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Democracy and access to information in South Africa

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Thesis submitted in fulfilment of the requirements for the Degree of Doctor of Philosophy in Political Studies

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November 2021

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The financial assistance of the NRF/British Academy Chair in Political Theory, Wits and Cambridge towards this research is hereby acknowledged. Opinions expressed and conclusions arrived at are those of the author and are not necessarily to be attributed to the NRF/British Academy Research Chair.

DECLARATION

I declare that this thesis, titled ***Democracy and access to information in South Africa***, is my original research. It has never been submitted by anyone for the award of any other Degree or Diploma in any College or University. Furthermore, to the best of my knowledge, it contains no material written by another person except where due reference is made in the text of the thesis. It is submitted for the degree of Doctor of Philosophy in Political Studies at the University of the Witwatersrand, in Johannesburg, South Africa.

Candice Bailey (Signature)

8 NOVEMBER 2021

Date (DD/MM/YYYY)

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DEDICATION

To my amazing Mom, Merrillian Yvonne Bailey, who is as rare a find as her name. Thank you for your unwavering support and love. For all that you are and for all that you have been in this time, and always.

I am because of you.

ACKNOWLEDGEMENTS

It was sunny afternoon in 2016. Professor Lawrence Hamilton and I were walking from the Origins Centre where we had a quick meeting, when he offered me a scholarship to do my PhD.

I thought he was stark raving mad. Me, do a PhD. I don't know how to. He was dead serious. I didn't think I could do it. He proved me wrong. And that's how it all began.

There's an old adage that it takes a village to raise a child. I'd like to expand that saying to reflect: *it takes a whole family to write a PhD.*

There are so many people to thank. Let's start with my higher power. Without God this would not have been possible. There were many moments when the seeds of my faith were parched. I struggled to water them as I felt stretched beyond measure. Over and over I got the message: if He brought you to it, He will bring you through it. In my journey, the seeds of my faith have blossomed. I am blessed. And I am grateful. I am guided by love and light.

My parents. I will always be eternally grateful for the countless sacrifices, for the constant guidance and support, for the consistent love, for the belief in me and for the prayers. Thank you for being there in your own ways and for doing everything you could on this journey. I appreciate you so much. Words are not enough.

My brothers. Jason and Jefferson. We're so vastly different but we're so damn similar. Thank you for help me to hang in there.

Mnce. It's been a tough road and many times you witnessed the crazy at 3am. Thank you for sticking through it.

My amazing network of friends, who have become sisters. Liezemarie deserves special mention for pushing me to apply for my Master's Degree in 2014 and then for the many hours of back and forth talks about a of theoretical framework during my PhD. But each in their own way,

everybody has been tremendously supportive and generous with their time and love. I am grateful, thank you. Shoutout to Terri for being my personal person and keeping me sane, Dianne for pushing us in iNtatheli and the gym and having my back, Refue for always listening and being the voice of reason, Tash for the talks and the analysis and the members of the Meldene Adventure Club Wesley Abrahams, Ettienne Le Grange vir daai jazz aande, Monica for the food and Nontobeko for those ever-long chats to dissect the Pdf.

To my fellow doctors to be: Dr Shibu Motimele and Dr Tshepiso Maleswena. Thank you for the amazing friendship, for the bonds that we have forged. For teaching me to get a writing font and for making me laugh about the climate when I didn't think I could do this. For making me believe in me. And for saving me when I needed saving. You are so special to me.

The Team at The Conversation Africa. A special mention to my Editor Caroline Southey and General Manager Alexandra Storey. Your patience. Your support. Your love and faith in me at a time when I needed it most. Thank you.

Nomhle and Thandeka. For the constant administrative assistance and the welcoming smiles in the department.

Natasha and Jono for the final edit.

And Professor Lawrence Hamilton. I didn't think it was possible. You believed in me. And you pushed me, gently. I'm grateful that you did. Thank you.

ABSTRACT

Access to information has been recognised as a vital component of healthy democracies across the world. In South Africa the right to access information is enshrined in the Constitution, which is the supreme law of the land, and legitimised through the Promotion of Access to Information Act (PAIA). This progressive law has resulted in South Africa being considered a leader as regards access to information, both on the continent and in the world. However, in democratic South Africa, the law has come under severe criticism for the manner in which it has been implemented and effected. Many users, including the media as one of the most prolific, have experienced various limitations while utilising the law in their endeavour to effect democratic accountability. In many instances it includes lengthy and costly legal battles and denials by the bureaucracy.

