusses the tensions between freedom of information and state security

and political accountability. This paper aims to help fill this gap and to do so by use of empirical research that draws on the direct experience of these representatives of four categories of 'PAIA protagonists'.

The interviews help explain the strategy that was pursued by the M & G, the DA and ODAC, and the extent to which use of the right of access to information was valuable to them in challenging the ruling elite and in shedding light on the use of public and private power in South Africa. The purpose is to provide a window into modern South Africa's ATI journey, taking into account the country's transition from authoritarian 'apartheid' rule to constitutional democracy in 1994 and the establishment of an array of institutions in support of the principle of public accountability.

In this context, the paper begins with a relatively brief exposition on the origins of both the constitutional right of access to information in South Africa and its enabling statute, the PAIA. Then, drawing on the empirical material drawn from the interviews with the four 'feather rufflers', as well as the familiarity of the author with the relevant issues,[15] it charts the experience of South Africa in terms of implementing and enforcing ATI in the twenty years since the country's transition to a constitutional democracy, drawing on both the relevant literature and some of the jurisprudence. Where convenient, attention is paid to the comparative aspects – to consider whether, and to what extent, the experience elsewhere contributed to ATI's place in democratic South Africa and, in turn, how South Africa's experience may differ from or have distinguishing features in relation to that of other places.

II. Origins & Genealogy of ATI in South Africa

South Africa's transition to democracy, from decades of authoritarian 'apartheid' rule, was ultimately the product of both political struggle and political compromise. There was no bloody revolutionary moment, no Tahir Square. But, after years of domestic and international pressure against what the United Nations had called a 'crime against humanity', the nationalist regime acceded to negotiations that culminated in the first democratic election in April 1994. An interim constitution bridged the old and new orders, enabling a Constitutional Assembly of democratically elected representatives of parliament to spend two years negotiating and writing a final constitution, which, after a certification process involving the newly established constitutional court, came into force in early 1997.

and Van Herden (Fn. 13) analyses the statutory limitation of the ATI right by provisions in PAIA which allow for certain categories of information to be kept confidential. See also *Jonathan Klaaren*, Open Justice and Beyond: Independent Newspapers v Minister for Intelligence Services (in Re: Masetlha), South African Law Journal 126 (2009), pp. 24-38, for a case study on a request for information potentially detrimental to national security.

15 I was the founder of ODAC and its Executive Director from 2001-2010. Prior to that, I was a member of the Open Democracy Campaign Group that is referred to later in the paper, as well as a member of the Institute for Democracy in South Africa's advocacy team that monitored and made representations to the Constitutional Assembly, as it worked to complete South Africa's final Constitution between 1994-1996.

Both the interim and final constitution's bill of rights enshrines a right of access to information.[16] The interim constitutional right was limited to state-held information, subject to a caveat that access was "required for the exercise or protection of…any rights". The final constitutional right's construction was far-reaching and ground-breaking in that it provides for access to privately-held information[17]. This was the first constitutional right anywhere to extend its scope in a 'horizontal' fashion to cover privately-held information. Accordingly, it did not draw inspiration from any other, comparable source. Instead, it emanated from a combination of the worldview of at least a significant part of the ruling African National Congress (ANC) and the view of its political allies, the South African Communist Party (SACP) and the Congress of South African Trade Unions (COSATU), that South Africa's post-apartheid constitutional order needed to recognize and then regulate private power as much as public power.

This paradigm was sustained into, and through, the process that followed the conclusion of the constitution-writing process: section 32(2) of the final constitution mandated, and required, parliament to pass enabling legislation. PAIA was the outcome of a drawn-out three-year legislative process that just made the February 2000 deadline imposed by the constitution.[18] McKinley's study from 2003 noted that "[l]ike South Africa's constitution, PAIA has been widely lauded both at home and abroad. It is, by international legislative standards, a fairly radical law, or as one archivist called it, 'the golden standard' (Harris, 2003b)".[19] In fact, the process of drafting the initial bill had preceded the finalization of the constitution and, therefore, the final articulation of the ATI right in section 32. The process had begun as early as 1994 with the appointment by then Deputy President Thabo Mbeki of a 'Task Team on Open Democracy' that driven by one of its members, the distinguished late Professor Etienne Mureinik, prepared an ambitious, wide-ranging Open Democracy Bill in 1996 after an extensive expert and public consultation.[20]

16 Section 23 of the Interim Constitution stated that "Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights." Section 32 of the Final Constitution states that "(1) Everyone has the right of access to (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights. (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.".

17 Albeit it that the condition requiring that access be required for the exercise or protection of any right and not state information that was in the interim constitution attached to the right of access to public information is contained within section 32(1)(b) relating to privately-held information.

18 Section 23(1) of Schedule 6: Transitional Arrangements.

19 *Dale McKinley*, The state of access to information in South Africa Paper prepared for, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.560.1016&rep=rep1&type=pdf (last accessed on 27 July 2017).

20 The drafting history of the Open Democracy Bill can be found in *Justine White*, Open Democracy: Has the Window of Opportunity Closed, South African Journal on Human Rights 14 (1998). The Task Force asked the Freedom of Expression Institute (FXI) to convene a large meeting of civil

The Open Democracy Bill not only provided for a right of access to both public and privately-held information, but also covered a right to privacy and protection against unauthorized use of personal data, an Open Meetings duty on government, and whistleblower protection. It also provided for an independent Open Democracy Commission and Specialist Information Court. In its breadth and depth, and its legislative ambition, it was typical of the age – the second half of the 1990s was a golden period of reform for a country still basking in the reflected glory and soothing embrace of Nelson Mandela's reconciliatory and unifying leadership of the so-called 'rainbow nation'.

To the frustration of the Open Democracy Campaign Group, between 1996 and 1998 the Bill went underground, ironically, as cabinet wrestled with its implications for government. When the bill re-emerged and was presented to parliament in 1998, there were significant changes: the Open Meetings chapter had been removed entirely; a blanket exclusion from the scope of the Bill in relation to all cabinet records was included; and, the oversight responsibilities had been added to the mandate of the South African Human Rights Commission – rather than creating a new, specialized body – and, after resistance from the Chief Justice and other leading members of the judiciary, the idea of a specialist information court had been shelved; appeals against denials for access would have to go straight to the High Court, notwithstanding the cumbersome, expensive and protracted nature of such a legal remedy.

