THE SECURING THE FREEDOM OF INFORMATION LEGISLATION AS A PUBLIC GOOD: THE SOUTH AFRICAN EXPERIENCE

By Mukelani Dimba

A presentation on behalf of the Open Democracy Advice Centre (ODAC)

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Good morning ladies and gentlemen,

Before I start my talk today I wish to thank the World Bank Institute (WIB) and the Kenyan branch of the International Commission of Jurists (ICJ-Kenya) for inviting me, as a representative of the Open Democracy Advice Centre (ODAC), to take part in this workshop. When I received the invitation from WIB and ICJ-Kenya I realized that this would be my third visit to Kenya on Freedom of Information (FIO) business. The first two visits I made as a Regional Co-ordinator for Africa for the Open Society Justice Initiative’s fourteen country comparative study on Freedom of Information monitoring. This study included Kenya.

I must say that it feels good to be back here among friends and colleagues. I am honoured to be among all of you here today and I look forward to discussions with all of you on issues of openness and transparency as essential ingredients for good governance in the African context. I look forward to tapping into that collective wisdom that is present here today.

The organisation I represent, the Open Democracy Advice Centre (ODAC) is part of a network of organisations that wish to, amongst other aims, support and promote meaningful participation in the democratic processes. ODAC and its associate organisations have all been involved in using and promoting the use of South Africa’s Freedom of Information legislation called the Promotion of Access to Information Act No 2 of 2000, PAIA for short.

The Open Democracy Advice Centre is an organization based in Cape Town, South Africa. ODAC’s mission is to promote a transparent democracy, foster a culture of corporate and government accountability and assist people to realise their human rights. ODAC seeks to achieve its mission through supporting the effective implementation of rights and laws that enable access to, and disclosure of, information. ODAC undertakes a number of initiatives in respect of access to information including awareness raising, support to organisations requesting information, training, litigation and policy work in respect of the legislation.
I’ve been asked by the organisers of this workshop to focus my paper on the history of the campaign for our Freedom of Information legislation and our experience in advocacy on the law. I will, however, also touch briefly on the some implementation challenges which can be traced back to strengths and weaknesses in advocacy for the law during the campaign. I will then pinpoint some critical lessons that emerge from that advocacy experience.

1. **Introduction**

Today South Africa is seen as a fairly stable democracy where its citizens enjoy many rights and freedoms that are enshrined in the constitution that is internationally recognized as one of the best of its kind. The rights and freedoms enshrined in the constitution have given a very audible voice to civil society and the fourth estate who have been quite successful shedding a beam of light into the inner workings of the government that so many sacrificed so much for in order to put it in power. As they say: “Sunlight is the best disinfectant”.

The new democratic order has made it possible for the civil society and the media to enable the views of the public to influence public policy, especially when such policy as pursued by government is not to the best interest of the public. Such has been the case with our government’s policy on treatment of people with HIV/AIDS\(^1\) which for a while was a thing of controversy until the outcry from the public, civil society and media could not be ignored anymore.

However, we must remember that things have not always been this “sunny and bright” in terms of public participation in public policy formulation. Our apartheid past is always a good yardstick for measuring how far we’ve come after thirteen years of democracy.

\(^2\)The previous apartheid governments routinely suppressed access to information - on social, economic, and security matters- in an effort to stifle opposition to their policies of racial supremacy. Security operations were shrouded in secrecy. Government officials frequently responded to queries either with hostility or with misinformation. Press freedom was habitually compromised, either through prior censorship of stories or through the banning and confiscation of publications. Information became a crucial resource for the country's liberation forces and their allies in international solidarity movements as they sought to expose the brutality of the apartheid regime and hasten its collapse.

Consequently, opposition groups came to see unrestricted access to information as a cornerstone of transparent, participatory and accountable governance. Two major conferences in apartheid’s dying days explored the legal aspects of information freedom\(^3\).
These consolidated the political will to make access to information a fundamental principle of a new democratic dispensation and helped to define the scope and content of the right.

This consensus was ultimately captured in South Africa’s new constitution of 1996. A democratic parliament then gave further shape to the right of access to information by enacting enabling legislation – a process in which civil society organisations played an unusually influential role.

2. Legislative history

In 1993, the South African government and extra-parliamentary political parties, including the previously banned African Nation Congress (ANC) led by Nelson Mandela, met to hammer out a new, democratic political order. These talks produced a constitution requiring the creation of open and accountable political institutions and the election of a new government on the basis of universal suffrage. The constitution was intended to serve as an interim instrument, until such time as a democratic government with a popular mandate could draft a final document.

2.1. Bill of Rights guarantees access to information

One of the most important aspects of the interim constitution was the introduction of a Bill of Rights designed to ensure equal protection of a broad range of human, socioeconomic and civil rights, irrespective of race, gender, sexual orientation, disability, belief, and other factors. Among the rights upheld was that of access to publicly held information. Section 23 of the interim constitution stated:

‘Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights.’

By entrenching an independent right of access to information – rather than leaving it to be protected by the right to freedom of expression, as has generally been the case in international human rights instruments – the drafters underscored its significance in South Africa’s constitutional order. Without this constitutional ‘anchor’ and the broad political consensus that underpinned it, the subsequent civil society campaign for freedom of information legislation would likely have been a very difficult endeavour.

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5 Section 8(2) of the interim constitution stated: ‘No person shall be unfairly discriminated against, directly or indirectly ... on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.’ The final constitution added pregnancy, marital status and birth to the list of grounds [section 9(3)].

Following the historic first democratic general election of 1994, the interim constitution's broad right of access to information was expanded further. Section 32(1) of the final constitution, enacted by the National Assembly in 1996, guarantees ‘everyone ... the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights.’