This thesis explores how the access to information legislation can be used to effect accountability and how this relationship in turn, affects democracy. It evaluates the theoretical underpinnings of democracy in relation to access to information, analysing how power intercepts the relationship between access to information and accountability. In evaluating PAIA in the context of South Africa's young democracy, this work attempts to understand how PAIA contributes towards the enhancement of democracy in the country. It reflects on the implementation of the law through two case studies, which trace the routes that were taken by two non-governmental groupings to access information in the country. Both cases only found resolution in the courts. It illustrates how the mechanisms of PAIA can be helpful to establish democratic accountability in South Africa. However, it also highlights the nuances in the power relations that affect the manner in which this plays out. Ultimately it

outlines how the democratic deficits in South Africa's democracy, particularly with regard to PAIA, have a negative impact on South Africa's young democracy.

Keywords: PAIA, Access to Information, Democracy, Democratic Theory, Accountability, Freedom of Information, Constitutional rights, Power, Enabling rights

1

1. BACKGROUND

1.1 Introduction

Democracy has been lauded as a political system that allows for the greatest human, social and financial well-being for all its citizens. Access to information has become a vital component of a healthy democracy (O'Reagan, 2000; Arko-Cobbah, 2008). It is recognised by the United Nations Educational, Scientific and Cultural Organization (UNESCO, 2018) and is noted in several international human rights charters and declarations, the latest being the 2016 Finlandia Declaration on Access to Information (UNESCO, 2016) as well as the Declaration of Principles of Freedom of Expression and Access to Information in Africa (ACHPR, 2019).

Globally, there are 129 countries that have adopted access to information laws in the last four decades (Mendel & Notess, 2020). On the African continent over the last 10 years, several countries have adopted access to information laws with Malawi becoming the newest country to join the fold in 2017 (Freedominfo.org, 2016). South Africa, however, has long been considered a leader in the access to information sphere both on the continent and globally (La May, Freeman & Winfield, 2013; Brobbey, Excell, Kakura & Tilley, 2012; McKinley, 2014) with a progressive access to information law – known as the Promotion of Access to Information Act (PAIA) captured as a constitutional right (SA Constitution, 1996). Despite this accolade, in democratic South Africa the access to information law has come under severe criticism from both civil society organisations as well as academics for the manner in which it has been implemented (McKinley, 2014; Dick, 2005; Razzano, 2015).

Furthermore, attempts to evaluate access to information in South Africa, and the potential value that it imparts on society in terms of democracy, prove more complicated. The concept, for one, needs to be considered in light of South Africa's tumultuous history, where, for close to 50 years the country was under authoritarian apartheid rule characterised by racism and oppression of people of colour. Central to apartheid rule was the government's decision to adopt widespread censorship measures, which would help prevent the media from reporting on the atrocities that the government of the day inflicted on millions of citizens (Merrett, 1982). In so doing, the apartheid government ensured that citizens' ability to access information was limited for close to half a century.

Censorship, can generally be defined as the suppression of freedom of expression (Newton & Artingstall, 1994) and is understood as attempts by a government to withhold information they believe could create dissent among its citizenry which would have a negative impact on their perceptions of the government. Newton and Artingstall (1994: 298) argue that these restrictions can be initiated by a government, an agency of the state or a public official directly responsible to the government. These restrictions can take various forms, including the introduction of legislation or policies that criminalised the release of information. In line with Newton and Artingstall's definition of censorship, legislation was central to the South African government's mechanisms to control the media (Switzer & Adhikari, 2000). It included an Act that banned publications thought to incite citizens or create dissent (Switzer & Adhikari, 2000). Newspapers, magazines, pamphlets and newsletters were periodically evaluated to establish whether these publications were undesirable (Switzer & Adhikari, 2000).

In the post-apartheid landscape of South Africa, the government has made a considerable effort to correct these ills, by creating a democratic society which insists on equality and provides the citizenry with extensive constitutional rights (Arko-Cobbah, 2008). Chief among these rights are equal voting rights for all, freedom of speech, freedom of association and

access to information (SA Constitution, 1996: 7). South Africa's commitment to transparency is enshrined in the Constitution, enacted in 1996. Accordingly, access to information as a Constitutional obligation was effected four years later, with the promulgation of the PAIA legislation (Promotion of Access to Information Act, 2000).

The Act provides South Africans with an opportunity to access any information that they deem critical to their citizenship, by making an application to the state and private bodies for the specific information in question. However, the legislation allows the government the ultimate power to dismiss any application with reason. Access to information is a noteworthy ideal in a country such as South Africa, which has been transformed from a censored society shrouded in secrecy to a society underpinned by transparency, where citizens are able to access a bevy of political rights.