The composition of the Campaign Group reflects the importance that civil society attached to the issue of transparency and access to information during the constitutional reform period. That many of the post-1994 period's most prominent progressive organizations should take on the extra burden that collaboration and partnership entails, over several years, demonstrates the commitment to the issue that they had.[21] The Campaign Group included COSATU – who customarily lobbied alone or quietly within their 'tripartite alliance' with the ANC and the SACP; democracy think-tank Institute for Democratic Alternatives in South Africa (IDASA); human rights organizations like the Black Sash and the Human Rights Committee; the Legal Resources Centre (LRC), a highly respected public interest law centre; as well as the progressive black lawyers association NADEL (National Association of Democratic Lawyers), who, like the LRC, had an established track record of defending the rights of people under the apartheid regime. In addition, the two faith-based organizations with parliamentary offices – the Catholic Bishops Conference and the South African Council of Churches (SACC) – were also part of the consortium. In other words, it represented a veritable who's who of the civil society legislative lobby community. As its

society and community organizations in July 1995, which was loosely described as the Open Democracy Advisory Forum (ODAF).

21 For an account of the Campaign Group from two of the leading 'insiders' from within it, see *Doug Tilton/Richard Calland*, In Pursuit of an Open Democracy - A South African Campaign Case Study, http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/southafrica/Calland%20&%20Tilton%20-%20In%20pursuit%20of%20open%20democracy.pdf (last accessed on 17 July 2017).

23 March 1999 media statement records, the Campaign Group was "a unique collaboration that has yielded an unprecedented level of consensus around the main issues", which included: the need for the law to adopt a 'right to know' approach;[22] the constitutional requirement to ensure that it would give full effect to the 'horizontal' application of the right to privately-held information; the need to establish a "cheap, speedy and accessible" enforcement procedure because "otherwise the Act will be solely used by the rich and powerful to defend their interests".[23]

As a result, the records of the Campaign Group's collaborative efforts are a treasure trove of information about the genesis and contents of South Africa's ATI law, and provide useful evidence about the expectations, driving motive, and influence of comparative law and practice on the legislative process. Many of the numerous submissions to the parliamentary ad hoc committee on the open democracy bill include references to research conducted by the campaign group's members on comparative law: for example, on fees, one submission quotes from the US Freedom of Information Act 1986 as well as from the Freedom of Information and Privacy Act of Ontario;[24] and, evidence in support of the case for an open democracy tribunal was adduced from the UK experience with comparable administrative tribunals.[25] Moreover, in its initial, primary substantive submission, the Campaign Group's sixty page 'Critical Review' of the Open Democracy Bill contained extensive comparative citations drawn from the relatively limited number of countries that at that time had freedom of information legislation (such as Australia, the USA, Sweden, and Canada).

In addition, a study tour to Canada for a mixture of members of the Campaign Group and the ad hoc committee was organized and funded by the Canadian High Commission, while the representative of the Human Rights Commission who was an 'adjunct' member of the Campaign Group, Victoria Meyer, went on a study tour to Australia funded by the Australian High Commission. In the letter of support for the Canadian study tour prepared by the chairman of the ad hoc committee, Advocate Johnny de Lange, for his chief whip in parliament, de Lange stated that "[i]n South Africa, we have no experience of this type of matter at governmental level and a very new and cursory exploration thereof at an academic level. Thus I am of the view, that when this matter does arise before Parliament there will

22 It will be noted that the Campaign Group did not include an environmental rights organization. However, the LRC was experienced in environmental rights and was represented in the Campaign Group by Angela Andrews, one of the country's most accomplished environmental public interest lawyers. Here, the comparative experience was brought to bear: a memo from LRC in 1998 made the case for what it described as the "global protype of the RTK paradigm" which it asserted is in the field of environmental information. Memorandum to Open Democracy NGO Working Group from Graham Boyd, Legal Resources Centre, re Right to Know provisions in Open Democracy Bill, 5 August 1998.

23 Media Statement from the Open Democracy NGO Campaign Group, 23 March 1999.

24 Comment on the proposed new free structure for Members of the ad hoc committee on the Open Democracy Bill (ODB), 24 November 1999.

25 Enforcement Procedures: Supplementary Submission from The Open Democracy Campaign Group, Undated (but probably in November 1999).

be very little expertise to draw upon to find the correct answers to a very vexed and complicated issue."[26]

Yet, as Arko-Cobbah argues, "[w]hen Darch and Underwood (2005: 78) argue that despite its global outlook, the promotion of access to information, on closer examination, is influenced by local values, they seem to be making a valid point. South Africa's introduction of PAIA was influenced by a constitutional imperative rather than by popular pressure."[27] This paper's ambit includes neither an exposition nor a critique of the many substantive considerations of interest that arise from the form and content of the South African ATI law, PAIA, suffice it to make the following main observations, which, against the backdrop of the legislative journey described above, and, in particular, the role played by organized civil society during the legislative process, assist in evaluating Darch's and Underwood's view.[28]

First of all, the chapter of PAIA dealing with exemptions to access is unexceptional and contains the 'usual' exemptions such as those pertaining to commercial confidentiality, legal privilege, defence and national security, economic interests and financial welfare. In addition, it includes a public interest over-ride in relation to some of the exemptions. As noted above, cabinet records are excluded entirely from the scope of the law; this is a kind of 'category exclusion' that ran contrary to best international practice even in 2000.

Second, after debate in the parliamentary committee, provisions giving effect to the 'horizontal reach' of section 32 of the constitution were enacted. At one point, the committee seemed intent on only making detailed provision for state-held information, but was persuaded by the Campaign Group's submissions that this would be unconstitutional. The ANC membership of the committee was also heavily lobbied and influenced by COSATU for whom the issue of private sector transparency was viewed as a major strategic issue.

