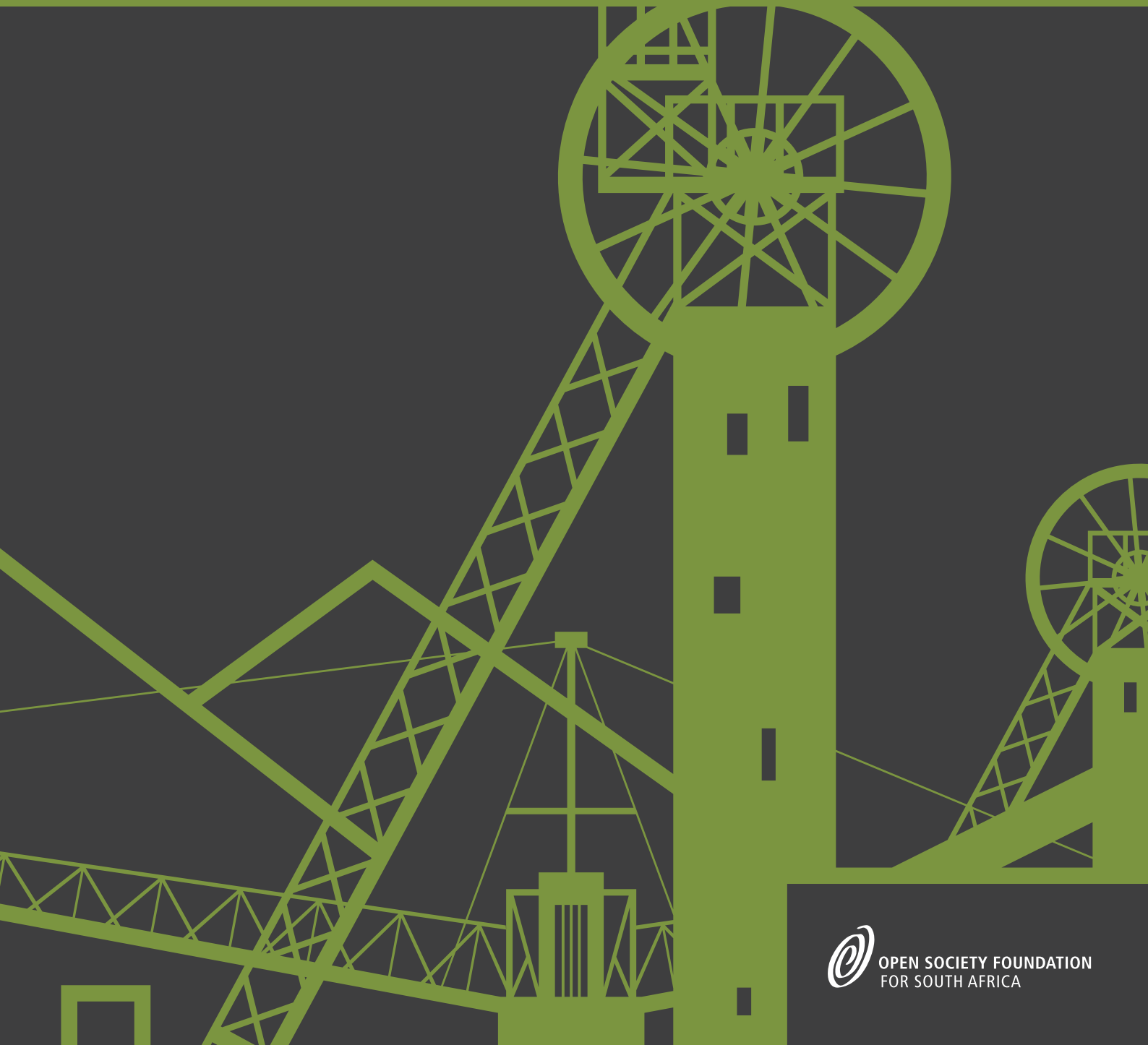
THE PROMOTION OF ACCESS TO INFORMATION ACT AND MINING-RELATED DISCLOSURE PRACTICES IN THE PUBLIC AND PRIVATE SECTORS

EXPERIENCES, SUCCESSES, SHORTCOMINGS AND REFORM

WORKING PAPER **THREE**

3

Dr Olufolahan Adeleke and Prof. Tracy-Lynn Humby



OPEN SOCIETY FOUNDATION
FOR SOUTH AFRICA

Published by the Open Society Foundation for South Africa (OSF-SA)

2nd Floor, Lobby 2, Park Lane
c/o Park and Alexandra Roads
Pinelands, 7405
Cape Town, South Africa

www.osf.org.za

First published 2016

Copy-editing by John Henderson
Conceptualised, designed and produced by COMPRESS.dsl | www.compressdsl.com

It is hard to imagine living in a world where access to information is filtered. That is not my time luckily. Now, we are totally surrounded by bits and pieces of information. A lot of my professional career is based on open source technology. Open source is about the philosophy of not just the exchange of information but the willingness to share. It helps you know, having this kind of knowledge to build upon. And now, because of free information, we are able to privately land a rover on the moon … imagine if we as part-time scientists are able to land a rover on the moon, what other people in different fields could achieve with access to free information. The goal here is to use mistakes from the past and try build over the world. Restricting information limits creativity. Being open is better for the benefit of humanity.

Robert Bohme[1]

1. Introduction

With the arrival of the age of technology and access to the Internet, we are not only surrounded by bits and pieces of information, we are overwhelmed by it. There is a continuous supply of information through various channels. It therefore strikes one as an aberration that the default position for accessing information from government and the private sector in South Africa is still through official requests for information submitted in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA).[2] In a world of unfiltered and instant access to information, the idea of restricting access to information has become the antithesis of progress and human development. The practice of proactive disclosure of information is yet to be fully embraced in South Africa and regulatory controls are still needed to compel disclosure of information by government and private institutions, notwithstanding that certain categories of information are becoming easier to access.[3] Ease of access, and a corresponding loss of control on the part of information holders, arises through multiple channels of disclosure, including members of oversight institutions who receive reports from public and private bodies, whistle-blowers, the media, non-governmental organisations, and data leaks.[4] With this loss of control, it is necessary that access-to-information laws and disclosure practice maximise the value of the economics of transparency whereby pre-emptive disclosure is accepted as a norm and/or regulations prescribe mandatory proactive disclosure. This would better respond to the appetite for openness in the information age.

There is a lot to be said about the relevance and value of transparency as an important part of reform in the extractive industry. Transparency is not to be construed as an end in itself, but rather as a means to an end. The aim of transparency is to build trust and to promote the accountability of the state and the private sector to members of the public, who are the actual beneficiaries of the country's natural resources. Indeed, the objectives of the Extractive Industries Transparency Initiative (EITI), which is a global standard designed to promote open and accountable management of natural resources, is to strengthen government and company systems,[5] inform public debate, and enhance trust. South Africa has consistently resisted joining the EITI based on the flawed argument that its governance structures and accountability mechanisms are adequate.[6] However, more recently, the Davis Tax Commission, which is responsible for making recommendations for overhauling South Africa's tax system, has supported the call for South Africa to join the EITI.[7]

---

1 Team leader of the Part-Time Scientists speaking in April 2016 while competing for Google Lunar X Prize funding to develop and soft-land lunar rovers on the moon.

2 With the explosion of various social media channels and online media publications, access to information has become instant and simplified. Media activism has further led to the development of public consciousness on the intrusive role of the state in infringing personal privacy with the help of private corporations (e.g. WikiLeaks disclosures). This has led to more demand for openness and transparency while safeguarding the right to individual privacy.

3 See T. Humby & F. Adeleke, 'Extractive companies and transparency: Exploring disclosure practice in South Africa and the implicit and explicit drivers of disclosure', 2016, Paper prepared for the Open Society Foundation for South Africa.

4 Ibid.

5 See https://eiti.org/files/GN/gn_20_recommendations_from_eiti_reporting.pdf.

6 T. Hughes, 'South Africa: A driver of change increasing transparency and accountability in the extractive industries', 2012, Working Paper Series, Transparency and Accountability Initiative & the Revenue Watch Institute, p. 9.

7 Davis Tax Committee, 'First interim report on mining for the minister of mining,' 2014, p. 115.

The aim of transparency is to build trust and to promote the accountability of the state and the private sector to members of the public, who are the actual beneficiaries of the country's natural resources.