Not only was the right of access to publicly-held information no longer qualified by the stipulation that the information be needed for the exercise or protection of a right, but a qualified right of access to information was also established with respect to private bodies and individuals.

Although the revised formulation of the right is more permissive in some respects than the interim right had been, the new wording indicated that early idealism was being tempered by the harsh reality of government and was to some extent already giving way to a more pragmatic or ‘hard-nosed’ attitude. This was evident in the final constitution's stipulation that the general right may be limited in two ways.

First, this right – and any of the rights identified in the Bill of Rights – may be restricted in terms of the constitution's generic limitations clause (sec. 36). As in the interim constitution, the limitations clause permits a right to be circumscribed only by legislation that applies generally to all – and then only if the limitation is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.’ In making the latter assessment, a number of factors must be taken into account, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and whether there are less restrictive ways to achieve the purpose.

Second, the final constitution required that the right be fleshed out in terms of enabling legislation. The constitution that came into effect on 3 February 1997 gave Parliament three years to enact legislation to give effect to the right articulated in section 32(1) and to regulate its application. Significantly, the legislation was permitted to include ‘reasonable measures to

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8 Until the required enabling legislation was enacted, the general right of access to information contained in Section 32(1) of the new constitution was suspended, and the more limited right of access to publicly-held information found in the interim constitution applied. The interim constitution (sec. 71) required that the Constitutional Court review the final constitution to certify that it was in compliance with a set of fundamental principles (listed in Schedule 4 of the interim constitution). Constitutional Principle IX read: ‘Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.’ In its First Certification Judgement, In re: Certification of the Constitution of the Republic of South Africa, 1996 [1996 (10) BCLR 1253 (CC)], the court ruled that although the interim right did not comply with the constitutional principles, the right of access to information was not a ‘universally accepted fundamental human right’. It therefore held that the temporary suspension of section 32(1) was reasonable if it was for the purposes of drafting and enacting legislation establishing ‘the practical requirements for the enforcement of the right and the definition of its limits’. However, the Justices clearly linked the concept of ‘reasonableness’ in this case to the temporary nature of the suspension. They ruled that, should the required enabling legislation not be passed within the designated three-year window, the interim right would fall away and the expanded right in section 32(1) would become operative.
alleviate the administrative and financial burden on the state’ – to balance, in other words, the state's potentially competing obligations to protect citizens' information rights and to provide fair, efficient, and cost-effective administration.

2.3. Enabling legislation gives effect to the right

Shortly after the democratic government took office in 1994, it appointed a five-member Task Group on Open Democracy headed by then-Deputy President Thabo Mbeki's legal advisor, Advocate Mojanku Gumbi, to draft appropriate enabling legislation.

The Task Group issued a preliminary report early in 1995 setting out in detail their legislative intentions and the principles underlying their approach to drafting. By August 1995, they had produced a draft bill, which had been based on consideration of the following international FOI legislation:

3. Freedom of Information and Protection of Privacy Act [Chapter F.31] (Ontario, Canada)
4. The Official Information Act 1982 (New Zealand)
5. Right to Know Bill [Bill 187 – a private members’ Bill] (United Kingdom)
6. Freedom of Information legislation (United States)

Soon after that Parliament set up an Ad Hoc Joint Committee on the Open Democracy Bill and during their deliberations the members considered the laws which had been used by the Task Group but also added following foreign legislation:

1. Australia:
   - New South Wales: Freedom of Information Act 1989
   - South Australia: Freedom of Information Act 1991
   - Western Australia: Freedom of Information Act 1992

2. Freedom of Information Act, 1997 (Ireland)

It took nearly five more years – and revisions so extensive that not even the bill's original name survived\(^9\) – before the legislation was enacted. At a seminar on the eve of the draft’s initial publication, participants were warned that ‘we must act fast because once the government gets used to doing things in secret ways their enthusiasm for access to information will drain away’. This was a prescient observation. Over the next two years, the executive arm of government chipped away at the draft proposals before releasing a much-altered bill.

\(^9\) During the deliberations the Open Democracy Bill [B67-98] became the Promotion of Access to Information Bill and the Protected Disclosures Bill.
2.4 The Open Democracy Campaign Group

Civil society played an extensive and influential role in helping Members of Parliament to craft the final Act. From the outset, civil society organisations took a keen interest in open democracy legislation, including its information access provisions. Despite the challenges of transition to democracy, which included diminishing foreign donor support, South Africa enjoys a large and thriving civil society sector, a substantial segment of which emerged from popular campaigns against apartheid and the socio-economic disparities it generated. Having worked for the realisation of a democratic vision, many of these groups saw Open Democracy legislation as a crucial mechanism for the consolidation of participatory democracy, grassroots advocacy, and accountable government in South Africa.

As early as July 1995, the Johannesburg-based Freedom of Expression Institute (FXI) convened, at the invitation of Mbeki’s Task Group, an Open Democracy Advisory Forum (ODAF) of civil society groups to monitor the legislative drafting process, facilitate public debate on the bill, and interact with government departments. It was, in some respects, an impressive initiative. It ultimately foundered, however, as it had neither the coherence nor the resources to sustain it through the process that followed. In contrast to the smaller, more tightly-drawn Open Democracy Campaign Group that was to follow later, ODAF tried to involve too large and diverse a range of organisations, without the funding to underwrite their travel to Johannesburg for workshops and campaign meetings. For many of the organisations, the issues involved were probably too far removed from their primary agendas – such as development or housing – to permit them to devote sufficient attention or resources to the protracted and complex process that subsequently unfolded.

FXI went on to organise an important conference on the bill in January 1996, and continued to play a useful role in critiquing the bill and facilitating responses from civil society organisations based in and around Johannesburg, but ODAF soon vanished from the scene.