Third, PAIA puts in place an extensive operational system, unusually making detailed provision for how access is to be granted, the procedural steps that record-holders should take to enable access, such as the section 19 duty to assist requesters, as well as the section 15 duty to maximize voluntary disclosure as far as possible – in other words to reduce the requirement to make requests for records that could easily be automatically disclosed, thus reducing the pressure on both requesters and record-holders. In this respect, the South African law was 'before its time'. None of the other comparable laws offered as much detail in terms of the operational and procedural system to be put in place – what one might

26 Letter from Adv Johnny de Lange MP, to Chief Whip of ANC, Mr Max Sisulu, dated 12 February 1999.

27 *Arko-Cobbah*, note 11.

28 *Colin Darch/Peter G. Underwood*, Freedom of information legislation, state compliance and the discourse of knowledge: the South African experience, The International Information & Library Review 37 (2005), pp. 77-66.

call the "plumbing" of the law's implementation.[29] This was a response to what the committee chair, Advocate de Lange, recognized to be the likely recalcitrance of South Africa's governmental bureaucracy. Astutely, he anticipated that unless the rules of the game were meticulously set out, then it would be even more likely that – given the lack of willingness or experience in administrative discretion – a prevailing, historical culture of secrecy would trump the spirit if not the letter of the ATI law.

Lastly, fourth, whereas the Campaign Group won notable victories on the implementation provisions, on the horizontal private sector scope of the Act, and on the public interest over-ride, amongst other things, it lost its battle to convince the parliamentary committee to establish an appropriately accessible and inexpensive appeals mechanism. Instead, the committee left in place the provisions requiring that appeals against denials are litigated in the High Court and merely stated in the committee's report on the Bill that further research and consideration should be given as to the appropriate enforcement mechanism. It was only some seventeen years later that this lacuna was finally addressed, with the establishment of an Information Regulator under the provisions of the Protection of Personal Information Act from 2013.

III. The Protagonists' Approach to, and experience of, using Access to Information Law in South Africa

Perhaps as a consequence of its legislative genealogy, and the country's own socio-economic context and history, South Africa's ATI right reflects both the dimensions referred to in the introduction to this paper – namely, the multi-rationality of ATI's conceptual, ideological and instrumental foundation; and, its potential as a 'power right', while at the same time aligning with the way in which significant bodies such as the country's Human Rights Commission conceptualize its modern democratic form: "South Africa's…[r]ight to Access Information is a highly significant right that impacts on other human rights such as the right to water and sanitation. The right to access information cross-cuts all human rights, holding government, businesses, private organizations and individuals to account. Thus, the right to access information is central to democracy."[30] As one of the leading NGOs, whose work traverses ATI in South Africa, the South African History Archive's (SAHA) own approach to the subject also reflects this deeper understanding of the purpose and underlying constitutional principle of participatory democracy: "[t]he right of access to information forms an important part of the realization and protection of our constitutional human rights as well as

29 In this respect, it is notable that the first (and as far as I am aware, only) international attempt that has been made to focus on the operational and procedural system, and the practical implementation (as opposed to the studies on the substantive provisions and the usage of the law, or jurisprudence), arrived in 2009 with the Carter Center's Access to Information Implementation Assessment Tool, see: https://www.cartercenter.org/peace/ati/iat/index.html (last accessed on 20 August 2017).

30 South African Human Rights Commission (SAHRC), The Promotion of Access to Information Act and Records Management consolidated Audit Report, 2012.

the promotion of social accountability… When the right of access to information is asserted by members of the public, this changes the balance of power between the State and ordinary citizens such that the ordinary South African can hold the government to account, as to how the government is delivering on their service delivery obligations. It creates an extra platform for engagement between the people and the government."[31]

Veteran human rights activist and former executive director of ODAC Alison Tilley's view is that there were "two motivating ideas behind both section 32 and PAIA: one, the idea of a culture of justification as expressed by Professor Mureinik, that an important part of being a constitutional state is openness and transparency; two – almost a second wave – the idea that it's not just about classic civil and political rights, but also about making sure that people have the right kind of information to support other claiming of rights, and especially socio-economic rights."[32] But, where did this important idea come from, one that now animates a not insignificant portion of the academic literature both in South Africa and elsewhere?[33] The experience of MKSS in Rajasthan was very influential. MKSS had not only led the impressive campaign in Rajasthan to get ATI law passed in the Indian state, but had developed a social auditory technique for using the law by linking it tightly to public service delivery and to development projects that mattered greatly to ordinary communities.[34] In this regard, Tilley notes that:

> *"MKSS was very important – knowing about that work and realizing how that kind of approach could directly change people's material conditions. It was a powerful argument, but it was also partly tactical, because of the concerns about ATI being a hin-*

31 South African History Archive, PAIA Unpacked: A Resource For Lawyers And Paralegals, 2012.

32 Interview with Alison Tilley, 17 June 2017.

33 *Saras Jagwanth*, The Right to Information as a Leverage Right, in: Richard Calland/Alison Tilley (eds.), The Right to Know the Right to Live: Access to Information and socio-economic justice, Cape Town 2002. Jagwanth's idea of ATI as a 'leverage right' was influential not just on the South African literature: "…writing not in respect of access to information generally but rather in respect of its utility in the achievement of socio-economic justice, the South African access to information scholar Mukelani Dimba has discussed the role of PAIA litigation. Drawing on the argument of Saras Jagwanth that access to information primarily plays an instrumental role in the achievement of socio-economic rights, Dimba sees access to information as a necessary aid for either social mobilisation or for litigation in order to enforce socio-economic rights." (*Jonathan Klaaren*, Developments in Access to Information Litigation and Enforcement in South Africa, https://cer.org.za/wp-content/uploads/2010/09/Developments-in-Access-to-Information-Litigation-and-Enforcement-in-South-Africa.pdf (last accessed on 24 August 2017). For further examples of the development of the literature in this direction in the Africa/South African context, see *Bentley/Calland*, note 9; *Richard Calland,* The Right Of Access To Information, The State Of The Art And The Emerging Theory Of Change Introduction, in: Richard Calland/Fatima Diallo (eds.), Access to Information in Africa: Law, Culture and Practice, Leiden 2013.