This development is an indication that the 'locus of control is shifting, lending weight to the argument that it behoves the extractive industry to engage with the transparency movement in constructive and creative ways'.[8] In the extractive industry, where host-communities are expected to be the primary beneficiaries of extractive operations, the practice of non-disclosure of the development plans for these communities is worrying.[9] In the world of South African mining, there are continued attempts to filter access to information, and the benefits of sharing information freely without restrictions have yet to be acknowledged and acted upon.[10]

Within this context, the focus of this paper falls on PAIA as the official gateway for information requests in South Africa. The following questions arise: Does PAIA enable access to the types of information necessary to build trust and accountability in the South African mining sector? In the manner in which it has been used, does it entrench information monopolies or does it facilitate information flows? What have been the successes and shortcomings of this transparency regime? In an age of increasing information porosity, is PAIA an anachronism?

After briefly outlining the context and substance of PAIA, the paper examines trends in usage, interpretation and application, and enforcement. On this basis, the paper assesses the 'state of play' of PAIA in the mining sector and then concludes by identifying key areas for reform.

2. A brief outline of PAIA

The South African Constitution contains various guarantees of an 'open society', among which is a right of access to information. The right of access to information is recognised in section 32 of the Constitution, which guarantees access to information in the possession of the state as well as any person, provided that the information requested is required for the exercise or protection of a right. This formulation extends the application of the right to private bodies. While this extension was ahead of its time when it was recognised in the 1996 Constitution, it has not necessarily translated into a more open and accessible private sector. This will be elucidated by providing a broad overview of the limitations of the law that aims to give effect to the right to information.

South Africa's apartheid rule left a legacy of secrecy that has, ironically, been maintained by the new government of freedom fighters, who also used secrecy in fighting an oppressive state.[11] However,

8 T. Humby & F. Adeleke, 'Extractive companies and transparency: Exploring disclosure practice in South Africa and the implicit and explicit drivers of disclosure', 2016, Paper prepared for the Open Society Foundation for South Africa, p 23.

9 In South Africa's extractive industry, mining companies are required to produce development plans (social and labour plans [SLPs]) for affected communities, and the participation of these communities and access to the plans are crucial for the required development in the areas concerned. In an ongoing research study by the Centre for Applied Legal Studies (CALS), PAIA was used to seek access to the SLPs of 50 mining companies. The study revealed that 'access is possible but it is an elite form of access, available only to those with time, resources and relationship-building know-how'. Also, in the limited instances where disclosures are made, access can be hindered by literacy constraints.

10 CALS reported that nearly half of the extractive companies approached for access to their SLPs denied the requests, see http://www.bdlive.co.za/opinion/2016/02/15/the-steps-sa-must-take-to-rejuvenate-mining-industry.

11 G. Sedungwa & T. O'Connor, 'Global right to information update: An analysis by region,' 2013, FOIAnet, p. 14.

the new government recognised the power of secrecy and its role in the suppression and marginalisation of active citizenship and, as a result, became a champion for openness and transparency in government during South Africa's transition to participatory democracy. The government developed the principle of *Batho Pele*, which means 'the people first'.[12] This is a foundational principle of public administration in South Africa's constitutional democracy and applies to public servants at all levels of government so as to ensure that they commit, inter alia, to consulting with the public, to providing accurate information about public services, and to being open and transparent. The basic values and principles governing public administration set out in South Africa's 1996 Constitution specifically include the principle that 'transparency must be fostered by providing the public with timely, accessible, and accurate information'.[13] As noted above, the Constitution also enshrined a right of access to information and expressly mandated the enactment of national legislation to give effect to the right, which may also 'provide for reasonable measures to alleviate the administrative and financial burden on the State'.[14]

The constitutionally mandated PAIA was thus passed in 2000. It was drafted by the Office of the former Deputy President, Thabo Mbeki, demonstrating the extent of political commitment to its passage.[15] Despite this commitment to open government in the early days of democracy, the political will to embrace the objectives of PAIA has not been sustained 15 years on. Since the passage of PAIA, public institutions have failed to comply with their minimum obligations in terms of the law, such as: designating a deputy information officer; developing a manual that lists the records held by public bodies and explains the means of access; and submitting reports that track the handling of requests in public institutions. The failure, or apparently half-hearted attempts, to comply with these legal obligations suggests that government institutions are not prioritising their obligations in terms of PAIA.[16]

This problem also extends to the lack of allocation of adequate resources to the original oversight institution for PAIA, namely the South African Human Rights Commission (SAHRC). The inability of the SAHRC to effectively oversee compliance by public and private bodies with their obligations under PAIA contributes to the general abdication of PAIA responsibilities. For example, the Department of Justice had to pass regulations that exempted some private bodies from submitting manuals in terms of PAIA due to the overburdening of the SAHRC with regard to the processing of the manuals.[17]

While PAIA was passed to give effect to the right of access to information, there are some gaps in the law which have impeded the Act's efficacy. For instance, while PAIA provides for a right to access records, it does not create an obligation for public and private entities to create records. For information to be disclosed in the first place, it is necessary for the record to exist, because the right of access to information is the right of access to a record.[18] Without records being created, it becomes impossible to access information.

Furthermore, the framework for accessing records through PAIA has unfortunately led to bureaucratic delays that frustrate users. PAIA provides that public and private bodies can have up to 60 days in order to process requests for information, requires information requesters to fill out a form in order to submit information requests, and opens up the possibility of private institutions charging high copying fees before requests can be processed.

---

12 See http://www.dpsa.gov.za/documents/Abridged%20BP%20programme%20July2014.pdf.

13 Section 195(g) of the 1996 Constitution.

14 Section 32(2) of the 1996 Constitution.

15 M. Dimba, 'Securing freedom of information as a public good: The South African experience,' 2007, p. 5. Available at: http://siteresources.worldbank.org/PSGLP/Resources/SecuringFOILawKenya.pdf.

16 See sections 14, 15, 17 and 32 of PAIA; SAHRC, 'Promotion of Access to Information Act annual report,' 2014, pp. 29–30.

17 See Government Notice No. 39504, published on 11 December 2015, which only requires private bodies with more than 50 employees, and an annual turnover in excess of R22.5 million in the case of mining companies, to submit a manual in terms of section 51 of PAIA.

18 Sections 11 and 50 of PAIA.

PAIA provides that, regardless of an applicable exemption, disclosure is required if the information requested shows a serious contravention of, or failure to comply with, the law or an imminent and serious public safety or environmental risk, and where the public interest clearly outweighs the harm contemplated in the exemption provision.

In addition, PAIA provides several grounds that information holders can rely on to refuse information requests.[19] For the extractive sector, as will be shown later in this paper, the ground mostly relied on is that of the commercially sensitive information of a third party. However, despite the numerous exemptions to disclosures provided for in PAIA, sections 46 and 70 of PAIA provide a public interest override clause with respect to the exemptions. PAIA provides that, regardless of an applicable exemption, disclosure is required if the information requested shows a serious contravention of, or failure to comply with, the law or an imminent and serious public safety or environmental risk, and where the public interest clearly outweighs the harm contemplated in the exemption provision. However, this public interest override has a limited scope of application, because it requires a two-part test of, firstly, demonstrating either a legal contravention of/failure to comply with the law or threat to public safety/environmental risk, and, secondly, establishing that the public interest in disclosure outweighs the harm the exemptions in PAIA seek to protect. Without access to information, requesters of information are at a disadvantage in demonstrating legal contravention, public/safety environmental risk or application of the public interest override, except through hearsay, and will have to rely on the information holders to apply the test in good faith.

Furthermore, there is no internal appeal mechanism in respect of requests that are denied by private bodies. Any refusal of information, including ignored requests for information, can only be dealt with through the courts or the newly established information regulator (which is not yet operational). The need to route appeals through the courts and the heavy toll on resources that this entails have a 'chilling' effect on access to information.

The recent amendment to PAIA that establishes a strong oversight authority – the Information Protection Regulator ('the Regulator') – is a welcome development. The Protection of Personal Information Act 4 of 2013 established this body over two years ago, but the enabling provision has not yet taken legal effect. The Regulator will have enforcement powers over non-compliance with PAIA by public and private bodies, and the mechanism will also allow members of the public to lodge complaints. The decisions of the Regulator will be binding on the parties and will ease the expensive and bureaucratic burden of approaching the courts for resolution of disputes in access-to-information cases. The sooner the Regulator is established, the sooner PAIA can be appropriately enforced.