In Cape Town, the Parliamentary Information and Monitoring Service (PIMS) of the Institute for Democracy in South Africa (Idasa) launched a parallel initiative. In October 1996, PIMS hosted a workshop entitled ‘Making a Difference: The Challenge for Civil Society Advocacy in South Africa’ that brought together representatives of roughly thirty civil society organisations involved in social justice advocacy, as well as ten international delegates. The workshop participants identified access to information as one of the pivotal issues for effective advocacy in the democratic era. They acknowledged a need for timely information both about the content of policy debates – the policy options being considered by government officials and the data used to assess these options – and about the structures and processes used to decide policy. At the conclusion of the workshop, three organisations – the Human Rights Committee, the Black Sash, and Idasa’s PIMS – were charged with investigating the status of the (then-stalled) Open Democracy Bill, analysing the contents of the most recent draft of the Bill, and designing a campaign to promote enactment of strong information access legislation. In addition, the group was asked to ‘find ways to test the new
system in relation to government openness and freedom of information generally, given its importance to effective advocacy.\textsuperscript{10}

These three organisations formed the core of an Open Democracy Campaign Group which ultimately grew to include the Parliamentary Office of the Congress of South African Trade Unions (COSATU), the Legal Resources Centre, the National Association of Democratic Lawyers, the Public Policy Liaison Office of the South African Council of Churches, the Parliamentary Liaison Office of the Southern African Catholic Bishops’ Conference, the South African NGO Coalition, and the Environmental Justice Networking Forum. The Campaign Group also benefited from the regular participation of the parliamentary monitor of the South African Human Rights Commission, one of a handful of constitutionally enshrined bodies responsible for promoting democracy.

In contrast to ODAF, the Campaign Group endured and thrived. Over time, the coalition developed a high level of cohesiveness and trust which allowed it to overlook minor differences and focus on core issues. The group also developed a collective expertise that made it an asset to member organisations, the media, and parliamentarians alike. Its members made numerous submissions – both individually and collectively – to the various parliamentary committees that considered the bill and monitored the legislation’s progress closely. It continued to track the implementation of the final Act and commented extensively on proposed regulations associated with the legislation.

2.5 \textit{Executive concerns narrow the legislation’s scope}

The reaction to the early drafts of the bill of one minister, Kader Asmal, probably mirrored that of most of his colleagues in the Cabinet. Asmal spoke with particular authority on matters of transparency and accountability given his position as Chair of the Parliamentary Ad Hoc Committee on Ethics, and his own history as Professor of Human Rights Law at Trinity College, Dublin. According to Cabinet sources, during the Cabinet's first review of the draft bill, Asmal argued for the blanket exemption of Cabinet records and warned of the dangers of unrestricted access to information. He articulated his position in a more public setting a year later:

\begin{quote}
“On the one hand, people must not feel powerless at the hands of those who temporarily or permanently control their destinies. On the other, the duly elected democratic government must not be rendered powerless in carrying out its mandate. Lord Acton, as we all know, said that power corrupts. It is necessary to adapt Acton and to point out that powerlessness is equally corrupting, for individuals and for the state. The former leads to individual frustration and helplessness. The latter causes governmental drift leading to chaos – with the state unable to perform the functions expected of it.”\textsuperscript{11}
\end{quote}

It must be remembered that these words were delivered at a crucial juncture in the history of the new government. Having delivered a peaceful transition and an internationally-admired constitution, the government was now struggling to reform an inherited public service that was in places obstructing its efforts to transform South Africa’s economy and society. There was growing frustration with the apparent inability to implement good policy. Issues such as access to information were increasingly seen as ‘unnecessary luxuries’ or, worse, as further impediments to rapid progress. Ministers such as Asmal were especially mindful of such considerations. They would have been familiar with the Canadian experience, for example, where at the time there was debate about the way in which its bill of rights has been hijacked by conservative forces to constrain progressive law and policy.

As a consequence, each government department that reviewed the bill contributed to a growing series of changes. The bill was diluted in very obvious fashion – the removal of the whole chapter dealing with open meetings, the blanket exclusion of all Cabinet records, the removal of a ‘necessity of harm’ over-ride clause, the excision of provisions creating an Open Democracy Commission and an Information Court – and in more subtle ways, such as the tightening of exemptions concerning third party confidentiality and commercial activity.

The acute irony of this process was that, in essence, it went underground. It became harder and harder to elicit information about both the process of revision and the specific content changes made by the Executive.

2.6 Developing the Campaign; Building Trust within the Legislature

Once the bill was finally tabled in parliament, after years of slow progress, there was suddenly a great urgency to meet the constitutional deadline of 4 February 2000. As a Campaign Group, the information and knowledge we had accumulated served us well in our lobbying; under pressure, the committee welcomed our expertise and came to see it as a resource. We also had to build trust, however. The former chairperson of the Justice Committee is a prominent advocate and a formidable parliamentarian. He is not easily persuaded and does not suffer fools gladly. If we failed to win his respect, our efforts would have come to naught.

Hence, we were careful to find a balance in our submissions between the “ideal” (as we saw it) and the “realistic” (as they were likely to see it). To pitch a submission too far in one direction would be to risk losing respect for being ‘unrealistic’ (and therefore unreasonable); to lean too far in the other direction would be to concede too much ground. In preparing submissions we tried also to be as ‘professional’ as possible, in terms of presentation and style, aiming to make the submissions clear and accessible. In this, we had to guard against the danger that our combined knowledge would overflow into over-long submissions. We decided to keep submissions short and offer longer, more detailed versions to those MPs that wanted them.