Within this context, the concept of access to information lies at the heart of the way democracy has been formulated in South Africa, embedded in the understanding that citizens need information to make informed choices and decisions that are beneficial for them in a democratic setting.

According to the South African government, PAIA was created to "entrench values critical to a progressive constitutional democracy" (SA Government, 2016). In listing the benefits of the legislation, the government cites "a more transparent and accountable government, efficient records management and advanced and informed public participation for a better South Africa" (SA Government, 2016).

Despite these promises, 21 years have passed since the promulgation of PAIA and access to information as a constitutional right, has in some respects only existed in principle. In practice, the implementation of this constitutional right has played out in a different manner. There have been several challenges to the implementation of the legislation. One of the challenges lies in the fact that the South African Human Rights Commission, as the initial

custodians of the legislation, is not being funded sufficiently. As a result, to date, it has been unable to increase capacity to monitor or enforce the legislation, or to educate the public about PAIA (Razzano, 2015). In recognition of these types of challenges, there has recently been a recent change in the handling and implementation of PAIA, with the appointment of the Information Regulator (Gallens, 2016) to manage these responsibilities.

As a result of the implementation challenges, PAIA has enjoyed limited popularity and public engagement, despite it being created as a mechanism to enhance democracy. Reports by both civil society organizations such as the Open Democracy Advice Centre, coalitions such as the PAIA Civil Society Network (which includes a broad church of civil society groupings), as well as the media and SAHRC, indicate that the legislation has not been utilised to its full effect (SAHRC, 2012). The media, as a primary user of the legislation, along with civil society organisations, on numerous occasions have had difficulty effecting these constitutional rights (Razzano, 2015).

Further to these challenges, pending legislative developments such as the Protection of State Information Bill (POSIB), which is informally referred to as the “Secrecy Bill” (Duncan, 2018; Brobbey et al., 2012), pose a significant threat to the creation of an enabling environment for information transparency. If the bill is promulgated, people, and particularly media practitioners found in possession of information considered classified by the state could face severe penalties including incarceration (Duncan, 2018). This legislation is in direct contrast to PAIA as a mechanism for transparency and accountability (Brobbey et al., 2012).

While access to information has been proven to be fundamental to democratic ideals of transparency and accountability, primary rights such as equal voting rights for all and freedom of speech and association, continue to be foregrounded in democracy theory. Less emphasis has, however, been placed on rights such as access to information, in effect giving access to information the status of a secondary right. The lack of appreciation for the enabling ability of this right, means that South Africa is unable to fully realise the means to

fulfil its democratic potential, and stands at odds with constitutional provisions dedicated to transparency.

1.2 Rationale

Twenty-seven years into democracy in South Africa, the country presents an interesting case study in terms of how citizens have embraced and made use of their civil rights of access to information. Access to information is potentially a good marker to establish how citizens have practically interacted with democracy after being subjected to an autocratic state for the latter part of the 20th century.

This research therefore attempts to establish the extent to which citizens have embraced these civil rights and whether this process has contributed to the enhancement of democratic ideals. The research is important because it provides an analysis of how accountability and transparency as pillars of democracy in South Africa have progressed in the 27 years post-apartheid. In addition, the findings of the research could also help inform and shape government policies and legislation in terms of access to information. It could provide practical examples of the application of this constitutional right and guide policymakers on whether or not this is sufficient in a young democracy such as South Africa.

1.3 Research question

The primary question of the proposed study is:

What is the interplay between access to information and accountability in South Africa and how does this contribute to an improvement in democracy?

Globally, access to information has been defined as a tool that can be used by the citizenry to hold officials in government accountable. However, challenges around the implementation of the right have raised questions around whether or not usage of this right actually results in governments being more accountable. This question will assess whether access to information has effectively been used to improve accountability mechanisms in South Africa and whether or not this process has led to aspects of democracy in the country being enhanced. It will look at how various forms of power intercept with these mechanisms and alters the landscape. In addition, it will also look at what lessons can be learnt about South Africa's democracy from the experience of South African citizens using their rights to access information.

In answering the research question, this thesis will evaluate practical examples of how some parts of the populace have used the right of access to information in furthering democratic ideals. Furthermore, it will address how this process has been influenced by the interplay between the power of the populace on the one hand, and the power of state actors, on the other.