Over and above these deficiencies in legal design, the implementation and application of the law on the part of public and private bodies since the passage of PAIA have revealed a number of problematic trends that impact on the usage of the law. On the other hand, the courts have adopted interpretations of PAIA that advance the right of access to information.

19 The grounds for refusal are listed in sections 63 to 70 of PAIA and include: protection of the privacy of a third party who is a natural person; protection of the commercial information of a third party; protection of certain confidential information of a third party; protection of the safety of individuals and protection of property; protection of records privileged from production in legal proceedings; protection of the commercial information of a private body; and protection of the research information of a third party and private body.

3. Trends in the application of PAIA

The following sections draw on studies that have assessed patterns of PAIA implementation on the part of public and private information providers. Thereafter, consideration is given to how the PAIA has fared in the courts.

3.1 Trends in PAIA implementation by public and private bodies

As stated earlier, there have been bureaucratic hurdles within the legal sphere that have created constraints on the exercise of the right to information, foremost among which have been the time period for processing requests for information, the broad exemptions to disclosures, the fees payable, and the lack of an effective oversight body to enforce compliance.

The Open Democracy Advice Centre (ODAC) recently conducted a research exercise that explored the possibility of an automated, online request process in respect of PAIA.[20] Its core research questions focused on the potential users of PAIA, how they behave, and how they engage with PAIA. The findings of the research revealed that 65.5% of the participants would not make use of PAIA because they did not believe that they would get a response.[21] For the users of PAIA, 'the delay in response time (or total lack of response) far outweighs any of the other possible reasons for discouraging requesters'.[22] These findings are telling and reflect the loss of public trust in the utility of PAIA and indeed in the exercise of the right to information. However, there are still gaps in knowledge on the usage of PAIA, given the inaccuracy and lack of reporting on PAIA usage by public institutions and the lack of statistical information from the private sector.

Turning to information providers, between 2010 and 2014, the Centre for Environmental Rights (CER) submitted a total of 240 information requests to a number of government departments, parastatals and some private bodies, and, in that period, less than 30% of the information requests were granted.[23] Of these requests, 192 were submitted to government departments, 14 to parastatals and 34 to private bodies. Over the course of this period, 'almost all actual refusals by government departments were based on the protection of the commercial information of third parties'.[24] According to the CER, 'on average, fewer than 29% of PAIA requests resulted in records being released during the reporting period'.[25] The Department of Mineral Resources (DMR) was reported to have fared the worst during the reporting period in terms of the processing period for requests, with an average response time of 117 days.[26] Out of 67 requests submitted to the DMR over the four-year period, 33 were refused, with the CER reporting that the main grounds for refusal relied on by the DMR were the protection of commercial information of third parties, and that the release of the records requested would likely frustrate deliberative processes and the success of policies formulated by the relevant department.[27] This reflects a disturbing trend in disclosure practices which will be further discussed below.

---

20 G. Razzano, 'Accessing information? What we know from user experiences,' 2015, Open Democracy Advice Centre. Available at: http://www.opendemocracy.org.za/images/docs/publications/PAIA_Users.pdf.

21 Ibid, p. 5.

22 Ibid, p. 6.

23 CER, 'Money talks: Commercial interests and transparency in environmental governance,' 2014, pp. 2–3.

24 Ibid, p. 3. Section 36 of PAIA allows public bodies to refuse disclosure of the confidential information of third parties where such information contains: the trade secrets of a third party; financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or information supplied in confidence by a third party, the disclosure of which could reasonably be expected to put that third party at a disadvantage in contractual or other negotiations, or to prejudice that third party in commercial competition. However, it further provides that access to the commercial information of third parties may not be refused where disclosure would reveal public safety or environmental risks.

25 Ibid.

26 Ibid, p. 4.

27 Ibid, pp. 7–8. These grounds of refusal are listed in sections 36 and 44 of the PAIA.

In general, and especially since 2010, the courts have promoted the underlying spirit and purpose of PAIA, opting for broad interpretations of provisions that favour access to information and narrow interpretations of the provisions of PAIA that allow for refusal.

Nevertheless, in a move that bucks this trend, the Department of Environmental Affairs indicated in its latest PAIA Manual (published in April 2016) that environmental authorisations issued in terms of the Environmental Impact Assessment Regulations, permits issued in terms of the Biodiversity Act, licences issued in terms of the Waste Act, and atmospheric emissions licences issued in terms of the Air Quality Act would be available for inspection or copying *without* the need for a PAIA application.[28] This access is, however, qualified in that the release of the document, together with supporting documentation, is 'subject to compliance with s 15(4) of PAIA, wherein certain portions may be redacted, and where relevant, will be released in the same form as they were published during [the] public participation process'. Section 15(4) deals with redaction of aspects of documents which are subject to the grounds of refusal listed under Chapter 4 of PAIA.

In alignment with the CER's findings, a new monitoring initiative on the part of the Department of Performance Monitoring and Evaluation (DPME) in the presidency introduced compliance with the minimum obligations of PAIA as part of the governance and accountability criteria for measuring management performance in public institutions. The findings in relation to PAIA revealed that, out of 41 national departments, only six institutions were meeting the minimum statutory requirements in PAIA.[29]

The SAHRC has been the institution responsible for monitoring compliance with PAIA by public and private institutions over the last 15 years, and public institutions are obliged to submit reports on an annual basis to the SAHRC on the trends in information requests submitted to public bodies, and on how the requests were handled.[30] However, this function has now been allocated to the Regulator established in terms of the Protection of Personal Information Act. In the monitoring exercise undertaken by the SAHRC, the section 51 manuals of most companies which are meant to detail the records held by such companies and the manner of access are sometimes outsourced to consultants,[31] and, more often than not, do not provide for records that are automatically available as indicated in the PAIA Manuals of the five companies surveyed in the course of research conducted into extractive companies' disclosure practices in South Africa and into the drivers of disclosure.[32]

Over a four-year period between January 2008 and March 2012, the SAHRC conducted an audit of 43 public institutions. The audits found that only two in every ten institutions had 'incorporated PAIA implementation within their organisational strategic planning processes by building into these strategic plans, components/activities that related to PAIA implementation'.[33] The audits also found that 'less than 15 percent of the audited institutions had specifically budgeted for PAIA implementation and compliance requirements' and that 'only a third of the audited institutions had established internal protocols for dealing with requests for information'.[34]

28 Department of Environmental Affairs, 'Automatically available records and access to such records,' Government Notice No. 435, *Government Gazette* 39922 of 15 April 2016.

29 See http://www.dpme.gov.za/keyfocusareas/mpatSite/MPAT%202013/MPAT%20report.pdf.

30 See section 32 of PAIA.

31 These are the observations of one of the authors who worked for the SAHRC and who was responsible for monitoring public and private sector compliance with PAIA.

32 T. Humby & F. Adeleke, 'Extractive companies and transparency: Exploring disclosure practice in South Africa and the implicit and explicit drivers of disclosure', 2016, Paper prepared for the Open Society Foundation for South Africa.

33 SAHRC, 'Consolidated audit report 2008–2012'. Available at: www.sahrc.org.za.

34 Ibid.

In another study commissioned by the CER, formal PAIA requests were sent to 35 private bodies – including 30 of the largest mining companies in South Africa – requesting that environmental licences be made available on their websites.[35] Only two of the mining companies agreed to do so, 18 failed to respond and ten refused to publish the information.

The outcomes of the DPME and the SAHRC audits show that institutional capacity is low and that the public and private sectors have not mainstreamed public accountability in their institutional operations.[36]

While the government now acknowledges that the lack of transparency in respect of the processes pertaining to applications for mining licences is creating public suspicion and distrust of both the government and the private sector, the government has nevertheless been slow to address the situation.[37] At the 2015 World Economic Forum, the former Minister of Mineral Resources in South Africa referred to transparency as the white elephant of mining woes in South Africa.[38] In 2016, the new Minister of Mineral Resources also acknowledged that the lack of access to licensing data was evoking suspicion of the licensing regime.[39] Despite these admissions, no regulatory proposals have been tabled in Parliament to address transparency and information disclosure in the mining sector.