It was a hard rule to keep; where we breached it, we would often prepare a short two or three page document summarising our main points, with headlines and key ‘sound bites’.
One particular lesson we learnt the hard way was (to borrow the language of the 1992 Clinton US Presidential Campaign) the need for ‘instant rebuttal’. During the committee hearings, a number of public officials gave evidence. One witness was the then Director-General of Land Affairs, Geoff Budlender, a man with an impeccable human rights reputation and credibility. He told the committee that he feared that the version of the bill then under consideration would paralyse his department and make it impossible for them to do their work. He did so on the mistaken basis that requests for information could constitute, in effect, requests for ‘research to be done’. In other words, Budlender interpreted the bill to grant a right not only to access records but also to compel departments to construct or compile records. The effect of Budlender’s evidence was profound, less in relation to the specifics of how the bill defined a record – it was already clear that it did not extend as far as Budlender’s interpretation – but more in intensifying committee concerns about the bill’s capacity to impede ‘delivery’ by government.

Our response should have been immediate: a short, clear letter to the chair of the committee, copied to the committee members politely pointing out the error of the interpretation. This could have been supported, perhaps, by a gentle rebuke in the media.

Later, it was difficult to dispel the perception that the bill had the potential to paralyse government. When similar incidents occurred we learned to respond more quickly – hence the importance of having members of the campaign group present to monitor proceedings.

The most important aspect of our strategy was our determination to offer constructive alternatives where we had complaints. There is little that is more irritating to a lawmaker than to be faced by a moaning lobbyist who is unwilling or unprepared to offer a better way of doing things. Hence, when presenting our primary concerns, we not only offered policy options, but also alternative legislative language to achieve our proposal.

Although the South African committee system has come a long way, it is still very short of resources. There are no lawyers to assist the committees, who have to rely on the expertise – and the bona fides – of the executive’s lawyers. Hence, the need to help the committee with its work by offering actual drafting. We did this in a number of cases: with the drafting of the whole chapter on the horizontal application, the ‘right to know’ provisions and, in the case of whistle-blowing, the drafting of a whole new bill, once the committee agreed to excise it and totally re-conceptualise the legislative approach.

One or two other further factors helped us to gain the trust of the lawmakers. Firstly, we stuck doggedly to our task and demonstrated that we were there for the long haul. Secondly, our presence at the committee enabled us to build up good personal relations with many of the MPs. Although the former chairperson of the Portfolio Committee on Justice\(^\text{12}\) is a charismatic and influential politician and our relationship with him was, therefore, pivotal, we did not neglect the other members of the committee both in the ruling party and in the main opposition parties. The ANC enjoys a very substantial majority in the South African parliament and so clearly our main task was to persuade the ANC members of the Committee. However, we sought to build strategic relations with one or two members of the opposition. This requires that a different sort of trust be built. It is advisable only to deal

\(^{12}\) Now the Deputy Minister of Justice and Constitutional Development (since 2004)
with opposition members who understand and respect the fact that it may damage a Campaign to have an opposition party member recite, parrot fashion, your arguments. Fortunately, the South African parliament is an exceptionally open one, where tea is shared at the breaks by MPs, lobbyists and media all together. Such breaks provided us with opportunities to raise points, respond to issues before the committee and promote our views quietly.

Finally, the media can play a pivotal role in any legislative campaign. Not all media coverage of a campaign will be good and it needs to be handled with care. For example, coverage in a newspaper which has lost the respect of the ruling party carries the same health warning associated with clumsy support by an opposition party member. Our comments to the media therefore focused on the issues, rather than the politics and the personalities. While it was hard to get the mainstream media to take up the access to information issue and we had to work hard to think of 'real life' examples to help journalists bring the issue to life, we were fortunate that a small group of very dedicated journalists decided to follow the story the whole way through. Accordingly, we sought out and built good relations with them.

Using the media to support a campaign is as specialist a task as, for example, preparing alternative clauses to the draft law. Division of labour is, once again, a useful thing for a campaign group, we discovered. Fortunately, the diversity of our campaign group gave us one or two individuals who had a good understanding of how media operate, what they need and demand, and how to build a good relationship with a journalist. Over a period of time a mutual dependency can grow. Sometimes the journalist needs an ‘expert’ quote to complete the story; other times the campaigner will want the journalist to cover a particular issue in order for the campaign groups’ line to acquire greater credibility, or to put more pressure on lawmakers. If handled carefully, media coverage can complement and enhance the other components of an effective campaign.

2.7 Building a Campaign: Fostering a strong coalition

Although the Campaign Group was not as disparate a grouping as ODAF had been, it enjoyed substantial diversity. With representation from labour, churches, human rights groups and the legal community, the coalition brought together prominent organisations from several key sectors of civil society. Participants were exclusively Cape Town-based (although FXI was present at a couple of the coalition's workshops), but most represented organisations that operate nationwide. Most of the groups involved were engaged in work on multiple issues and therefore saw open and accountable government as a central thread linking many of their concerns. The Campaign Group's breadth enriched its perspective and enabled it to speak with a great deal of moral authority.

This diversity was not free of pitfalls, however. The coalition needed to manage and accommodate the differing priorities, political perspectives, and organisational cultures of its members. Large organisations, such as COSATU, South Africa's giant labour federation, often required much more time to secure formal endorsement for specific policy proposals than smaller groups. In some instances, certain members felt that they needed to put their own ‘stamp’ on coalition submissions through the inclusion of a particular motivating argument or formulation of a policy proposal.
Fortunately, the Campaign Group had sufficient time to work through any difficulties. While the sluggish pace of the drafting process was a disadvantage insofar as it made room for the erosion of the government’s enthusiasm for the bill, it was a boon to the cohesiveness and expertise of the Campaign Group. The coalition met regularly for four years with a fairly stable group of personnel. During that period, some organisational representatives moved on to other positions, but their successors were typically well-briefed and rapidly integrated into the group. This regular contact helped to dissipate the early doubts that some organisational representatives had about the political motivations of their counterparts from other agencies. Continuity bred familiarity and trust and helped to promote consensus. Over time, we also developed a shared base of information, which contributed to a certain convergence of perspective on the legislation and the key issues arising out of it; as the group became more expert, so its confidence but also its cohesiveness grew.