1.4 Study design and methods

The research adopts a qualitative research approach to explain whether access to information rights have been used in South African society to its benefit or detriment. The thesis uses case studies and primary data collection methods to look at the state of access to information as a constitutional right in democratic South Africa. Although the 27 years in its entirety will be considered in this research, particular focus is placed on the period of 2014 to 2021 - a time when several significant PAIA requests were made to government departments involving matters of national importance and prominent citizens. These include the public outcry around the taxpayer-funded building upgrades at former President Jacob Zuma's Nkandla homestead in 2014. Linked to this case, is another in which the issues

around government buildings and sites that are defined as National Key Points. This case rose to prominence as secrecy around the designation and rights afforded to these sites were questioned by various non-state actors as it lent itself to abuse by powerful state actors. In addition, a request to the South African Reserve Bank for documents relating to an apartheid era economic crime investigation into eight men, was issued in 2015.

For the purposes of this research, the National Key Points case and the Reserve Bank matter will be used as case studies to showcase the interplay between access to information and accountability in South Africa. De Vaus (2001) suggests that the unit of analysis for a case study can be a person, a group of people, a marriage, a family, a household, and a place such as a block of flats or a community as well as an organization, an event or a decision. The case studies will illustrate some of the challenges and power relations that often need to be navigated in realising the right to access to information, and furthermore translating this information into accountability.

In terms of the case studies that will be evaluated, these have both received significant media coverage in South Africa. Firstly, in the National Key Points matter involved the request from a civil society organisation to the Department of Police, requesting a list of sites that had been declared National Key Points, in line with the National Key Points Act (Act 2 of 1980). The state became embroiled in a battle with the non-governmental organisation over its refusal to declare which state buildings had been labelled national key points, in line with a piece of legislation that had been introduced during South Africa's apartheid era and not struck down with the advent of democracy. The second relates to a case where another civil society organisation requested detail on the investigations into economic crimes committed by eight men towards the end of Apartheid.

These cases are critical for the research as they have been at the centre of extensive PAIA applications, which have been deliberated through the courts. These cases therefore provide a critical window into the role of the courts in the application of rights in a country as well as

the challenges that users incur with the actual application of the legislation. The two case studies are included in the research to showcase the advantages and limitations of PAIA and how these affect the way in which access to information can be used to answer the research question. The case studies primarily make use of two data collection methods: a document review of the court papers as well as interviews conducted with stakeholders that were involved in the court case. The case study is organized according to six themes: the legal framework, national security, public interest, and the role of the courts, civil society's contribution and power. Public interest in this research is intended to mean both what is interesting to the public and the wellbeing of the general populace.

In order to draw a more complete picture of the implementation, primary data has been collected through semi-structured interviews with non-state actors that have experience of using PAIA to affect accountability. A total of 13 interviews were conducted with non-state actors that include the PAIA Network - a group of media houses and non-governmental organisations that have clustered together to strengthen their ability to submit PAIA requests successfully. The research looks into their experiences to understand how their cases were dealt with. Their interviews provide significant insights from their individual and organisational experiences of the legislation and challenges linked to it. Collectively, their insights have reiterated the overall sentiments with regard to access to information practises in South Africa.

By drawing on the PAIA Network, the research will include the work of investigative journalist group amaBhungane, the South African History Archive and individual academics. These stakeholders have interacted and engaged with access to information legislation for several years. The research will therefore attempt to understand their experiences and how these have contributed to the state of access to information in South Africa. These interviews are important to illustrate the challenges with the implementation of the PAIA laws. Although these challenges have been alluded to anecdotally on various platforms, there is a paucity of such information in academia. The research aims to consolidate these challenges and

present them to understand how these fit into the international perspective of access to information laws and more broadly contribute to the realization of democracy.

Content analysis will be the main methods for analysing the collected data. Content analysis is understood in terms of Mouton's (1987: 26) definition as a "method for the analysis of qualitative data. It is the methodology for transforming various kinds of documents, speeches, presentations, video and film material and other recorded phenomena into a form that social scientists can analyse".

The method of data analysis will include desktop analysis of data from:

- Reports and statements by civil rights organisations that have been produced following the development of the legislation and its practical application
- Statements issued by the government along with parliamentary reports and questions
- Reports by the South African Human Rights Commission as the Chapter 9 institution responsible for the legislation
- Selected media reports on access to information
- Court cases that have centred on access to information or have made significant reference to constitutional rights

1.5 Theoretical Framework

The theoretical framework for the research will be embedded in a concept of power provided by Lukes (2005), which goes beyond the popularly understood definition provided by Dahl (1957: 203) that: "A has power over B to the extent that he can get B to do something B would not otherwise do". Dahl's definition, which relies on power to be exercised around decision-making, has been criticised for being restrictive in that it depends on "behaviour in the

making of decisions on issues over which there is an observable conflict of (subjective) interests" (Lukes, 2005: 19). Lukes's conception of power goes beyond this definition, to conceive of power in terms of the ability to set the agenda.