34 For an early contribution to this strand of the international literature on ATI and socio-economic rights, and for a theoretical consideration of the 'social auditry' approach of the MKSS, see R*obb Jenkins/Anne Marie Goetz*, Accounts and accountability: Implications of the right-to-information movement in India, Third World Quarterly 20 (1999), pp. 603–22.

> *drance – that it would open flood gates and create logjam that would 'get in the way' of government's delivery of services" - so, we needed to have a counter-argument to show how it could support the government's 1990s reconstruction and development program, and economic transformation. At least three different stakeholders were interested in this from the word go: Black Sash – which does work in advice offices, on social security; they really needed it for 'instrumental' purposes to help improve public administration of welfare payments; COSATU, who, as a trade union federation, were looking at the employment context, and how difficult it is to negotiate with powerful employers; and, lastly, the environmental justice sector was very clear about how it would help them, again as a companion to asserting the right to just administrative action as well as the right to a clean environment."*

How then have things transpired? What have been the main uses and drivers for ATI in South Africa since the enactment of PAIA? And what conclusions can one draw from the available empirical material that will be of comparative interest and use?

Public Interest Lawyers

Tilley thinks that PAIA "has not lived up to expectations". She points to the absence of an independent information commissioner as a major obstacle: "We strongly urged the committee to take that on board, and we knew that was a problem, and could only get it back on the legislative agenda via privacy legislation arising, ironically, in relation to the 2010 FIFA world cup because of EU data protection laws." For the biggest positive impact in terms of ATI as a leverage right, Tilley believes that "it has also been a useful companion piece, not least because it averts a lot of litigation, because you get the information and can then make a more informed choice about whether to launch legal proceedings." She points out that in Cape Town, for example, PAIA has been used in a number of cases to find out what housing projects the city is planning, such as the MOU between the City and the airport authority (ACSA) in relation to moving people from local communities close to the site of a possible airport expansion.

Tilley also points to the work of the Centre for Environmental Rights, which has done "very interesting work around powerful state-owned enterprises such as [power utility] Eskom - getting basic reports out that have been done, which has allowed them to go on and argue more effectively around emissions' standards and climate change and renewable energy options." This observation about the role of a NGO accords with the literature on usage of the ATI right in South Africa: "the evidence…suggests that intermediaries are necessary; poorer communities cannot avail themselves of the opportunity provided by PAIA without the expert companionship of organisations such as ODAC. So, although civil society interventions make up some of this deficit, it is clear that insofar as the lever of access

to information remains beyond the reach of most citizens, it is at best just one tool in the arsenal of those who fight for economic justice and equality in South Africa." [35]

In this context, there is evidence that activist civil society and public interest law strategy on the usage of PAIA shifted as experience evolved and the politics of the country entered a new phase. "We reached a point at which we moved away from saying PAIA is the best thing since sliced bread to saying it's not working so well. In the intermediate phase, we said we should give public officials the benefit of the doubt, to the point where we said 'no, this is deliberate obstruction and a refusal to implement this law," says Tilley. She adds that "the 'right to know sector' became more willing to get out of the tent. Gradually, more of an understanding that being in the tent is not a necessary precondition for being effective emerged. Got to be on the inside –no!"

The Media

AmaBhungane means, literally, "dung-beetles". This word does not convey the real meaning: as one of its founder members, Stefaans Brümmer, drily notes, it does not translate to "M & G centre for investigative journalist"; instead, its metaphorical meaning according to Brümmer is "raking the earth… or the shit" – a notion that chimes well with the idea of 'ruffling feathers' that is the driving theme of this paper. AmaBhungane is an NGO that has a separate legal entity, distinct from the M & G newspaper. It has a mission that is directed towards promoting an "open, accountable democracy", with a triple-headed objective: to investigate, to transfer and build skills in investigative journalism, and advocacy. Hence, a major reason why AmaBhungane uses PAIA is a public policy one, rather than a purely journalistic one – in other words, to contribute to the building of a culture of transparency and accountability, rather than necessarily or simply serving a particular story, including

35 *Bentley/Calland*, note 9, p. 361. For early empirical data on compliance with PAIA, and the experience of different kinds of requester, see Open Society Institute's 14-country 2004 survey that included South Africa: Transparency & Silence, https://www.opensocietyfoundations.org/sites/default/files/transparency_20060928.pdf (last accessed on 24 August 2017). See, *Arko-Cobbah*, note 11. The underlying reasons for an institutional culture of secrecy may be complex: "Adversarialism and malicious non-compliance with the Act may be rooted deeply in the country's culture of secrecy and what Dick (2005: 6) describes as "bureaucratic arrogance and hostility". A naturally secretive public servant may credibly claim a lack of resources or any other reason considered convenient, as a strategy for the effective denial of access to information. No doubt, that despite the generous time frames provided by PAIA to officials to respond to information requests, mute refusals accounted for 63% of information requests made under the Act in 2004 (OSI JI 2004: 3). Much as one would like to agree with the observation that the local propensity to be secretive mars the efficacy of information access, it is important to note that South Africans have seen much repression, including organized misinformation such as the *Muldergate* or the *Information Scandal*, that occurred during Prime Minister Vorster's rule. Therefore, the culture of secrecy surrounding government operations, should have in reality, been regarded as something of the past and the opportunity seized to fully support the effective implementation of PAIA.".

how the practice of open government will assist journalists in pursuing their investigative journalism.