3.2 The PAIA and the courts

The drafters of the PAIA opted for enforcement through the judicial system, rather than through an independent administrative tribunal. Initially, only the High Court had jurisdiction to hear PAIA reviews, but since 16 November 2009, magistrates' courts have also been empowered to review and enforce PAIA requests. This move has implications for any review of PAIA in the courts, as the decisions of magistrates' courts are not systematically reported. The notes on PAIA and the courts in this section are accordingly based on decisions of the High Court only.

In general, and especially since 2010, the courts have promoted the underlying spirit and purpose of PAIA, opting for broad interpretations of provisions that favour access to information and narrow interpretations of the provisions of PAIA that allow for refusal.[40] Over the years, the courts have pronounced on: the threshold requirements for gaining access to the records of public and private bodies; the categorisation of a body as public or private; the scope of the grounds for refusal in Chapter 4; the validity of grounds of refusal related to issues of resources and capacity; and the scope of the public interest override in section 46. The courts have also not held back on passing moral judgement on obstructive responses to access-to-information requests.

3.2.1 Threshold requirements to gain access to the records of public and private bodies

Notwithstanding the general trend of supporting access to information, in earlier decisions[41] the courts were initially criticised for the position adopted on the threshold requirements for information requests made to private bodies. To access information from private bodies, it is necessary for requesters to comply with the constitutional condition that the information be 'required for the

35 See CER, 'Unlock the doors: How greater transparency by public and private bodies can improve the realisation of environmental rights,' 2012.

36 C. Darch in *Access to information in Africa: Law, culture and practice*, 2013, p. 46.

37 See: http://www.internationalresourcejournal.com/features/january11_features/mine_regulations_changing_in_south_africa.html.

38 See Comments of Minister of Mineral Resources at the World Economic Forum, [accessed 5 February 2015].

39 See: http://www.internationalresourcejournal.com/features/january11_features/mine_regulations_changing_in_south_africa.html.

40 The one context where the courts have *not* advanced a progressive interpretation of the PAIA has been access to information dealing with political party funding – see the cases of *IDASA v ANC* 2005 (5) SA 39 (C) and *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC).

41 The analysis of older decisions draws on the earlier work of Jonathan Klaaren, 'Developments in access to information litigation and enforcement in South Africa,' 2010, unpublished report.

exercise or protection of any rights'.[42] In *Clutchco (Pty) Ltd v Davis*,[43] the Supreme Court of Appeal adopted a restrictive interpretation of this clause by holding that, in order to gain access to the financial records of a private body, it was necessary for the requester to establish 'substantial advantage or element of need', both in principle and on the appropriate facts. In the case of *Unitas v van Wyk*,[44] the court added that the information had to be 'essential or necessary' to the exercise or protection of a right (as opposed to the less stringent standard of the information being 'useful and relevant').

As a result, to access information about extractive companies, an information requester would have to demonstrate the necessity of the information requested in protecting a right. This might be difficult to prove in relation to requests for information where there are allegations of rights violations and the only way of knowing whether a right is in need of protection is through access to the documents requested. This is where the value of mandatory proactive disclosure of information becomes pertinent. The existence of a law that specifies what information must be disclosed, when and on which platforms is vital to improve disclosure practices in the extractive sector. PAIA currently prescribes the development of a manual by both state and private institutions which should, among other things, specify the records in possession of the institution as well as the manner of access.[45] These manuals, where they are actually compiled, often do not comply with the requirement to specify the records that are automatically available in the institutions concerned – a finding that is consistent with all five case study companies considered in the OSF-SA extractive-industry transparency report.

Notwithstanding the apparent stringency of the 'essential or necessary' test, the courts have not found it difficult to find that the necessary threshold is met when the information request relates to the protection of fundamental rights. In *Makhanya v Vodacom Service Provider Co (Pty) Ltd*,[46] for example, the High Court held that the right to privacy required that the cell phone service provider concerned disclose the telephone numbers of unsolicited early morning cell phone calls. Further, in *Company Secretary, Arcelor Mittal South Africa Ltd v Vaal Environmental Justice Alliance (VEJA)*,[47] in response to Arcelor Mittal's challenge that the right sought to be protected had not been adequately identified, the Supreme Court of Appeal held that the VEJA's articulation of its rights under the National Environmental Management Act 108 of 1996, the National Water Act 36 of 1998, and the Waste Act 59 of 2008 constituted a sufficiently specific identification.

3.2.2 Categorisation of a body as public or private

The determination of whether a body is public or private is material in information requests, as requests made to public bodies are subject to a less stringent threshold standard and enjoy the advantage of an internal appeal process. In general, the courts have established generous criteria for the recognition of a body as public rather than private.

For example, in *Mittal Steel SA Ltd (formerly Iscor) v Hlatshwayo*,[48] the court used the 'control test' to determine that, at the time the record was created, Mittal Steel was a public body for the purpose of PAIA requests. Essentially, the control test focuses on the state's control of a particular body. If such control is in fact present, the body is deemed to be a public body for purposes of PAIA. In this case, however, the Supreme Court of Appeal expressly pointed out that the control test was not appropriate in all circumstances.

The question of whether a body was public or private again arose in the case of *M&G Media Ltd v 2010 FIFA World Cup Organising Committee South Africa Ltd*.[49] Here, the Gauteng South High Court

42 Section 32(1)(b) of the 1996 Constitution.
43 2005 (3) SA 486 (SCA).
44 2006 (4) SA 436 (SCA).
45 Sections 14, 15, 51 and 52 of PAIA.
46 2010 (3) SA 79 (GNP).
47 2015 (1) SA 515 (SCA).
48 2007 (1) SA 66 (SCA).
49 2011 (5) SA 163 (GSJ).

In the early case of *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd*, the Supreme Court of Appeal opted for a progressive approach to the grounds of refusal in Chapter 4 of PAIA by holding that the confidentiality clause in a tender did not carry through after the tender award and did not ground a refusal of access based on section 37 of PAIA (protection of certain confidential information).

held that the key factor in determining whether the 2010 FIFA World Cup Organising Committee was a public or private body was whether it had disbursed public funds. Government was found wherever its funds went, the court stated. Thus an entity that received and disbursed public funds was either exercising a public power or performing a public function, and transparency and accountability had to follow.

Whether mining companies could ever be regarded as public bodies for purposes of PAIA is a moot point. Social and labour plans are a possible grey area where, to the extent that companies take on public functions such as electricity provision or water reticulation, they could be seen as performing public functions.

3.2.3 Narrow interpretation of grounds for refusal

In the early case of *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd*,[50] the Supreme Court of Appeal opted for a progressive approach to the grounds of refusal in Chapter 4 of PAIA by holding that the confidentiality clause in a tender did not carry through after the tender award and did not ground a refusal of access based on section 37 of PAIA (protection of certain confidential information). The case of *SA Airlink (Pty) Ltd v Mpumalanga Tourism and Parks Agency*[51] dealt with the related ground of refusal in section 36, namely the mandatory protection of the commercial information of a third party. In this case, SA Airlink requested the Mpumalanga Parks and Tourism Agency (MPTA) to provide it with a copy of an agreement it had entered into with Comair (a rival airline operator). The Gauteng South High Court held that, in interpreting the scope of section 36, the overriding principle of PAIA was that public bodies had to conduct their operations transparently and accountably. Parties could not circumvent this responsibility by resorting to a confidentiality clause.[52] Because the MPTA had not discharged the onus of establishing that it was probable that the disclosure of the agreement would harm Comair's commercial interests, the presence of a confidentiality clause could not shield the agreement from disclosure.

That the MPTA was a public body was thus a material factor in the *Airlink* case. It is doubtful whether the courts would have adopted such a rigorous approach if the two bodies in question had both been private in nature. Nevertheless, this decision is salient insofar as mining companies engage with public bodies, a situation that arose in the cases involving information requests made to Eskom for the pricing formulas contained in long-term, bulk-purchase agreements between Eskom and BHP Billiton for electricity supply to two aluminium smelters operated by BHP. In *De Lange v Eskom Holdings Ltd*,[53] Eskom and BHP opposed the information requests citing the protection-of-confidential-information grounds in sections 36 and 37 of PAIA. The Gauteng South High Court held that BHP had established reasonable grounds to show a probability that disclosure of its production costs would amount to a revelation of trade secrets and thus cause it commercial harm. On the other hand, because the matter concerned issues of considerable public interest – the consumption of more than 5.5% of Eskom's total baseload capacity at a time when the general public was being exposed to electricity blackouts and persistent tariff increases – Eskom bore the burden of proving

50 2006 (6) SA 285 (SCA).

