

“A Less than Fertile Environment”
Promoting Access to Information in South Africa

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Two headlines from the front page of the newspaper *Cape Times*, 26 April 2010:

Zuma breaches ethics code

President goes public
with his HIV status

Neither story *mentions* South Africa's
PAIA legislation

Neither story is imaginable if South
Africa's PAIA legislation didn't exist

So ... PAIA may have actually changed the
way we think about *transparent*
behaviours

(Warning – a comprehensive overview does NOT follow)

South African Constitution of 1996 guarantees the right
(Section 32 [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”

This is a “leverage right” extended to
the public sector and even to individuals

Parliament subsequently passed the Promotion of Access to Information Act no.2 of 2000 (*PAIA*), widely considered a model law

However, PAIA has not been judged an unqualified success

Why?

There is no Information Commissioner or equivalent

Hence remedies must be sought in the courts
Hence while organisations may succeed, individuals usually fail

The Human Rights Commission is very weak

It has not “fully grasped the nature of its legal obligations”
(Asmal Report, 2007)

We have incomplete and unreliable data; in 2007-2008 HRC received reports from only

17 out of 39 national public bodies
20 percent of provincial-level public bodies
under five percent of municipal bodies

and mute refusals are common

Citizen demand is generally very low

However, the state has lost every PAIA case that has gone as far as a judgement in the High Court (2009)

A common government strategy has been to abandon cases by settling out of court just before judgement is handed down (see *Paper Wars*)

... to avoid setting precedents and thus forcing requesters to fight each case through the courts again

Astonishingly, among the most obstructive
state bodies have been

The National Archives
The Department of Justice

This is a problem of untransformed state structures

Other Factors

South Africa is not really an English-speaking country

Do we meet the minimum requirements?

The rule of law

A legal-formal bureaucracy

Effective record-keeping

An assertive, strong NGO sector

Real benefits for requesters

A rights-based concept of citizenship

The Resilient Culture of Secrecy in South Africa

Apartheid regime was

pathologically secretive

pathologically bureaucratic

destroyed massive amounts of archival material in the early 1990s

The African National Congress was

a liberation movement

disciplined ability to keep a secret – even under torture – was prized virtue

this has transferred into current political practices

critics may be seen as “enemies” rather than merely “opponents”

QUESTION

What is the *strategic* objective of ATI activism?

- a) to change perceptions, behaviours and practices at the “citizenry”–bureaucracy–political class nexus?
- b) to get ATI legislation passed?

If it's the former, then we might ask

What's in it for politicians?

What's in it for bureaucrats?

Do we need the “hermeneutics of suspicion”

What kind of alliances are possible?

Does PAIA bring any benefits to the South African poor
– mainly black, mainly rural?

SOME PROPOSITIONS

This is the fundamental *democratic* question about RTI

We can define “democracy” by reference to institutional arrangements such as electoral systems, pluralism, changes of government

But Luciano Canfora says democratic moments are the times, often short-lived, when political power is exercised by those without property

RTI is most exciting when it enables such moments – but this hasn't happened in South Africa ... yet

LYRICAL INTERLUDE

It's possible in this view that ATI – like democracy itself – is something we must always strive towards but never achieve

ATI is thus not merely a series of transactions between information requester and information holder, between citizen and state

But also fundamentally about constructing democratic moments, “as fleeting as the scent of jasmine “

Such moments are most valuable when they are most difficult (e.g. post-conflict)

BACK TO SOUTH AFRICA AND PAIA

High proportion of successful work has been done by a handful of NGO's

The Open Democracy Advice Centre (ODAC) in Cape Town – concentrates on testing the limits of and efficacy of PAIA legislation

2003 ODAC study showed 23 percent of requests granted, 52 percent mute refusals

South Africa performed worse in a comparative study than countries with no legislation at all

The South African History Archive (SAHA) in
Johannesburg – concentrates on opening up
apartheid-era issues

Kate Allen (ed.), *Paper wars: access to
information in South Africa* (Johannesburg:
Wits University Press, 2009)

Case studies on ATI campaigns around

The TRC's missing boxes of documents

The apartheid regime's decentralised nuclear energy programme

The apartheid regime's nuclear weapons programme

Accessing the military archives (which were hidden from the TRC)

ANOTHER PROPOSITION

RTI as an endeavour is about

1. recognising the legitimate secret
2. resisting the illegitimate secret, which can be defined as “the story that refuses the invitation to be told”

(Verne Harris, 2009)

It follows that

The “story” is information that is given meaning by context

Contextualised information is the essence of “the archive”

The archive is a process of the construction of memory

Releasing “information” but decontextualising it, may be considered to be a form of refusal

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Thank you

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