This is not to say that there were no disagreements among members. To the contrary, there were often protracted and even heated debates both inside and outside of coalition meetings. But the mutual trust and respect which Campaign Group members developed for one another had two important consequences. First, coalition members were generally willing to overlook petty differences and reserve their passion for more central concerns. Second, conflicts never generated lasting tensions that might otherwise have jeopardised the coalition’s survival.

The Campaign Group’s diversity had an additional benefit in that it enabled a division of labour. Various members of the group brought different skills, interests and expertise to the coalition. This allowed for specialisation, as one or two members focused on particular aspects of the bill: the appeal and enforcement mechanisms, the horizontal application of the right to information held by private bodies, the introduction of a ‘right to know’ approach to handling state records, the exemption clauses, and so on.

This complementarity meant that the Campaign Group became greater than the sum of its parts. It also made the coalition a valuable resource to member organisations with limited staff, time and research capacity. Members recognised that the bill was long, complex and difficult. Individually, they were unlikely to be able to juggle all of the issues raised by the legislation. The Campaign Group offered assurance that all of their organisation’s primary concerns would be addressed without having to duplicate the research and analysis undertaken by their colleagues.

The value of this approach was particularly evident in the coalition’s advocacy strategy. Campaign Group members designed their written and oral submissions to be interlocking, with each witness endorsing the positions advanced by other coalition members, then devoting the bulk of her or his time to elaborating a further theme. We dubbed this tactic the ‘Twelve Days of Christmas’ approach; where time allowed, each individual making a submission would quickly run through the ‘headline’ points of the previous submissions made by the Campaign Group members before making her or his own, detailed submission. The purpose of this was to hammer home the key points to the MPs.
On several occasions, the group also prepared joint submissions, with each member contributing a section on her or his area of expertise. During the protracted committee deliberations, the group made an effort to ensure that the relevant ‘expert’ was on hand to monitor the discussion of provisions of particular concern to the coalition.

The legislation's stately pace not only allowed time for the coalition to gel, it also provided invaluable opportunities for research. By the end of 1997, the Campaign Group had produced a detailed analysis of the content of the draft Open Democracy Bill, including information on the ways in which central problems had been resolved in other countries. Eventually, seven key issue areas crystalised:

- Ensuring that the legislation gave full effect to the 'horizontal' right to access privately-held information;
- Ensuring that the enforcement mechanisms established by the new law would be accessible, inexpensive and speedy;
- Promoting a ‘right-to-know’ approach to government-held information, in order to change government attitudes about the disclosure of state records and to maximise the amount of information released without prior review by government officials;
- Reconceptualising and redrafting in separate legislation provisions intended to protect whistle-blowers;
- Narrowing the scope of the disclosure exemptions
- Contesting the blanket exemption of all cabinet records

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14 The freedom of information clause included in the final constitution is unique in that it not only guarantees access to information in the possession of the state, but it also provides limited access to information held by “private persons” (whether individuals or organisations) to the extent that such information is required for the protection or exercise of any right. To the best of our knowledge, South Africa is the only country that has attempted to establish such a comprehensive right of access to information. We note however that the Declaration on Principles of Freedom of Expression as adopted by the African Commission on Human and People’s Rights borrows from the South African formulation. The Kenyan draft law is currently unclear on the issue of private sector application of the intended FOI law (see, ANNEXURE A attached to this presentation. The title Annexure is, Dimba, M. Comments by the Open Democracy Advice Centre On the Kenyan Freedom of Information Bill, 2006, Cape Town, South Africa, November 2006, unpublished, but to be available at www.opendemocracy.org.za).

The Open Democracy Bill, as introduced, failed to address fully the right of access to privately-held information. It required only that individuals be permitted to review and correct personal information (such as contact details, etc.) about themselves recorded in any “personal information bank” from which data could be retrieved using a name or other unique personal identifier. This was a much narrower right than envisaged in the constitutional provision.

The enormous gap between the constitutional and the legislative language was due in part to the fact that the original task team had completed its initial draft before the freedom of information clause was finalised. The interim constitution made no mention of privately-held information. However, no effort was made to capture the intent of the new constitutional clause before the draft bill was published in October 1997 or before a final bill was introduced in July 1998.
• Reinstating an early chapter promoting Open Meetings in the public sector.

Each one of these key issue areas was adopted by one or more members of the group, who then took the lead in co-ordinating the research, the formulation of policy proposals, and the lobbying around the particular topic.

The Campaign Group organised one-day workshops at important junctures, drawing in academics and other professional experts to inform the group's discussion and strategic planning. On two occasions, it also commissioned legal opinions from counsel to support or ventilate various arguments.

Consequently, the Campaign Group developed a collective expertise, which became an asset to its members, to parliamentarians, and to the media. As the legislative debate on the bill progressed, a number of journalists began to look to members of the coalition for comment, analysis and background. On the eve of the first parliamentary committee hearing, Business Day, one of South Africa's most respected daily newspapers, ran a front-page story saying that the Campaign Group was going to alert the Committee to the dangers of failing to flesh out the 'horizontal' part of the constitutional right. The piece not only recited the main issues of concern to the group, but also referred to the Campaign Group as the 'ten organisation Open Democracy Campaign Group'.

At the meeting the next day, one MP referred to the Campaign Group as 'the Group of Ten' and it stuck; from then on, generally that was how the committee referred to us. It gave us a sense of presence and persona, of cohesion and achievement. Campaign Group participants also received positive feedback and encouragement from within their own organisations in the wake of these media reports. This enhanced members' commitment to the campaign and gave it further momentum.