51 2013 (3) SA 112 (GSJ).

52 Ibid, para 22.

53 2012 (1) SA 280 (GSJ).

that secrecy was justified. The section 46 public interest override would kick in once it appeared that the records requested would reveal an 'imminent or serious public or environmental risk' that outweighed the probable harm caused by the disclosure of the information pertaining to BHP's commercial interests. On the facts at hand, the court established that the requisite threshold for section 46 to take effect had been reached. In the later case of *BHP Billiton Plc Inc v De Lange*,[54] BHP Billiton appealed against the decision of the High Court, maintaining that the request for information had been properly refused in the light of sections 36 and 37. In a split decision, the Supreme Court of Appeal held that these provisions could not shield BHP from the release of the information. The majority decision maintained that the onus of proving that financial harm would be suffered rested squarely on the mining company. It stated that BHP's argument that the information requested was ordinarily unavailable to its competitors was substantially overstated, since a significant amount of this information was in fact readily available – at cost – from a third-party provider. It was therefore difficult to see how granting access to the pricing formulas in the long-term purchase agreements would result in the harm BHP perceived, and it was not harm of the type that would 'likely' occur or that could be 'reasonably' expected to occur. Moreover, since the information had been requested from a *state* entity, the notion that the information had been supplied in confidence was totally inapplicable.

In *Avusa Publishing Eastern Cape (Pty) Ltd v Qoboshiyane NO,*[55] the Port Elizabeth High Court was seized with scoping the ambit of section 44, a ground of refusal relating to the operations of public bodies. The court held that, in interpreting section 44(1), it was essential to take sections 32 and 195 of the Constitution into account. It stated that the provisions of the PAIA providing for the refusal of access to information had to be 'strictly and narrowly construed' in order to give the broadest effect to these provisions.[56] Moreover, in discharging the onus of establishing the ground for refusal, merely regurgitating the wording of the legislation was insufficient and contrary to the spirit of the culture of justification that permeated PAIA.

3.2.4 Validity of grounds of refusal related to resources or capacity

The courts have maintained a dim view of grounds of refusal related to resources or capacity. In *Garden Cities Inc v City of Cape Town*,[57] for example, the High Court held that the failure of an internal system of a municipality receiving a request for access was an invalid ground for refusal of a record requested in terms of PAIA. This ruling could be relevant in the extractive sector to the extent that information requests are made to public bodies relating to such sector's operations. Although untested, this principle should also apply to private bodies, especially smaller mining companies. The constitutional obligation on private bodies to provide access to information in terms of section 32(1)(b) of the Constitution is qualified only by the need for the information to be 'required' for the exercise or protection of any rights, and not by the capacity of the private information provider.

3.2.5 Interpretation of the public interest override in section 46

As noted above, the public interest override in section 46 was successfully invoked in the first *De Lange* case, which involved a request for access to information pertaining to the cost of electricity supplied to BHP Billiton's aluminium smelters.[58] In *Centre for Social Accountability v Secretary of Parliament*,[59] this section was also successfully applied in order to gain access to information regarding the abuse of the parliamentary travel-voucher system. The court held that, although section 46 was couched in restrictive language, it had to be read as requiring disclosure where it was shown on a balance of probabilities that the evidence would reveal proof of a substantial contravention of the law. In the first *Avusa* case,[60] Avusa Publishing was successful in gaining access to a report detailing maladministration at the Nelson Mandela Bay Metropolitan Municipality on the

54 2013 (3) SA 571 (SCA).
55 2012 (1) SA 158 (ECP).
56 Ibid, paras 14 and 17.
57 2009 (6) SA 33 (WCC).
58 See section 3.2.3 above.
59 2011 (5) SA 279 (ECG).
60 2013 (3) SA 571 (SCA).

In a number of cases, the courts have cast a jaded eye at attempts on the part of public and private actors to resist their PAIA obligations.

ground that it was subject to mandatory disclosure under section 46. The Member of the Executive Council (MEC) challenged this decision in *Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd*.[61] The matter had become moot and the point of principle the MEC wished to raise was dismissed. The court nevertheless saw fit to emphasise that the language of section 46 indicated that, where the specified criteria had been met, disclosure was not optional or discretionary. Finally, in *Industrial Health Resource Group v Minister of Labour*,[62] family members, trade unions, and a public interest organisation were granted access to a report on a workplace fire at the Paarl Print facility, to which they had been denied access after filing a PAIA request. The court indicated that section 46 made access to inspectors' report mandatory in the circumstances.

Thus, while the jurisprudence on section 46 is still fairly sparse, it is also clear that the courts have not shied away from applying this override in different contexts. In the extractive sector, we have yet to see a precedent that directly invokes the criterion of 'substantial contravention of the law' and precedents that are more closely connected to 'imminent and serious public safety or environmental risk', for example water-quality-monitoring results or information on the structural and chemical stability of tailings dams.

3.2.6 Passing judgment on obstructive behaviour

In a number of cases, the courts have cast a jaded eye at attempts on the part of public and private actors to resist their PAIA obligations. An example of this is the longest-running PAIA case in *South Africa, M&G v President of RSA*,[63] where, for over six years, the presidency resisted several court orders to release records relating to a commission of inquiry into the Zimbabwean elections.[64] In the latest decision in this judicial saga, the Supreme Court of Appeal held that the president's attempts to introduce additional information in the High Court process aimed at taking a 'judicial peek' at the contested document, which was then itself contested and appealed, amounted to 'an intolerable abuse of process' and the opposite of what the Constitutional Court had intended to achieve when it referred the matter to the High Court.[65]

In *MEC for Roads & Public Works Eastern Cape v Intertrade*,[66] the Supreme Court of Appeal slated what it considered to be 'technical objections' to disclosure, and, in *Dlusha v King Sabata Dalindyebo Municipality*,[67] the court condemned the conduct of the municipality, holding that public access to information was fundamental in encouraging transparency and accountability in government, and that arrogant disregard and failure to positively engage the public amounted to unconstitutional behaviour.

61 2013 (3) SA 315 (SCA).

62 2015 (5) SA 566 (GP).

63 [2013] 2 All SA 316.

64 See http://mg.co.za/article/2014-11-14-khampepe-zimbabwes-2002-elections-not-free-and-fair. See *President of the Republic of South Africa v M & G Media Ltd 2011 (2) SA 1 (SCA)*; *President of the Republic of South Africa v M & G Media Ltd 2012 (2) SA 50 (CC)*; *M & G Media v President of the Republic of South Africa 2013 (3) SA 591 (GNP)*; *President of the Republic of South Africa v M & G Media Ltd 2015 (1) SA 92 (SCA)*.

65 See *President of the Republic of South Africa v M & G Media Ltd 2015 (1) SA 92 (SCA)*.

66 2006 (5) SA 1 (SCA).

67 2012 (4) SA 407 (ECM).

While not being as scathing of the conduct of private bodies, the courts have made it crystal clear that private bodies cannot expect to evade the reach of PAIA. In the *Arcelor Mittal* case,[68] the Supreme Court of Appeal pointed out that the preamble to the Act recognised that the system of government prior to the advent of constitutional democracy had resulted in a secret and unresponsive culture in public *and* private bodies, a culture which frequently led to abuse of power and human rights violations.[69] 'Corporations operating within our borders, whether local or international', the court continued, 'must be left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced.'[70]

And, in the recently decided *Nova Property Group Holdings Ltd v Julius Peter Cobbett*,[71] the Supreme Court of Appeal quickly dismissed the claims of the companies concerned that section 26(2) of the Companies Act 71 of 2008[72] afforded only a qualified right of access to the securities register of a company, and that requests could be refused based on PAIA grounds and the motive of the requester. Citing its previous decision in *Bernstein v Bester*,[73] the *Arcelor Mittal* case, and a number of other precedents, the Supreme Court of Appeal underlined the point that the manner in which companies operate and conduct their affairs *is not a private matter*.[74] Companies operate within a context where both the legal framework and the funds mobilised for operations ultimately stem from endorsement or contributions by the members of the community. The benefits inherent in a company being a creature of state are accompanied by responsibilities, among which are statutory obligations of proper disclosure and accountability to shareholders.[75] The new Companies Act expressly endorses a culture of openness and transparency, recognising that the establishment of a company is not purely a private matter and may impact the public in several ways.