What should be noted at the outset is the extent to which the South African experience suggests that use of ATI law, especially by entities such as the DA and the M & G that are regarded as hostile to the interests of the government or ruling party, requires fortitude and above all patience. Brümmer notes that the media tends to want "instant gratification, which is inimical to the 'slow burn' of using PAIA". As James Selfe explains, "[w]e put in dozens [of PAIA requests]. A lot of them are ignored. In which case, we maintain that is a deemed refusal and kick in the internal appeal mechanism and then we have to decide whether to go to court. Often they do misquote PAIA when refusing an application for documents and then we challenge their application of the law."[36] This is a view that is echoed by Brümmer, who says that "[i]f you allow them to get away with it, then that is the end of the Act. So, you need to be persistent, in order to hold them to account."

By coincidence, Brümmer[37] was one of the first reported cases in South Africa and was brought by Brümmer himself. The case derived from the M & G's investigation into what became known as 'Oilgate', which revealed that R11m of public money had been siphoned off to the ANC via a state-owned enterprise, PetroSA. The middle man was a businessman called Sam Majoli, a "money man for the ANC", according to Brümmer, who later became aware that Majola had a relationship with a cabinet minister, Zola Skweyiya, whose department of social development was in the process of awarding a substantial tender to an IT company owned by Majoli who, in turn, had paid for some work to be done on Skweyiya's private house. The M & G's PAIA requests were directed towards "who knew what and when".

The newspaper did not succeed on the substance of the matter. The PAIA request was rejected on the spurious basis that the matter was *sub judice* – Majoli had sued the department in relation to the tender and although, according to Brümmer, "the litigation was dead it was kept on the books to help keep things secret. Regrettably, the pursuit of the information ran aground; partly, it should be said, because of lack of capacity in the NGO that was representing the M & G [ODAC]." However, the newspaper did, *en passant*, secure an important procedural victory and a change in the law. When appealing the decision to refuse the PAIA application, the M & G discovered that it was out of time: section 78(2) of PAIA required appeals to be brought within 30 days of the date of the notice of the failure of the internal appeal provision.[38] Justice Sandile Ngcobo held that this constituted a constitutionally impermissible limitation on not only the right of access to information in section 32 of the Constitution but also the right of access to court enshrined in section 34 of the Constitu-

36 Interview with the author.

37 Brümmer v Minister for Social Development and Others (CCT 25/09) [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) (13 August 2009).

38 PAIA requires that after the initial refusal, an 'internal appeal' must be made to the Information Officer, who is the accounting officer for the particular department or state entity: section 74 of PAIA.

tion. Citing the experience of the *amicus curiae* in the case, the South African History Archive (SAHA), Justice Ngcobo noted that:

> *"SAHA's experience in this regard is illuminating. It will be recalled that this is an NGO which collects, preserves and catalogues material of historic, contemporary, political, social and economic nature. Since 2001 it has made over 1 000 requests for information from various government departments. It has brought 11 applications to court arising out of these requests. In all these applications it had to seek condonation because the applications were launched "a significant time after the expiry of the 30 day period." SAHA has outlined the difficulties associated with complying with the 30 day limit in section 78(2). The delays arise from having to seek legal opinion on prospects of success; securing legal representatives; getting funding; securing approval and authorisation from its board of trustees who are scattered all over the country; and limitation of funds. If an NGO faces these difficulties in meeting the 30 day limit, I think it is fair to expect that individuals will have even greater difficulty in complying with this time limit. The applicant's predicament in this case bears testimony to this. Both NGO and individual requestors have a critical role to play in ensuring that our democratic government is accountable, responsive and open. Indeed, the Constitution contemplates a public administration that is accountable and requires that "[t]ransparency must be fostered by providing the public with timely, accessible and accurate information." Thus, the public and the NGOs must be encouraged and not obstructed in carrying out their civic duties."*

Justice Ngcobo ordered that the 30-day limit be extended to 180 days. Thus, Brümmer's first experience of litigating PAIA had mixed results. On the one hand, due to a combination of the legal filibustering of the government and the lack of capacity of the law centre representing the newspaper, he did not succeed in gaining access to the records he sought. But on the other hand, he not only secured a change in the law that is advantageous to requesters and appellants, but also achieved some very useful language in the jurisprudence, in terms of Justice Ngcobo's approach to PAIA and the right of access to information in section 32 of the Constitution:

> *"[A]ccess to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas. As the present case illustrates, Mr Brümmer, a journalist, requires information in order to report accurately on the story that he is writing. The role of the media in a democratic society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state. This carries with it the responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Ac-*

> *cess to information is crucial to accurate reporting and thus to imparting accurate information to the public."*[39]

Similarly, in the Khampepe case, the Mail & Guardian's pursuit of a secret report that was prepared by (now) constitutional court justice Sisi Khampepe and then Deputy Chief Justice Dikgang Moseneke on the 2002 elections in Zimbabwe at the behest of then President Thabo Mbeki, the positive outcome of the case had less to do with the content of the report when, after a five-year battle, the report was finally released than with the procedural victory.[40] Probably for fear of what disclosure of the report might reveal about the inappropriateness of his administration's policy of 'quiet diplomacy' with the Mugabe regime, the Presidency fought hard to resist disclosure, citing national security. Writing in the majority, Justice Ngcobo held that given the nature of a PAIA application, courts may at times have insufficient evidence to decide responsibly whether an exemption from disclosure is rightly claimed. This can happen because the requester, not having access to the record, faces difficulties raising genuine disputes of fact as to the exemptions claimed by the state. It can also occur when the state is limited, under the ATI law, in its ability to refer to the contents of the record in justifying the exemptions it claims. For these reasons, the majority concluded that courts are empowered to examine the contested record to determine whether exemptions claimed by the state are proper – to take a so-called 'judicial peek' at the requested records. The majority held that this power should be invoked when it is in the interests of justice to do so. In a separate concurring judgment, Justice Zak Yacoob held that courts must always examine the contested record in order to reach a just and equitable outcome. In a further separate concurrence, Justice Johan Froneman held that it will be in the interests of justice for courts to examine the record where either of the parties is constrained in presenting evidence in relation to the dispute, or where there are questions as to whether the exemption applies to the whole record or only to a part of it which can be severed so that the rest of the record may be disclosed.[41]

The government had consistently maintained that the report contained privileged information given by Zimbabwe officials to special envoys of the South African government. Releasing the document, the government argued, would therefore damage diplomatic rela-

39 Ibid., at paragraph 63 of the judgment.

40 President of the Republic of South Africa and Others v M & G Media Ltd (CCT 03/11) [2011] ZACC 32; 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) (29 November 2011).