Members of the Campaign Group were all busy people who had many other areas of work on matters of governance, human rights and academia. They also relied on each other to research areas of concern, and develop positions in relation to those areas. Given the size of the group, and the time available, the decision was made to focus on certain key areas.

This was useful in that it gave clarity and purpose to submissions, and created expertise and confidence in the group. However, a number of more technical issues fell to the wayside. These included, for example, the exemption clauses, and particularly, an exemption relating to records which are part of a deliberative process. This exemption was widely drafted, and became a cause for concern after the Bill was passed. Had we allowed fatally wide drafting to escape our scrutiny? Had the drafters simply ended up, in the press of getting the law out, simply made an error?15

The section reads:

15 The former Chairperson of the Justice committee and current Deputy Minister of Justice has stated that there was not error in the drafting of the deliberative process exemption of in section 44 of PAIA
Operations of public bodies

44. (1) Subject to subsections (3) and (4), the information officer of a public body may refuse a request for access to a record of the body—

(a) if the record contains—

(i) an opinion, advice, report or recommendation obtained or prepared; or
(ii) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; or [MY EMPHASIS]

(b) if—

(i) the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid—

(aa) communication of an opinion, advice, report or recommendation; or
(bb) conduct of a consultation, discussion or deliberation; or
(ii) the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.

The trouble here was the choice of conjunctives between subsection 44(1)(a) and 44(1)(b). We strongly believe that the appropriate conjunctive should have been “and” instead of “or”. We hoped that any interpretation of the clause would narrow the exemption. However, this minor omission has been seen by many users of the access to information law as being so wide that – as one academic put it – “that it will potentially subsume the right”16. Professor Govender further wrote that, an “absurd situation would arise in terms of which the exception to the right of access to information would completely negate the operation of the right itself.”17

3. Key Lessons

Many of the lessons identified here are applicable to any legislative lobbying, while some are of particular relevance to access to information campaigns.

First of all, all legislative lobbying requires expertise and knowledge. This is especially so in the case of access to information legislation, which tends to be complex and intricate. There are, therefore, many advantages in building a coalition of some sort. There is no substitute for convincing, well-researched and reasoned arguments; and, in the case of access to information, there is a huge and growing quantity of comparative research. The South African parliamentary committee was especially interested in models from the different

16 Govender, K. “An Assessment of Limitation to Information in the Promotion of Access to Information Act and the Danger that Disclosure Will Become the Exception Rather than the Norm” in the Seminar Report, Konrad Adenhauer Stiftung, Johannesburg, 2001
Australian States – so the Campaign Group helped persuade the Australian government to finance a study trip by four members of the parliamentary committee.

Second, work together – establish a broad coalition of forces, across both disciplines and regions. We benefited from having legal, good governance, religious, labour, environmental, and human and civil rights groups all working together. At the same time it was valuable to have a fairly stable core group.

Third, communicate. This helps to keep the coalition together. Trans-regional communication was especially important for us. Although there was some exchange between the Johannesburg and Cape Town groups, this could have been more extensive and fruitful. Regrettably, we did not have the resources to develop good networks in other important regions like KwaZulu-Natal or the Eastern Cape.

Fourth, share tasks. Consider whether specialisation makes sense; it worked well for us.

Fifth, identify and utilise outside expertise. Sympathetic lawyers can make especially valuable contributions to analysis and debate, provided they are not given undue deference or allowed to hijack the coalition. Lawyers often adopt a cautious, even conservative approach to legislative issues, and this should be factored into any planning informed by their advice. One way of retaining strategic control of the campaign is to bring lawyers in as consultants on specific issues by commissioning legal opinions.

Sixth, cultivate contacts in government. These can be important for getting documents or other intelligence on the government’s plans. For us in South Africa – where we enjoy a relatively strong and independent legislature – cordial ties with parliamentary leaders who recognised the value of civil society input were particularly important for allowing our voice to be heard and getting our proposals before legislators.

Seventh, be prepared to offer solutions, even if they aren’t perfect. The Campaign Group provided basic language to fill several gaps in the legislation. This was often adapted – sometimes beyond recognition – by legislators, but it helped to frame the issues and provided legislators with a starting point, thereby reducing resistance to exploring new themes.

Eighth, be prepared for the long haul. The struggle is not over when the legislation is enacted. One needs to monitor and comment on implementation, regulations, and request procedures and systems.

Ninth, identify unique advantages. In addition to our strong constitutional grounding, the political and institutional fluidity of the transitional state created an openness to input, in part because new MPs often had limited access to research and a propensity to take on board civil society proposals. Other countries may not have these specific characteristics, but may have other advantages unique to their situations.

Finally – and perhaps most important – there must be political will. In our case, the political momentum was captured in the country’s constitution, which lent both moral and legal
authority to the campaign even if the political will of some individual public officials began to flag.

4. Passage of the Act

This secrecy and foot-dragging was a cause of increasingly frustration to civil society organisations monitoring the bill's progress. They began to plead desperately for the bill to be tabled in Parliament, due largely to their confidence in the South African parliament's capacity to address the bill in an open and consultative manner. Eventually, the much-revised draft legislation – known as the Open Democracy Bill\textsuperscript{18} – was published for comment in October 1997 before being introduced in Parliament in July 1998.

Responsibility for the passage of the bill lay with the National Assembly's Portfolio Committee on Justice, one of Parliament's most dynamic committees with a reputation for legislative competence and careful attention to public submissions. The Portfolio Committee eventually took up the bill in March 1999 when it held two days of public hearings. This process was interrupted by South Africa's second democratic general election in June. When the new Parliament reconvened in August, the 4 February 2000 deadline for adoption of the enabling legislation was looming. To expedite the parliamentary process, an ad hoc joint committee of both Houses was created solely to deal with the legislation\textsuperscript{19}. This held a second round of public hearings in October 1999, then worked well into the December-January holiday recess to ready a bill for final passage at the beginning of the new parliamentary session in February 2000.