4. PAIA: Obstructing rather than facilitating access to information?

Inasmuch as the preceding sections demonstrate the progressiveness of the courts, they also reveal the extent to which PAIA requests are met with recalcitrance and obstruction. Non-governmental organisations (NGOs) have progressively used PAIA with a fair amount of success in the enforcement of environmental protection standards, though the backing of the courts has been required in some instances.[76] However, the number of cases destined for litigation or for settlement out of court shows that there are routine denials of PAIA requests or simply failures to respond to requests.[77] Therefore, as the state attempts to exercise oversight over the extractive industry, and

68 2010 (3) SA 79 (GNP).

69 Ibid, para 78.

70 Ibid, para 82.

71 Case No. 20815/2014, Supreme Court of Appeal; judgment delivered on 12 May 2016.

72 Section 26(2) entitles a person who does not hold any beneficial interest in any securities issued by a for-profit company, or who is not a member of a non-profit company, to inspect or copy the securities register of the profit company, or the members register of a non-profit company, or the register of directors of a company, upon payment of an amount not exceeding the prescribed maximum fee for such inspection. Section 26 of the Companies Act of 2008 was in fact inserted in recognition of the court's position in the earlier PAIA-related case of *Davis v Clutcho (Pty) Ltd* (High Court of South Africa, Cape of Good Hope Provincial Division, Case No. 1289/03) that, to the extent that the earlier Companies Act did not provide for access to information, section 32 of the Constitution and PAIA had to be read into the Act.

73 1996 (2) SA 751 (CC).

74 See n 70 above, para 16.

75 Ibid.

76 A recent example litigated by the CER is *Bronkhorstspruit and Wilge River Conservancy Association v Malachite Mining Pty Ltd* (South Gauteng High Court Case No. 11/40655), which dealt with a deemed refusal of access to permits held by a mining company.

77 See, also, *Centre for Environmental Rights v Director-General: Department of Mineral Resources*, which dealt with a deemed refusal of access to information about financial provision for rehabilitation under the Mineral and Petroleum Resources Development Act of 2002.

PAIA's underlying model – seeking access to information with a corresponding obligation on the state or the private sector to release the information only where they feel it is legally permissible to do so – is problematic in the South African context.

as mining corporations through their practices resist accountability to different interest groups, access to information becomes contested and political.

In terms of access to information, the South African citizen is being marginalised. This marginalisation takes place through the law itself, which imposes a range of bureaucratic hurdles (as described above). Without assistance from public interest groups, use of PAIA within the mining sector would be virtually non-existent, and this has stifled the notion of active citizenship in using the law to hold the state and mining companies accountable.[78] This indeed manifests itself in the volatile sector where the right to protest and to strike is often asserted,[79] which, to some extent, is a reflection of the breakdown of meaningful consultations and communication between government, mining companies, their employees and the public.

PAIA's underlying model – seeking access to information with a corresponding obligation on the state or the private sector to release the information only where they feel it is legally permissible to do so – is problematic in the South African context. After 15 years of PAIA, the level of usage shows that there is an appetite for substantive public participation and consultation through meaningful provision of information that takes the public into its confidence with regard to decision-making within government as well as in mining companies, particularly where corporate social investment is concerned.

This raises a crucial question: how does PAIA fit into the social culture of South Africa and the framework of public engagement with the state? In the *Arcelor* case, the Supreme Court of Appeal confirmed that:

> *citizens in democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect of governments and in relation to corporations. In South Africa, because of our past, the latter aspect has increased in significance.*[80]

It has been suggested that South Africa's apartheid regime deliberately cultivated a culture of secrecy which legitimised the operations of companies that acted in an unaccountable manner, provided that this was supported by the state.[81] For Hughes:

> *both government and organised business in the extractive sector could, and sometimes do, see transparency and accountability as being critical and adversarial in nature. This is driven in part by culture, in part by collusiveness, and in part by the existence of bad practices.*[82]

78 Most of the transparency cases related to mining cited in this paper have happened through the assistance of NGOs and NGO-sponsored, organised community groups.

79 The five-month strike in the platinum sector in South Africa had devastating consequences for the sector, for miners and for the South African economy as a whole – http://www.sahistory.org.za/article/2014-south-african-platinum-strike-longest-wage-strike-south-africa.

80 2010 (3) SA 79 (GNP), para 1.

81 See Hughes (n 5 above), at p. 3.

82 See Hughes (n 5 above), at p. 19.

The Constitutional Court has noted the importance of *proactively* disclosing substantive information in a case involving a community that challenged a mining company's malicious compliance with the community consultation requirement when applying for a mining licence.[83] In the case of *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*, the applicants, who were landowners, wanted a prospecting right that had been granted to the respondent, Genorah, set aside.[84] In determining whether prospecting rights should be awarded to the community or Genorah, the court noted the importance of providing:

> *landowners or occupiers with the necessary information on everything that is to be done so that they can make an informed decision in relation to the representations to be made, whether to use the internal procedures if the application goes against them and whether to take the administrative action concerned on review. The consultation process and its result is an integral part of the fairness process because the decision cannot be fair if the administrator did not have full regard to precisely what happened during the consultation.*[85]

The principle of proactive disclosure of information is embedded within the objective of PAIA, couched in the obligation of public and private bodies to disclose information that is 'automatically available' to the public.[86] However, the proactive disclosure of information, which is a foundational principle of PAIA, is routinely ignored – which is a manifestation of the lack of political will to implement PAIA. This is evident in the abysmally low levels of compliance with PAIA obligations in the private sector and the evident inability of the state to enforce such obligations in the private sector given its own complicity.[87]

Corporations often see their information as private information.[88] A trend that has emerged in the usage of PAIA in the mining industry is the heavy reliance on the PAIA exemption of third-party commercial confidentiality to deny access to information. With state institutions effectively pandering to the will of mining companies, the utility of PAIA in promoting a practice of public disclosure will, therefore, continue to be contested through the courts.

PAIA is not the only law that is applicable to disclosures in the private sector. Apart from PAIA, the plethora of laws applicable to the extractive industry in terms of financial, ownership and operational disclosures shows that disclosure practices in the industry can be avoided by reliance on the commercial sensitivity of information as an exemption to information disclosure. The term 'commercially sensitive information' or 'commercial information of a third party' is not defined and therefore creates a blanket exemption to information disclosure.[89]

Consequently, experience of disclosure practices has largely been that of shortcomings in the legislative disclosure regime aiding a reprehensible practice of non-disclosure in the public and private sector.

---

83 *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC).

84 Ibid, para 2.

85 Ibid, para 66.

86 See sections 15 and 52 of PAIA.

87 See CER (n 22 above).

88 CER, 'How greater transparency in public and private bodies can improve the realisation of environmental rights,' 2012.

89 Sections 64 and 65 of PAIA make provision for exemptions in respect of the commercial information of a third party and confidential information, but do not define these terms. However, the sections list various kinds of commercial information and include: the trade secrets of a third party; financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or information supplied in confidence by a third party, the disclosure of which could reasonably be expected to put that third party at a disadvantage in contractual or other negotiations, or to prejudice that third party in commercial competition. These exemptions do not preclude disclosures that will reveal public safety or environmental risks.

5. The path to reform

With government's acknowledgement of the need for transparency in the mining sector,[90] there is an opportunity to leverage this government position to push for regulatory reform that will open up the extractive industry to greater public scrutiny. Legislative reform would require plugging gaps that might allow the assertion of confidentiality over public disclosures. It will also require the amendment of PAIA to loosen the bureaucratic bottlenecks that frustrate users of the law.

5.1 Reviewing PAIA processes and strengthening enforcement

PAIA legislative amendments are needed to address some of the bureaucratic hurdles within PAIA. These include imposing a duty to create records in terms of PAIA, lessening the time period for information requests to be processed (which can take up to 60 days),[91] and exempting requesters from the cost of obtaining records that are public interest information. This will include records that fall under section 46 of PAIA, as well as records that are applicable to the protection of communal rights, such as the right to an environment that is not harmful to health or well-being.

Furthermore, the establishment of a Regulator that is well equipped with the necessary human and financial resources to enforce compliance with PAIA obligations, is crucial. It is notable that Parliament has started the process of setting up this new enforcement body by appointing commissioners. It is important that the constitution of the secretariat for this body is well-balanced in terms of prioritising both access to information and privacy rights as intended in the Protection of Personal Information Act.