41 Once again, Justice Ngcobo provided very useful language in setting the precedent: "The constitutional guarantee of the right of access to information held by the state gives effect to "accountability, responsiveness and openness" as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined." Ibid., at paragraph 12.

tions, and could imperil future diplomatic missions. This meant that the document could not be released in terms of the PAIA exemption that pertains to documents with sensitive information from another state. When the matter was reconsidered by the High Court, following the Constitutional Court ruling on 'judicial peeks', Justice Joseph Raulinga took a 'judicial peek' at the report and ruled that the part of the record that the state had claimed was exempt could "never be reasonably constructed as information supplied in confidence by or on behalf of another state." After the report was finally disclosed when the Supreme Court of Appeal turned down an appeal from the High Court,[42] it emerged that the report made no reference to any meetings with officials, and did not refer to any information received from the Zimbabwean government. It contains no information that could imperil sensitive sources, nothing said in confidence, and nothing that caused the M & G to consider redaction – prompting, in turn, a furious reaction from the leader of the opposition in Zimbabwe, Morgan Tsvangirai, who stated that the report revealed the hypocrisy of Mbeki's position on Zimbabwe at the time of the 2002 election and his betrayal of the people of Zimbabwe.[43]

The M & G has also confronted the interface between public and private power, prompting an important precedent-setting judgment on where the line between public and private should be drawn, and how to determine whether in the case of a particular request the document is a "public" or "private" one under the provisions of PAIA – which has significant legal and practical implications, in that if a record is a 'private' one, then although unlike many other ATI laws PAIA does still apply, it provides a right of access on when the requester can show that it is "required for the protection or exercise of a right".[44] The case was driven by (then) M & G investigative journalist Adrian Basson, who was one of the founders of AmaBhungane. In a thoughtful and comprehensive judgment of the South Gauteng High Court, Morison AJ. traversed the various factors that on the basis of both international and foreign law, as well as South African administrative law precedent, could help determine whether the record was to be regarded as a public or private one.[45] The court held that the *function* of the body was more significant than the *form* of the body. Ac-

42 President of the Republic of South Africa and Others v M & G Media Limited (998/2013) [2014] ZASCA 124; 2015 (1) SA 92 (SCA); [2014] 4 All SA 319 (SCA) (19 September 2014).

43 Mail and Guardian, Morgan Tsvangirai: Khampepe report is '12 years too late', http://mg.co.za/article/2014-11-21-morgan-tsvangirai-khampepe-report-is-12-years-too-late (last accessed on 26 November 2017).

44 Section 32 of the Constitution, reflected in the provisions of PAIA. The Supreme Court of Appeal has held that "required" means that "reasonably required" and that, in turn, this means that the requester must show how he or she would accrue a substantive advantage were they to get access to the record – a legal test that inevitably invites speculative litigation since the requester is by definition making their argument blind of the actual record they are requesting access to: Unitas Hospital v Van Wyk and Another (231/05) [2006] ZASCA 34; 2006 (4) SA 436 (SCA) ; [2006] 4 All SA 231 (SCA) (27 March 2006).

45 M & G Media Limited and Others v 2010 FIFA World Cup Organising Committee South Africa Limited and Another (09/51422) [2010] ZAGPJHC 43, especially pages 1-6 (background); 50-55, 60 (para 178) - 61; 68- 97 (part of finding the LOC to be a public body); 114-134 (private body - grounds on which applicant would succeed even if court is wrong about LOC being a public

cordingly, the Local Organising Committee (LOC) of the FIFA 2010 World Cup in South Africa was held to be a public and not a private body. Thousands of documents relating to contracts, including multi-million dollar procurements for services and construction were disclosed. However, as Brümmer now concedes, it was "a bit of a sad example, in that we won, but we did not have the capacity to do anything with it, in that we probably didn't have the analytical tools that we have now."

The Opposition Party

In the case of the opposition party, the DA, Selfe suggests that it was the failure of parliamentary questions to extract the information that the opposition hoped would be elicited from the executive arm of government that propelled them towards using PAIA:

> *"In the apartheid parliament, you could put a question. The minister could refuse, but if he said this is the situation then it generally was. We soon discovered that in the democratic parliament after 1994 you generally get nowhere with the ministers. You are lucky if you get a response. Often it is badly answered. I have tried writing directly to the minister and I remember writing to the minister of defence and heard nothing back. So when I bumped into the Minister at parliament I asked him about it and he promised to inquire. When he got back to me I was astonished to learn that the Minister's Head of registry had thrown my letter away because he does not believe in the right of the opposition to get information from the state, which was a very revealing answer. So, faced by obstruction on the part of the executive, we have turned to PAIA applications."*

The experience of the DA suggests that such a blanket disinclination to reveal information or respond positively to requests for information is not always the case. "How sophisticated is the state?," Selfe asks rhetorically, "It is random; it depends on who gets it. Some are more compliant. Some are more ignorant and let it go through." Yet, the DA maintains that there has been a serious clampdown on providing information, with an increasingly paranoid attitude. The DA cites the extraordinary denial of a request for hard copies of a power-point presentation on 'information peddling' made by the (then) Minister of State Security Siyabonga Cwele. The presentation was made to the Ad hoc Committee on the Protection of Information Bill (the so-called 'secrecy bill') at an open meeting in Parliament with the media present. Yet, after the meeting the Minister surprisingly refused to make hard copies of the power-point presentation available to committee members because the document was "classified". Ironically, the contents of the information-peddling briefing were reported in the media and a detailed minute of the meeting was published on the Parliamentary Moni-

body); and 135-145 (grounds of refusal and order), available at: http://www.saflii.org/za/cases/ZAGPJHC/2010/43.pdf (last accessed on 29 April 2016).

toring Group's website.[46] The PAIA request was refused on the grounds that disclosure "could reasonably be expected to cause prejudice to the defence and the security of the republic"; and that it "would reveal information supplied in confidence by or on behalf of another state or international organization."