5. Implementation challenges as a result of weaknesses and strengths in advocacy.

\textit{“I can remember in February 1990 watching Nelson Mandela being released from Pollsmoor Prison down the road from here. I would have been truly amazed if somebody had said to me then that, 12 years from now...”}

\textsuperscript{18} Although the Open Democracy Bill was primarily intended to give effect to section 32(1) of the constitution, it had been conceived from the outset as a broader bill. Section 195 of the constitution sets out a number of basic principles and values that are meant to govern public administration. These include the encouragement of public participation in policy-making, the accountability of public administration, and the promotion of transparency through the provision of ‘timely, accessible and accurate information’. National legislation was also required to ‘ensure the promotion’ of these values. The Open Democracy Bill initially sought also to respond to this mandate. Advocate Justine White, who was involved in early efforts to develop a Freedom of Information Act, has written that the original draft of the Open Democracy Bill ‘performed the work of four separate pieces of legislation, namely, a Freedom of Information Act, a Privacy Act, and Open Meetings Act and a Whistleblower Protection Act.’ [Justine White, ‘Open Democracy: Has the Window of Opportunity Closed?’ South African Journal on Human Rights 14 (1998), 69.] By the time the bill was approved by Parliament, it had been stripped of these other components and renamed accordingly: the Promotion of Access to Information Act.

\textsuperscript{19} The Ad Hoc Committee on the Open Democracy Bill included most of the members of the Portfolio Committee on Justice and was co-chaired by the Portfolio Committee Chair, Advocate Johnny de Lange, and the chair of the NCOP Select Committee on Security and Justice, J. Mahlangu.
I will have visited a democratic South Africa eight to ten times, that I will be at my second annual meeting of the Open Democracy Advice Centre and that a racial dictatorship that was a disgrace around the world and was an international pariah would have become, in my opinion, the gold standard of constitutional development in terms of its constitutional reforms, its bill of rights, its access to information act, its protection to whistle blowers and the whole elaboration of rights that has taken place the last few years in this country.”
- Andrew Puddephatt

Speaking at the Second Open Democracy Review conference, Puddephatt warned South Africa against allowing herself to falter on the rock of implementation. Some developments in the access to information regime in South Africa created anxiety about the state of compliance with and implementation of the law. Since the South African FOI law came into force in 2001, the Open Democracy Advice Centre has been tracking its implementation and usage. The picture is far from rosy with a number of institutions failing to respond to requests for information. On average only 30% requests for information are responded to completely.

There is also a problem with lack of awareness of the legislation by officials as well as the public which leads to lack of consistency in the implementation of the law. Even more challenging to effective implementation of the FOI law is the lack of an oversight body with adjudicatory functions on the legislation, but more about this later.

Our experience with the FOI law in South Africa shows that we must be cautious of coming to conclusions about access to information in South Africa based merely on a highly regarded piece of legislation and, more broadly, this experience suggest that countries that have not yet adopted freedom of information legislation need to realise that just passing a law in itself does not promote access to information. More efforts must be put towards making the law work.

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20 Puddephatt (former Director of Article 19) is one of ODAC’s Senior International Associates. This is extracted from his opening address at the 2nd Annual Open Democracy Review Conference held in Cape Town, South Africa on 10 –12 October 2002

21 The Open Democracy Campaign Group felt that its work was not done with the passage of the Act but agreed not to disband but continue to track and monitor implementation of the law through a new purpose-built law centre called the Open Democracy Advice Centre (ODAC)


In the South African FOI law the South African Human Rights Commission (SAHRC) – a constitutional body - is tasked with:

- making a copy of a guide on how to use the Act available to the public;
- developing and conducting educational programmes to advance the understanding of PAIA by the public, in particular to teach disadvantaged communities about PAIA and how to use it and how to exercise their rights in terms thereof;
- encouraging public and private bodies to participate in these programmes, and undertake their own educational programmes on the understanding of PAIA;
- training information officers and deputy information officers of public bodies;
- making recommendations to public and private bodies that they change the manner in which they administer PAIA, as the Commission considers advisable;
- consulting with and receiving reports from public and private bodies on the problems they have encountered in complying with PAIA;
- obtaining advice from and to consulting with, or receiving and considering proposals or recommendations from any public or private body, official of such a body or member of the public in connection with the Commission’s functions in terms of PAIA;
- receiving reports from public bodies regarding the implementation of PAIA;
- compiling and submitting a report to Parliament annually on the enjoyment of the right of access to information in the Republic and the implementation of PAIA in general;
- assisting any person wishing to exercise the right contemplated in PAIA.

We believe that these obligations of the SAHRC are appropriate and, despite some slow progress in the beginning, over the last couple of years the SAHRC has done a lot to meet its educational and promotional obligations in terms of the Act and we are encouraged by their many efforts at making the law works as it should. These efforts have included the establishment of a forum of Information Officers, conducting numerous training workshops throughout the country, distributing educational materials on the Act and running the Annual Openness and Responsiveness Awards (a.k.a. Golden Key Award) to encourage and recognise best practice in the implementation and usage of the law.

Despite the role played by the SAHRC in making the law work, there is still a gap in its mandate: it still doesn’t have any adjudicatory function in terms of the decisions to withhold information. This is a necessary condition that the South African law lacks and it goes back to the decision to drop the provision for the establishment of an office of the Information Commissioner during parliamentary deliberations. The removal of the provision for an information commissioner in the South African FOI law was a result of the strength of the South African judiciary in lobbying for the deletion of this provision and a weakness of other stakeholders in lobbying for the retention of the provision.