There are three scenarios that Lukes sketches in terms of power being effected by setting the agenda. In the first sense, setting the agenda can take place through a process of controlling another party's thoughts, socializing them in a particular way and controlling the information they have. This, Lukes identifies as a supreme exercise of power, where one party is able to secure compliance "by controlling another party's thoughts and desires by influencing, shaping or determining their wants" (Lukes, 2005: 36). In the second scenario the agenda can also be set through "inaction" or what Lukes terms "political inactivity, directed by the process of non-decision-making which can stunt the political consciousness of the local public" (Lukes, 2005: 36). In the third scenario, setting the agenda can take place by suppressing knowledge. Here "institutions that are 'supposed to represent what they themselves called 'the public interest' are 'deeply embedded in the hidden exercise of power and the protection of special interests' and powerfully placed actors frame issues, present information and structure arguments and how the less powerful and the powerless either, acquiesce in or feebly resist, a process which culminates in most people ending up worse off" (Lukes, 2005: 112).

Deploying power in this manner is what Lukes (2005: 124) calls "false consciousness" or the "power to mislead". This takes the form of "straightforward censorship and disinformation to the various institutionalized and personal ways there are of infantilizing judgment and instilling and sustaining, misleading or illusory ideas of what is natural" (Lukes, 2005: 124).

The power dynamics proposed by Lukes is fundamental to understanding the issue of access to information relevant to the research, particularly in relation to the manner in which access to information laws are implemented. It considers the perspective of those who handle

access to information requests and those that apply, particularly the media and civil society, which links to the media's agenda setting ability in society.

By giving citizens a law that allows them to access information in the possession of the state or private sector bodies, the government effectively gives citizens the power to hold officials accountable for their actions. However, the way in which these laws are implemented, could allow "political institutions and leaders to exercise considerable control over what people choose to care about and how forcefully they articulate their cares" (Lukes, 2005: 57), by regulating their access to the information. As the research is set in South Africa, it is critical for agenda setting power to be embedded in a historical context and considered in conjunction with the notion of censorship, which was a vital cog in the repressive apartheid regime.

The consequence of censorship is that it intimidates people to constrain themselves, sometimes more than is even necessary (Fieser, 2017). Merrett (1982) argues that censorship has the ability to destroy basic beliefs in civil rights. Censorship takes several forms, according to Merrett (1982), including the suppression of facts and information, the use of propaganda and the denial of access to information, the manipulation and suppression of dissenting opinions, and the silencing of opposition. Merrett (1982) argues that censorship did not die in South Africa in 1990.

This theoretical framework will be further expanded in Chapter 3. However, it is worth noting that power forms the basis of the discussion around access to information and accountability, and the interplay of these concepts in democracy.

1.6 Limitations

While the thesis will add to the academic literature around access to information in South Africa, thereby combatting the paucity of research in this area, the research will not provide granular detail on the various processes that form the basis of an access to information application. Furthermore, while there are a number of examples of PAIA requests that have been successful and provide a clear link between access to information and accountability in South Africa, this thesis will only focus on two case studies, as these highlight the most salient features associated with the negative and positive aspects of effecting access to information in South Africa. In addition, examples of PAIA requests that have been unsuccessful, and a detailed analysis of the justification and reasoning in these cases will not be explored. Instead, the thesis provides the reader with an overview of the PAIA landscape in South Africa over the last eight years, and draws on the case studies to provide key lessons learnt about the intersection of power on the access to information, and by extension, transparency and accountability.

1.7 Ethical Clearance

Ethical considerations are central to the process of designing and executing scientific inquiry. With regards to this research, particular attention was paid to the ethical concerns that could have arisen from the process of collecting primary data, in this thesis, interviews. To this effect, the researcher adhered to procedures and principles that ensure voluntary participation, safety of participants, anonymity and confidentiality.

To this end, all participants were provided with a participant information sheet, providing details on the nature and content of the thesis, and were informed that they are able to withdraw from the interview or decline to comment, at will. Verbal consent was also sought (and, in all cases, provided) at the beginning of each interview. Interviews were recorded

digitally, and permission for this was also sought and verbally agreed upon prior to the interview. These recordings were subsequently transcribed by the researcher.

The real name of participants are concealed when participants request to remain anonymous. This is in line with the ethical principles of anonymity and confidentiality. While every attempt was made to provide anonymity to participants, due to the nature of the thesis, and the specific position of certain interviewees, anonymity could not be guaranteed in all cases. This was communicated to all interviewees accordingly, and permission was sought to proceed with the recording of the interview and subsequent use of data provided in the thesis. Interviewees were also afforded the opportunity to review transcriptions of their interviews on request. Digital copies of the recordings and transcripts will be stored on the researcher's personal computer, with files containing the audio and transcripts of the interviews, digitally encrypted and password protected. These will be kept for a period of five years and will then be destroyed.