The DA has used PAIA to expose "Cadre Deployment" – the practice of government jobs going to loyal members of the ANC[47], ANC links to sub-contractors[48] and contract records relating to controversial e-tolling in the industrial heartland province of Gauteng where Johannesburg and Pretoria sit.[49] The party also requested the hotel bills of the Minister of Trade and Industries, unsuccessfully,[50] as well as the Burmese Ambassador to South Africa's credentials.[51] With concerns about crime high on the political agenda, the DA also sought the record of police-to-population ratio.[52]

46 Parliamentary Monitoring Group, www.pmg.org.za (last accessed on 26 November 2017).

47 The DA successfully requested records related to the interview process that led to the appointment of Robert McBride, an ANC stalwart, as Head of the Independent Police Investigative Directorate (IPID).

48 The DA requested documents related to sub-contracts entered into by state-owned enterprises, Eskom, in respect of the Medupi power plant. The Medupi project was subject to delays and there were complaints that one of the sub-contractors, Hitachi Power Africa, were to blame and that the subsidiary of the Japanese multinational had only got the sub-contract as a result of peddling undue influence by using an ANC-owned front company as its black economic empowerment partner when putting together the bid. Although the PAIA requests from the DA did not substantiate this, the US Securities Exchange Commission subsequently investigated the matter and brought charges in the US against Hitachi Ltd., the conglomerate parent company of Hitachi Power Africa, alleging violations of the US Foreign Corrupt Practices Act (FCPA), including that during the Medupi bidding process Hitachi knew that Chancellor House was a funding vehicle for the ANC. Without admitting or denying the violations, Hitachi agreed to pay a substantial penalty of US$19m. See US Securities and Exchange Commission, SEC Charges Hitachi With FCPA Violations, http://www.sec.gov/news/pressrelease/2015-212.html (last accessed on 10 August 2017) for SEC press statement on the case and Hitachi's settlement payment, which was subsequently consented to by the US District Court for the District of Columbia on 24 November 2015. Note: the writer was retained as an expert witness on matters related to the party political funding environment and governance context, and related issues of political economy associated with the Chancellor House arrangement and its relationship with key political actors, such as the ANC.

49 The ATI "mechanism worked: 20-30 boxes of records were delivered" (Selfe).

50 The request was rejected on grounds of 'national security'.

51 The Department of International Relations and Cooperation denied a request for a copy of the credentials of the Burmese ambassador to South Africa, Myint Naung, on the grounds that the documents contained "confidential correspondence". The application was made in light of the fact that between June 2007 and February 2008, the Tatwadaw (Burma's armed forces) committed a series of atrocities while under Myint Naung's control, including attacks on displaced villagers; the burning of civilian hiding sites; the destruction of schools; and the looting of food, clothes and blankets from civilians hiding from military patrols.

52 The DA submitted a PAIA application to the South African Police Service (SAPS) for the police to population ratio for every police station in the country, with a provincial breakdown. The request was made after the Minister of Police, Nathi Mthethwa, failed to provide this information to a DA parliamentary question.

In contrast to these requests that sought to expose corruption and weaknesses in the criminal justice system, the DA has also sought to shed light on development projects with implications for socio-economic rights and justice, such as: the publication of a delayed report on HIV & Syphilis Prevalence; the investigation report on the CEO of Eastern Cape Hospital, following reports of high numbers of still-born babies,[53] after numerous deaths of infants due possibly to contaminated tap water in the Eastern Cape province, the DA requested access to records of the monthly water quality summary reports published by the Department of Water Affairs and Forestry (DWAF) on the Water Quality Management System (WQMS) website; and, against the backdrop of textbook shortages, the Limpopo provincial education department's directives on the shredding and recycling of textbooks.

What this small sample of the DA's extensive use of PAIA illustrates is that although the preponderance of the requests relate to government maladministration or possible corruption, they span a large number of departments and many relate to developmental issues where the impact on ordinary people is affected. In a substantial proportion of the cases referred to, the DA neither got the information they were requesting nor took the matter on appeal. The requests were made on the basis that they might yield results that would be useful, but that there was no intention to appeal if they did not. "The Executive tend to act as if there was no consequence – and then say: 'go ahead and take it to court'. They have bottomless pockets, and we don't.", Selfe says. For the research department in the DA's parliamentary office, using PAIA is a complimentary strategy, to help giving them more information for their skirmishes with the executive and the ruling party. Selfe states: "It's a fundamental tool for us in supporting our MPs."

IV. Analysis: Lessons from the Field

What does the experience of these four feather-ruffling users of the right of access to information in South Africa reveal? What are the most important points of analysis and lessons from the field? Four main idea and themes arise.

First of all, it is clear from the experience of the DA as an opposition party that ATI is seen as part of an armoury of weapons at their disposal to drive their political agenda, pressurize the ruling party and the government, and 'market' their attempts to impose political accountability on those in power. It is a means to an end often, and not an end in itself; sometimes acquisition of the record is a vital goal, but frequently it is not. In other words, it is a tactical tool rather than a 'silver bullet'. This is similar to the experience of the activist, public interest law community, who recognize that PAIA is a legal companion to a range of legal strategies and instruments at their disposal and which can help leverage other rights.

Capacity challenges have been a driver of this approach, and a common problem for most of the PAIA protagonists surveyed. "Bombing an applicant with information is an old

53 After two and a half years, the Public Service Commission disclosed a report with major sections redacted (blacked out).

tactic and nothing less than we would expect," says Brümmer. So, in one case where use of the mechanism did yield significant results without recourse to a High Court appeal – the e-tolls matter – Selfe echoed the sentiment expressed by Brümmer in relation to the M & G FIFA case, when he conceded that it prompted the "good question about the impact on the political narrative, because I am not sure that having got all that information we had the capacity to find out what we needed to find out."