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24 The earlier versions of the Bill provided for creation of the Office of the Open Democracy Commission and Information Courts.
The judiciary lobbied hard for the deletion of this clause because they felt there was no need for information courts or other tribunals to hear cases on FOI “because the judiciary would be more than competent” to preside over such cases, so the argument went. The argument was accepted by Parliament but bedeviled the success of the law after its passage. This decision during the passage of Act has been a source of major concern.

In a number of forums, stakeholders identified the lack of a better dispute resolution mechanism on requests for information as a major challenge to the success of the law. In terms of the South African law applicants for information held by public bodies are restricted in their right of appeal to the same body that refused access, followed by appeal to the High Court. Requestors who are aggrieved about the decision on an Information Officer in the private sector do not have an option to appeal internally within the private body but have to directly approach the High Court for relief. In both these instances this is an extremely expensive and lengthy process that is out of the reach to a vast majority of South Africans.

It is for this reason that organisations present at the 2003 PAIA Indaba (conference) called for:

> Parliament’s Portfolio Committee on Justice and Constitutional Affairs [to] review the options for the establishment of a new independent review mechanism that would provide an excess-reedy for citizens in respect of their Access to Information requests.25

In the same year, the Act was amended to make it possible for PAIA cases to be heard at Magistrates Courts and not only at the High Courts as had been the case before this amendment. However this is unlikely to make a substantial difference in terms of cost, speed and specialisation for two reasons:

a) The Magistrates Court remains a lawyer-centric forum and a far cry from the administrative tribunal systems that operate in other jurisdictions, and

b) We currently cannot go to the Magistrates Court on PAIA disputes because no rules have been issued by the Rules Board after close to five years of amendment of the Act to allow for magistrates to preside over these issues. This means no progress is possible there.

Until we have such an alternative dispute resolution forum such as an Information Ombud or Commissioner, the slow and expensive process of the High Court establishing the limits of PAIA will continue.

The problems of implementation (lack of awareness and responsiveness) as stated above and the lack of rules at the Courts of law for dealing with PAIA reveal how crucial it is to have in place a properly constituted information commission or information ombud. We believe that if the PAIA is to work, particularly for vulnerable communities and groups, it is essential that its appeal procedures are inexpensive, quick and easy to use. This is the reason why major

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advocacy work in South Africa now is for the establishment of the office of the information commissioner.

By including this provision in the Kenyan draft law\(^{26}\) the drafters have ensured that the Kenyan law has enjoys the necessary condition for it to thrive. This is the strongest provision in the Kenyan draft law and it is a bedrock upon which the law will succeed or collapse as we have learnt in South Africa. We are still lobbying the government and parliament on this matter. We believe that the creation of such an appeal mechanism will:

- enable requestors to more readily challenge mute and actual denials;
- build up a larger body of jurisprudence faster;
- help establish good practice and higher standards.

Despite initial doubts about the prospects for such a venture, it seems now that these advocacy efforts can succeed especially since the SAHRC has expressed support for this idea and also because the South African Law Reform Commission is currently working on a draft bill on protection of personal information and other data. In all likelihood we will need a data protection agency to implement such legislation. Cost considerations would suggest that a practical solution would be to combine such an agency with an information commission. This would also allow development of a consistent jurisprudence on access and privacy, avoiding the inter-agency conflicts.

The SALRC makes such recommendations in the Privacy and Data Protection Discussion Paper 109 (Project 124) and the subsequent – but still unofficial – draft bill. The Discussion Paper suggests that a Commissioner should be responsible for the implementation of both the Protection of Personal Information Act and the Promotion of Access to Information Act, 2000.

Our position is that following passage of legislation on privacy and data protection, the Information Ombud/Commissioner should be given responsibility for adjudicating disputes relating to privacy as such disputes are closely associated with questions of information disclosure.

Our advocacy efforts may also be rewarded positively following the recent release in August 2007 of a report by our Parliament’s Ad Hoc Committee on Review of State Institutions Supporting Democracy wherein the Committee called for appointment of a dedicated Information Commissioner within the SAHRC. We believe this recommendation is a new dawn for transparency and human rights in South Africa.

We also believe that this recommendation will go a long way towards supporting ODAC’s submission that for our Access to Information regime to be effective South Africa needs to establish an independent office of the Information Commissioner. International best practice demonstrates that a mechanism such as an Information Commissioner is an essential and crucial component of an open transparency regime. Without an Information Commission to effectively monitor implementation of the

\(^{26}\) Please see Annexure A for our comments on the proposal for an Information Commission(er) in the Kenyan FOI Law.
law and to provide necessary redress for ordinary people for whom access to information is part and parcel of service delivery, the Promotion Access to Information Act will remain simply a grand idea whose promise lies unrealised.

6. CONCLUSION

Through civil society’s campaign for a Freedom of Information law, South Africans have managed to secure for themselves the promise of an open democracy and an open society - a democracy where they have the right to scrutinise the actions of government and the private sector, and to demand more accountability from both and participate meaningfully in the decisions that affect everyday lives in a profound way.

It is early days still in the campaign for the exercise of right of access to information in the continent. It is important for those who are active in this and other campaigns to join forces and push for more openness in public policy issues. For us openness is not something which has to be achieved because it is the latest trend. For us access to information is a matter of high importance. Openness or the lack of it affects people's livelihoods and lives. It is therefore very important that progressive government officials, civil society organisations and the media speak for those who are not able to speak for themselves by doing all that they can to protect this right.

The process of transforming our societies from being closed and secretive police states to people-centred open democracies is unfolding and it is still in its infancy. It becomes important, therefore, that these baby-steps be jealously guarded. We as members of civil society, the media, Parliament and government must remain steadfast in our determination to ensure that the constitutional gains of nearly two decades of democratic transition are defended and enhanced in the interest of socio-economic justice for the poor because, afterall, the right to know is a key part of the right to live27.

I wish you success in your campaign. Thank you.

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