In addition the researcher sought approval to conduct research from all the relevant authorities (University of the Witwatersrand). The ethical clearance certificate protocol number is: H19/02/02. A copy of the Clearance Certificate can be found in the annexures of this thesis.

1.8 Structure of thesis

Chapter one: Introduction

This chapter briefly introduces the background of the topic, the rationale as well as the research question and study design. It outlines the time frames of the thesis, the ethical clearance processes that were undertaken, as well as the limitations of the study.

Chapter two: The association between democracy, accountability, the media and access to information

This chapter will look at the theoretical underpinnings of democracy, accountability and the media and how these three concepts are critical in the analysis of access to information.

Chapter three: Democracy, Access to Information and Power

This chapter draws the conceptual lines between democracy, access to information and power. It will evaluate the interplay between the concepts of access to information, accountability and power within democratic theory.

Chapter four: An evaluation of the legal framework of access to information in South Africa

This chapter evaluates the practical application of PAIA. It will outline how the PAIA laws work and provide context for the application of the law in South Africa by evaluating how access to information laws work in other countries.

Chapter five: Case study - PAIA and its access rights for all

This chapter presents the first of the two case studies. The case study relates to a request from the Right2Know Campaign (a local non-governmental organisation) to the Department of Police requesting a list of National Key Points in the country. The request was denied and became the subject of a PAIA court case. The chapter provides an overview of the court case and outlines six themes that are used to discuss the merits of access to information and accountability in democratic South Africa. It will outline the role of the media and civil society in the application of PAIA.

Chapter six: Case study - The balance of power

This chapter provides an overview of the second case study of the thesis and draws on the six themes identified in the previous chapter to discuss the merits of access to information and accountability in the case study. The case study relates to the request by the South

African History Archive to the South African Reserve Bank, asking for detail on an economic crime investigation into eight men that took place during Apartheid.

Chapter seven: Conclusion and Findings

In concluding this thesis, this chapter will draw on concepts, practical examples and themes provided in the preceding chapters, to answer the research question. It provides a brief overview of the content of the thesis in evaluating whether access to information, as it has been applied and implemented in South Africa, can improve democracy.

2

2. THE ASSOCIATION BETWEEN DEMOCRACY, ACCOUNTABILITY, THE MEDIA AND ACCESS TO INFORMATION

2.1 Introduction

The concept of access to information is one that dates to the 18th century. The first known access to information law was introduced in Switzerland to hold the state accountable to the populace (Manninen, 2006). Both the political landscape and the status of democracy across the world has significantly altered since then. However, access to information as a means to ensure accountability still remains a central tenet of democracy and the relationship between the populace and the state. Thus, an evaluation of the value of access to information laws is incomplete unless it attempts to understand its place in modern democracy.

The aim of this chapter is to interrogate how the use of access to information mechanisms can help improve accountability within a government and how this relationship, in turn, affects democracy. This chapter will evaluate the theoretical underpinnings of democracy that relate to access to information and the role of accountability. In addition, it will discuss the pivotal role that the media play in the relationship between access to information and accountability in the analysis of whether or not access to information laws are effective.

This chapter will show how accountability is critical in a democracy and that access to information, in turn, is central to accountability. While electoral democracy is important, this chapter argues that it cannot be the only mechanism that is utilised within a democracy and

alternative accountability tools are needed. It explains how the tenets of the democratic process defined by Dahl (1989: 90) as "effective participation, an enlightened understanding and control of the agenda" can be strengthened through societal accountability tools. Access to information is pivotal to these societal accountability tools, with the media and civil society critical to this process.

2.2 Democracy and access to information

In order to understand the importance of access to information in a democracy and its ties to accountability and the media, two concepts need to be explored. Firstly, it is critical to understand what is meant by a democracy: how does it function, how is it adequately evaluated and what privileges does this type of regime offer its constituents. Secondly, the concept of access to information needs to be evaluated: how does it work, how is it used in a democracy and what does it mean to access information in a democracy?