5.2 Reviewing the grounds for refusal

The frequency of denied information requests, which are often overturned by the courts, shows that there is a considerable lack of understanding concerning the application of PAIA in both the public and private sector. It is unfortunate that, though PAIA has been in existence for a while, a recommendation that needs to be taken seriously is the training of public and private sector officials in the good faith application of the law, particularly with regard to applying the exemptions in PAIA and the application of the public interest override. While civil society has played a laudable role in training members of the public and communities in the usage of PAIA, government and various private body associations, such as the Chamber of Mines need to embark on training for their employees responsible for PAIA if there is to be a serious commitment to realising the objectives of PAIA.

5.3 The need for proactive disclosure

The principle of proactive disclosure of information needs to be embedded within institutional processes in the public and private sector. There should be a willingness to share information before it is requested. Where such willingness is not forthcoming, then reform would also require the development of institutional capacity to monitor and enforce compliance with various obligations, including proactive disclosures. This would include strengthening existing institutions and ensuring that legislative powers and sanctions are enforced so as to drive maximum compliance.

The shortcomings of PAIA discussed earlier in this paper reveal a need to amend the law to bring about consistency with emerging trends on information disclosure practices. For example, the recently adopted African Union (AU) Model Law on Access to Information for Africa establishes a

90 See: http://www.internationalresourcejournal.com/features/january11_features/mine_regulations_changing_in_south_africa.html.

91 The Nigerian Freedom of Information Act, which is a more recent law, provides that information requests must be processed within seven days.

This shows the importance of intersecting South Africa's legal regime in order to develop a harmonised approach to transparency in the extractive industry.

duty to create records and prescribes a robust, proactive disclosure-of-information regime that is mandatory and spans ownership, operational and financial disclosures.[92]

While South Africa has only just acknowledged the need to publish information in relation to mining licences, other developing countries already publish some or all of their oil, gas and mining contracts/licences, including countries such as Niger, Sierra Leone, Guinea, the Democratic Republic of Congo (DRC), Liberia, and Ghana.[93] The International Monetary Fund and the World Bank also require disclosure of contracts for extractive projects in which they invest.[94] This is an important development which also highlights the role of shareholders in shaping the disclosure practices of mining companies in South Africa. With the integration of the Socially Responsible Investment (SRI) Index by the Johannesburg Stock Exchange, enough information is now expected to be provided in order for shareholders to act as gatekeepers in promoting disclosure to the public that will improve the brand and reputation of mining companies.[95]

The government should adopt a prescriptive disclosure approach – which is already nascent in the Environmental Impact Assessment (EIA) Regulations – to future legislative amendments which will prioritise substance over form in the disclosure practices of the state as well as mining companies. Such an approach would specify forms of disclosure, how and when the disclosures should be made, as well as the format of disclosures. This approach should also promote the verifiability of information, its completeness and accuracy, as well as ensure that public access is possible for all categories of people.

5.4 Strengthening other sectoral laws

In the absence of a duty to create records in PAIA, there are a number of other laws applicable to the extractive industry that prescribe a duty to create and maintain records.[96] This shows the importance of intersecting South Africa's legal regime in order to develop a harmonised approach to transparency in the extractive industry. Furthermore, there are other laws that already prescribe disclosures, but to oversight authorities rather than the general public. Legislative amendments should further require public disclosure of records submitted to oversight authorities, with emphasis on public interest disclosure over third-party confidentiality exemptions.

It is important that South Africa reviews some of its laws so as to directly address global concerns such as tax-benefit disclosures, disclosures of all forms of payments made to governments, and beneficial-ownership transparency.[97]

92 Article 7 of the AU Model Law provides for the automatic disclosure of detailed administrative information, policies, contracts, licences, permits, authorisations and public-private partnerships granted by the public body or relevant private body, reports, budgets, revenue and expenditure information, among others.

93 Open contracting guiding principles were developed by the Open Contracting Partnership in 2013 and were endorsed by the World Bank Institute – http://www.open-contracting.org/resources/extractives/.

94 Ibid.

95 See https://www.jse.co.za/services/market-data/indices/socially-responsible-investment-index.

96 These laws include the: Companies Act 71 of 2008; Diamond Export Levy Administration Act 14 of 2007; Mineral and Petroleum Resources Development Act 28 of 2002; Mining Royalty Administration Act 29 of 2008; Mining Titles Registration Act 16 of 1967; Mine Health and Safety Act 26 of 1996; National Environmental Management Act 14 of 2009; Precious Metals Act 37 of 2005; and Tax Administration Act 28 of 2011.

97 This topic has been addressed in F. Adeleke & T. Humby, 'Regulatory requirements pertaining to ownership, operational and financial disclosure in South Africa: Beneficial-ownership and tax-benefit disclosures,' 2016, OSF Paper.

It is also necessary for the government to develop practices that aid the collection, management, publication and verification of information relating to licensing and associated conditions, such as the disclosure of social and labour plans.[98]

5.5 Importance of collaborative governance

In *Vaal Environmental Justice Alliance v Company Secretary of ArcelorMittal*,[99] in upholding a community-based, civil society organisation's right to seek information to enable it to assess the impact of various activities on the environment,[100] the Supreme Court of Appeal emphasised the importance of consultation and interaction with the public. According to the court, 'environmental degradation affects us all. One might rightly speak of collaborative corporate governance in relation to the environment.'[101] The idea of collaborative corporate governance is one of the paths to reform that can transform the culture of secrecy in the extractive sector. As the Supreme Court of Appeal noted, a company, Arcelor Mittal in this case, cannot make 'a commitment to environmental sensitivity and asserting a collaborative approach to ensuring that environmental degradation is limited' and then 'assume an obstructive and contrived approach to a request for information which can only assist that collaborative effort'.[102]

For accountability within the extractive industry, the relevant government institutions should embrace the principle of dialogue. The dialogue should involve business, labour unions, and communities. Where necessary, the dialogue should also involve negotiating between competing interests of the various stakeholders so as to build shared interests.[103]

The balance of shared interests was the concern before the Supreme Court of Appeal in the *VEJA* appeal case discussed earlier. The court had to deal with the juxtaposition of 'two competing interests, namely industrial activity and its concomitant significance for the country's development and economy, as against concerns about the preservation of the environment for the benefit of present and future generations'.[104] For the court:

> *the hallmark of our constitution is proportionality. A balance has to be struck between the competing concerns ... and our courts will be astute to adopt a common sense approach to how far, in any set of circumstances, the principle of public participation and collaboration extends.*[105]

For the mining industry, the first step towards developing a shared concern where collaboration must occur, particularly between government and mining companies, is the recognition that there are other stakeholders in the industry who must have an equal voice and representation if the extractive industry is to be sustainable. These stakeholders include financial investors, miners and host communities.

The state is the custodian of natural resources on behalf of the people of South Africa and, in fulfilling this role, it cannot adopt the apartheid-state approach of 'the government knows best'.[106] As a result, it is important that host communities are constantly engaged and their consent obtained in the development of their communities and in the issuance of licences, as well as adequately empowered to exercise oversight to ensure compliance with licensing conditions and in the rehabilitation of mining areas post-extraction. This robust engagement will not be possible without transparency through public participation, consultation and access to information.

---

98 See F. Adeleke & T. Humby, 'Where public-sector accountability meets private sector accountability in mining: Lessons on transparency from Marikana,' 2016, OSF Paper.

99 (2014) ZASCA 184.

100 *Vaal Environmental Justice Alliance (VEJA) v Company Secretary of Arcelor Mittal (2014)* ZASCA 184 para 16.

101 *VEJA* appeal case, para 53.

102 Ibid, para 82.

103 See Hughes (n 5 above), at p. 19.

104 *VEJA* appeal case, para. 3.

105 Ibid, para 73.

106 See Hughes (n 5 above), at p. 3.

For the miners who are at the coalface of mineral extraction, their wellness and equitable compensation are paramount. The incessant wage disputes in the industry show a lack of trust[107] in the management of mining companies. Access to information, open negotiations and dialogue build trust – and it is high time this occurs in the extractive industry.

For financial investors, particularly institutional investors, it is necessary that they begin to exert their influence as shareholders to ensure that companies take their environmental and social governance seriously and begin to prescribe disclosure practices that will aid collaborative governance among all stakeholders for the benefit of the industry as a whole.