Thus, even if the requests did not yield any positive outcome in terms of information disclosure, the effect would be to ruffle feathers and thereby put pressure on the government and/or the ruling party and, in addition, provide the opposition with positive media coverage. In other words, there will be occasions when the usage of ATI law is less about the outcome and just as much about the exercise of the right, regardless of whether it yields information or not.

Secondly, it is clear that for all of the different categories of PAIA protagonists, there is a large degree of dependence on other parts of the system. The fact that valuable and progressive jurisprudential advances have been made – some of them set out above – requires a functioning rule of law and an independent, capable judiciary, which South Africa has.

Third, all of the four categories of PAIA users can be described as intermediary. The broader public and society depend on them for PAIA to work and for ATI to be a real and vibrant part of the democratic infrastructure and culture of South Africa.

Fourth, despite the strength of the judicial branch, one of the big challenges for ATI litigants in South Africa is that there is no intermediary appeal body and that any appeal to a decision to deny access requires an appeal to the high court, which is highly expensive as well as slow. The establishment of the Information Regulator, pursuant to the provisions of the Protection of Personal Information Act 2013 (POPI), could change this since the Regulator will have the power to hear appeals from PAIA denials. The office was established in 2017 following the appointment by the National Assembly of the five members of the body in September 2016, but at the time of writing (November 2017) it was still not 'open for business' and the relevant parts of POPI relating to appeals to the Information Regulator were still not in effect. Civil society organizations were encouraged by the appointment of Advocate Pansy Tlakula – the former special rapporteur on freedom of expression and access to information for Africa – and a trusted proponent of ATI as the chair of the Information Regulator, but it is too early to tell how much of a difference the Information Regulator will make.

V. And so Back to Nkandla…

The M & G's application for documents relating to the controversial security upgrades at President Zuma's private homestead played a major part in the unfolding legal and political drama that threatened not just to ruffle the feathers of the South African President but bring him down – although clearly it was not the only factor; other important parts of the new

constitutional system of oversight, such as a robust Public Protector (Ombud), and an independent judiciary, were even more important.

According to Brümmer, the original PAIA refusal was so replete with national security objections that the government refused to sever; the internal appeal was not responded to; the Public Works Minister got an answer he could not live with from counsel and so decided to let the matter proceed to court. The M & G filed quickly. It had a specialist lawyer at a big law firm (Dario Milo, at Webber Wentzel) and so could tackle the matter with real capacity. This was crucial to making progress:

> *"It is quite a formidable team there. That is their strength; their teamwork is good, like ours. They made the breakthrough that really got us somewhere. They found someone who had worked for the department but then gone to the private sector. He knew the department inside out. He knew what kinds of documentation there must be. Our reply to the 'replete', had the supporting affidavit from this former employee who undermined the argument about replete…then the department knew that we meant business. They attempted to settle with the 12,000 documents. We took that, but when we analysed it we saw lots of gaps. There was no head office documentation, for example. So we pressed on with the litigation."*[54]

This part of the story shows the importance of inside knowledge and understanding, as well as nexus between ATI law and whistleblower protection. As Brümmer adds: "We had some high-level docs from an anonymous source. Things reached us in the proverbial brown envelope." At the subsequent hearing, the M & G convinced the court that the 12,000 pages were insufficient and sought an order for a diligent search at head office (or oral evidence related to such a search). "There have now been a few searches at head office. It is patently clear that they are not really wanting to discover things. They would have to give evidence on oath, which would set such a powerful precedent – senior officials having to give evidence on the stand about their failure to comply with PAIA." Meanwhile, because a team had been built at AmaBhungane with the requisite skills and experience, it was possible to divide up the work and tackle the 12,000 documents.

Thus, a clearer picture emerged of how the Nkandla project had expanded exponentially and how procurement processes had been breached and the President and his family unduly and unlawfully enriched. Meanwhile the Public Protector was responding to the complaint laid by DA parliamentary leader, Lindiwe Mazibuko. She, too, had attempted to use PAIA to get access to a public works report, but it had been initially refused and then a doctored version was provided to her. As Mazibuko argued in her affidavit challenging the government: "In truth, there never was any lawful basis to classify the report as top secret... In light of what Masilo has revealed, the minister abused the government's national security protections." She continued: "As I pointed out in my replying affidavit, seeking to shield

54 Interview with the author.

the president from political embarrassment is not a matter of national security which justifies a top secret classification."

Clearly, Mazibuko was ruffling feathers. Once the Public Protector reported in March 2014 that President Zuma should take remedial action including paying back a proportion of the money spent on security upgrades, the stakes were further raised. Zuma and the ANC in parliament contested the Public Protector's constitutional authority and the binding character of her power to "take remedial action". The DA (and the Economic Freedom Fighters, another, more militant opposition party) were poised to challenge Zuma and parliament, and on 31 March 2016 won in the constitutional court. As Selfe puts it in relation to the ATI spadework that was done by the M & G on Nkandla: "While it was not ours, it was a huge victory for PAIA and assisted us greatly in driving our work on PAIA."

VI. Conclusion

It is clear that there is an emerging community of practice in South Africa on ATI and that the whole may be greater than the sum of the parts. Despite the substantial constraints that exist on the ability of individual protagonists to pursue appellate litigation, PAIA is a valuable tool to enable key users such as investigative journalists/newspapers or opposition political parties to challenge those in power. Whether in explicitly collaborating or not, their efforts can contribute to the overall attempt to claim a right of access to information and thereby to help secure the principle of public accountability. The evidence of some of the most prominent sets of users of ATI law in South Africa – the Mail & Guardian Newspaper and the AmaBhungane investigative journalism unit on the one hand, and the Democratic Alliance on the other, as well as public interest lawyers Alison Tilley (ODAC) and Dario Milo (Webber Wentzel) – suggests that while this may present itself as the task of Sisyphus, the results can be politically as well as legally significant, thereby justifying the investment in time and resources. The use of ATI law in South Africa is certainly ruffling feathers and helping to inject additional much-needed sharpness and vigour into the democratic process and to entrenching a new culture of constitutional accountability.