The subject of democracy has been extensively researched, interrogated and debated globally. Scholars of modern democratic theory have reached considerable consensus that democratic regimes are more beneficial than their non-democratic counterparts (Dahl, 1998; Shapiro, 2003; Dunn, 1992; Held, 1996; Karpinnen, 2013; Schmitter & Karl, 1991). The resounding sentiment is effectively encapsulated in the words of renowned political scientist David Held (2006: 1) who notes: "Democracy remains the best of all governing arrangements". Even outside of Western democratic thought, there are grassroots notions of democracy (Alexander, 2010). While these notions are not expressed with the same terminology, people understand the importance of government's obligations towards them and the need for transparency and accountability from their leaders (Alexander, 2010). Matolino, in discussing how the political theory of consensus is relevant in Africa, notes that a consensual system is a preferable model of democracy because it appears to meet the requirements of meaningful representation, aimed at "satisfying both the formal and

substantive aspects of representation" (Matolino, 2018: 108). In terms of Matolino's view, there is a very "real possibility of representatives not fully representing their constituencies" and that they are able to be manipulated by their parties (Matolino, 2018: 108). However, "if the interplay between those who exercise power and democracy is really about allowing ordinary people to have a voice and [...] restrain the powerful from abusing power, then the maximal representation of people can ensure such an outcome" (Matolino, 2018: 108).

It is therefore imperative, for the purposes of this research, to understand what is meant by democracy. Democracy will be defined in terms of Dahl's (1989) definition that centres the concept on the democratic process or procedural democracy, which he links to the principle of political equality. The democratic process, he notes, is important because it provides citizens with an "array of rights, liberties and resources" (Dahl, 1989: 80), which allows them to participate as equal citizens and make decisions to which they are bound, underscoring the value of Matolino's comments on democracy.

2.2.1 Dahl's theory of Democracy

There are five criteria that Dahl (1989) cites, in this democratic process, which need to be met to achieve political equality. The criteria are: "effective participation, voting equality, an enlightened understanding, control of the agenda, and inclusion of adults" (Dahl, 1989: 90). However, only three of the five criteria are pertinent for the purposes of this research, namely: "effective participation, an enlightened understanding and control of the agenda" (Dahl, 1989: 90). These criteria need to be evaluated in terms of how they underpin the link between access to information and democracy. The remaining two criteria – inclusion of adults and voting equality – are not relevant.

Voting equality, for one, can be excluded because the research does not seek to understand the voting procedures but rather to understand and evaluate the knowledge-building exercises that citizens undertake outside this political institution in an attempt to hold their

governments accountable at other points in their leaders' cycle of governance. With regard to the inclusion of adults, although historically there have been restrictions on citizenship, the criteria for inclusion have become a norm (Schmitter & Karl, 1991) and the inclusion of adults is no longer disputed across democracies. Therefore, for the purpose of the research, this criterion will not be discussed any further.

The evaluation of the three criteria as part of a democratic procedure needs to be understood in terms of both Dahl's explicit and implicit concerns. Dahl's explicit concern around democracy revolves around the democratic procedure that results in political equality. His implicit concern is of human development and human worth (Dahl, 1989: 90).

In order to fully appreciate Dahl's conception of democracy, the interlinkages between the identified criteria need to be explored. Dahl's explanation of effective participation suggests that when citizens make decisions that are to be binding on their lives, they need to be in a position to express their preferences around this decision. They need to be able to have an equal opportunity to do this as well as an adequate opportunity to voice their concerns or their preferences. This would afford them, as citizens, with political equality. It follows then that a citizen who wants to participate in democracy and wants to be in a position to make their own decisions about the preferences that they wish to pursue, needs to be in a position to understand what the choices are before them. Once they have these scenarios, they are able to make an informed decision based on their enlightened understanding about their choices. When citizens have an enlightened understanding of the matters that affects them, and understand that it is a binding decision, they are able to feel empowered and enjoy political equality. In the same way the citizen also needs to have control of the agenda (Dahl, 1989).

In the strictest sense, Dahl's control of the agenda criteria refers to matters that should be decided upon in the process of voting. However, these criteria can be considered outside of the realm of voting. It can be argued that at any point of engaging with the state, the citizen

should be in a position to set the agenda rather than merely weigh in on it. The populace should be able to indicate both the general and specific matters that would affect their daily lives and be empowered to make this preference. This, once again, links back to the citizen having an enlightened understanding about what, in actual fact, affects them (Dahl, 1989).

Taken together, citizens that are able to participate effectively are in a position to question the agenda and provide a position that adequately reflects their specific needs within that society. Effective participation, for example, allows the citizen to question the agenda and propose an alternative position that considers and includes their needs. In this way they are able to guarantee their freedom of speech and simultaneously influence the decision-making process. However, if citizens are denied the opportunity to participate effectively, it results in citizens' needs not being taken into account because their preferences are not known or correctly perceived. This ultimately means that their interests are not equally considered, undermining political equality.