5.6 Participation in global initiatives

South Africa should consider joining global transparency initiatives. These initiatives are voluntary approaches to state and corporate disclosures which open up a space for engagement among different stakeholders (the state, civil society, communities and the private sector) and offer opportunities for accountability. One of the leading initiatives is the EITI. South Africa has not indicated any intention to join the EITI movement, though African finance ministers, including South Africa's Minister of Finance, endorsed the AU recommendation in 2015 that naturally resource-rich countries should consider joining this global platform.[108]

While a voluntary approach to transparency is not ideal because it does not have the force of law and relies on the goodwill of corporations for compliance, Calland argues that the voluntary, sectoral approach to transparency through multi-stakeholder initiatives has enormous potential for not only getting information into the public domain that would otherwise have remained secret, but also for establishing new standards of conduct and behaviour.[109] According to Calland, in some cases, 'a voluntary, sectoral approach, based on a carefully constructed multi-stakeholder process, can make the link between the information disclosure (the transparency 'means') and the socio-economic change (the accountability 'ends') more quickly, more efficiently, and more persuasively than a statutory system'.[110]

A multipronged approach that involves both a voluntary and regulatory approach to transparency would certainly improve the extractive industry disclosure regime.

Furthermore, South Africa's intention to develop a beneficial-ownership law and its commitment in terms of the Open Government Partnership (OGP) on beneficial-ownership transparency also offer opportunities for reform. In May 2016, the South African government launched its third action plan under the OGP, a voluntary initiative intended to promote open governance in states. The South African government committed to implement its:

> *action plan on the G20 high level principles on beneficial ownership transparency and implement a register of legal persons and arrangement which is available to the public in open data formats, in order to protect the integrity and transparency of the global financial and public procurement systems.*[111]

This commitment is noteworthy given its ambition to address financial crimes, such as money laundering, bribery, insider trading, and tax evasion, among others.

---

107 F. Adeleke & T. Humby, 'Regulatory requirements pertaining to ownership, operational and financial disclosure in South Africa: Beneficial-ownership and tax-benefit disclosures,' 2016, OSF Paper.

108 'Illicit financial flows: Report of the High Level Panel on Illicit Financial Flows from Africa,' commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development, 2015.

109 R. Calland, 'Review of impact and effectiveness of transparency and accountability initiatives,' 2012, Institute of Development Studies, p. 21.

110 Ibid.

111 The 3rd South African Open Government Partnership Country Action Plan, 2016–2018, p. 37.

A multipronged approach that involves both a voluntary and regulatory approach to transparency would certainly improve the extractive industry disclosure regime.

Another emerging global trend is open contracting, which is the practice of publishing information in relation to the conceptualisation, development, implementation, and monitoring of public contracts awarded.[112] This is a principle which can also apply to licensing applications and awards in the extractive industry in South Africa. Open contracting is based on disclosure and participation.[113] The public disclosure of information is aligned to the right of access to information. Through public participation, people are empowered to participate in processes that affect their lives and, in so doing, allow mining companies and the state to be accountable to citizens. Furthermore, public participation is an exercise of a community's right to development, which is protected under international human rights law.[114]

The United Nations' Guiding Principles on Business and Human Rights were developed to create a universal standard with respect to the duties and responsibilities of state parties and businesses regarding business and human rights. These guiding principles provide recommendations pertaining to:

- the state duty to protect individuals and communities against human rights abuses by non-state actors through regulations, policies, and other public interventions;
- the corporate responsibility to respect human rights through the exercise of due diligence to mitigate possible human rights abuse and monitor the impacts of operations in this regard; and
- the responsibilities of both state and non-state actors to ensure measures are put in place to enhance a victim's access to effective remedies, both judicial and non-judicial.

Transparency and accountability are mentioned briefly under the second recommendation with respect to creating open lines of communication between the business and the full scope of its stakeholders.[115] In addition, transparency is mentioned as a critical means of ensuring legitimacy under the remedial mechanisms of the third recommendation.[116]

These international developments point to certain shortcomings in South African law that law reform could remedy.

Conclusion

The value of secrecy is significant when it comes to consolidating power and authority. As a result, where transparency might appear to be in the greater interest of the majority, it is less so from the perspective of the state and a mining company. Mining is a major contributor to the failing South African economy and the protection of the industry therefore becomes a strategic national interest. If this proposition is accepted, then the South African state has an added incentive to resist openness in the mining sector on the basis of economic interests and the financial welfare of South Africa.[117]

112 Open contracting guiding principles cited above at n 92.

113 Ibid.

114 International Covenant on Economic, Social and Cultural Rights, and African Charter on Human and Peoples' Rights.

115 Article 21.

116 Article 31.

117 See section 42 of the PAIA which provides that 'the information officer of a public body may refuse a request for access to a record of the body if its disclosure would be likely to materially jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic'.

According to the Supreme Court of Appeal in the *VEJA* case:

> *corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced.*[118]

This admonition from the Supreme Court of Appeal must be embraced. South Africa's apartheid regime colluded with corporations in order to embrace the culture of secrecy, with devastating consequences.[119] History cannot be allowed to repeat itself, and this requires vigilance and a deliberate approach so as to tackle such cultural practices within the extractive industry, as illustrated in the suggestions for reform in this paper. A strong political will is needed in government to commit to the implementation of these reform projects in order to deal with transparency, the white elephant of mining woes in South Africa.

Recent social-science advances suggest that it is not just the presence of natural resources that leads to the so called 'resource curse' in Africa, but also:

> *the 'governance structure' around resource extraction, processing and the management of generated revenues that determine if natural resources will turn out to be either a curse or a blessing for a country.*[120]

As a result, it has been suggested that the greater the transparency around natural resources revenue earned by African states, the greater the opportunity and possibility for these governments to be held more accountable for the use of such revenue.[121]

It is not only financial transparency pertaining to natural resources that affects the governance structure of the extractive industry, but also the ownership and operational disclosures of the companies operating in this sector. Moreover, it is about the willingness of the state not only to act as the custodian of natural resources for the nation and its people, but also to empower its citizens through the law and its effective application so as to hold the government and the private sector accountable for their actions.

More importantly, we also need to pay attention to issues of sustainability, social and environmental impacts, and development. A comprehensive understanding of the beneficial value and costs of resource extraction is necessary in order to understand the extent of the positive or negative impacts of the extractive industry.[122] Openness with respect to various specific data sets of information is what would help us to truly assess the collective creativity required in developing sustainable solutions for the extractive industry and for the benefit of posterity.

---

118 *VEJA* appeal case, at para 82.

119 See Hughes (n 6 above), at p. 4.

120 Idemudia 'The Extractive Industry Transparency Initiative and corruption in Nigeria: Rethinking the links between transparency and accountability,' Paper presented at the 1st Global Transparency Research Conference, 2011, p. 3.

121 Ibid, p. 4.

122 See the recommendations in: 'South Africa's extractive industry disclosure regime: Analysis of the legislative and regulatory regime and selected corporate practice,' 2016, OSF-SA.

About the authors

Dr Olufolahan Adeleke is a senior researcher with the Mandela Institute, University of the Witwatersrand. He is currently a visiting Fulbright Scholar at the Columbia Centre for Sustainable Investment, Columbia University School of Law. He holds a PhD from Wits University, and his LLM and LLB degrees from the University of Cape Town.

Prof. Tracy-Lynn Humby is an associate professor at the School of Law, University of the Witwatersrand, and a research associate at the SWOP Institute, Wits University. She holds a PhD from Wits University, an LLM, LLB and B.Proc from the University of South Africa, and a B.Mus from the University of Port Elizabeth.

About the series (working papers)

The Open Society Foundation for South Africa periodically commissions research papers on topics related to our portfolio on *Promoting Extractive Sector Transparency and Accountability*. This publication forms part of a series of three working papers commissioned in 2016 on select topics related to disclosure practices in South Africa's extractive sector.

The series focus is drawn from the report titled *South Africa's Extractive Industry Disclosure Regime: Analysis of the legislative and regulatory regime and selected corporate practice*, written by Prof. Tracy-Lynn Humby and Dr Fola Adeleke. While related to the larger disclosures report, this series provides deep analysis into beneficial ownership, drivers of disclosure, and experiences with the Promotion of Access to Information Act in mining related disclosure practices.

We hope that the series is a useful knowledge resource for the work of our grantees, our partners and the many mine-affected communities in South Africa.

November 2016

OPEN SOCIETY FOUNDATION
FOR SOUTH AFRICA