There are, however, limitations linked to each of these criteria that need to be acknowledged. Various scholars have criticised Dahl's criteria, arguing that it fails to consider the concept of power, which ultimately influences the way in which these criteria are met (Gordon, 2001; Bachrach & Baratz, 1962; O'Flynn & Sood, 2014). Dahl's understanding of power is underpinned by the notion of one grouping being able to exert influence in a decision-making process around contested issues that affect the other group, to the preference of the first group (Dahl, 1998). However, Gordon (2001) argues that the challenge with Dahl's procedural democracy is that it does not acknowledge that power is more complicated and that individuals are situated in a complex web of power relations. These ultimately affect the way in which they engage with the democratic criteria. The challenge with Dahl's criteria, according to Gordon (2001: 23), is that it "assumes a 'perfect' procedural democracy that functions according to the ideal standards", to ensure equality and freedom. However, the procedures linked to democracy cannot be "divorced from the power relations" (Gordon, 2001: 23) that surround them.

This, in turn, means that the 'perfect' procedural democracy is untenable. He therefore argues that even if the perfect procedural democracy could be attained, it would not ensure freedom and equality (Gordon, 2001). Gordon (2001) -- drawing on Foucault -- argues that there are a range of controlling mechanisms that suppress freedom and engender inequality. These are able to legitimately function in Dahl's perfect democracy (Gordon, 2001). Bachrach and Baratz (1962) argue that people's ability to decide on their interests can be restrained or limited by people who have the power to pre-determine the issues that are put onto the agenda in the first place. The citizen therefore also may not be in a position to participate as freely as they wish due to others controlling the agenda.

In addition to the issues linked to power, O'Flynn and Sood (2014) in evaluating the effectiveness of deliberative polls and mini-publics, raise several localised concerns with regard to the three criteria of Dahl's that are under discussion. They posit that often citizens are unable to participate equally because they have less of an opportunity to participate, even when there "formally" is the same opportunity available for everyone (O'Flynn & Sood, 2014: 46). Additionally, those who manage to participate, may not be in a position to do so on an equal footing.

"The garrulous, those strongly attached to their views, those who think the issue is important, the self-righteously knowledgeable, among many other species, all prefer talking to listening, often at the expense of giving others the chance to air their views. Then there are those who, even when they have the opportunity to talk, talk very little" (O'Flynn & Sood, 2014: 46).

O'Flynn & Sood (2014) argue that it is impossible to exclusively rely on the formal rules or democratic procedures espoused by Dahl (1989) in its entirety. Similarly, in terms of an enlightened understanding, although citizens are able to be the best judges of their own interests, developing an enlightened understanding to make an informed judgment could require a significant amount of information, which may not be at the disposal of citizens, or

may be too copious or complicated to get through (O'Flynn & Sood, 2014). And, they argue, while the principle of equally distributing the power among members of a democratic society should take place so the citizens have the power to control the political agenda and determine which political issues will be discussed, "popular control over the agenda is notoriously difficult to secure" (O'Flynn & Sood, 2014: 51). At the heart of it, they argue, is the reality that those who control the agenda have the advantage of deciding what issues get discussed, the order that they get placed on the agenda, as well as the decision of where to source the issues that are to be discussed (O'Flynn & Sood, 2014).

Dahl (1961), in a later work, has acknowledged the challenges related to these power imbalances in terms of his democratic criteria. He argues that it is impossible that all five of his criteria be achieved in any specific democracy and that these criteria collectively amount to an ideal democratic setting, which is hardly ever fully realised. He recognizes that an inequality in resources inevitably engenders political inequality. According to Dahl, ownership and control are the two issues that contribute to the largest differences in citizens' wealth, income, status, skills and the information that is available to them. This in turn generates significant inequalities in their capacities and opportunities to participate equally. His concern is that the unequal distribution of the resources could be used to influence the choices of voters and officials. As a result, power is skewed by the socio-economic elite who control the democratic process (Dahl, 1961).

However, it is important to note that power imbalances affect the implementation of democratic procedures and ultimately influence how citizens control the agenda, develop an enlightened understanding and effectively participate. This was acknowledged by Dahl, in his later work, and therefore his preoccupation with political equality and the three criteria must therefore be seen in the context of power. Collectively, the three criteria provide the citizen with the necessary autonomy to hold their leaders to account. Power, as Shapiro (2003) notes, is central to accountability because "the essence of political accountability is to limit domination in the face of power" (Shapiro, 2003: 17). However, as Gordon (2001) and

O'Flynn and Sood suggest (2014), the power relations that surround Dahl's three criteria have the propensity to weaken them as accountability mechanisms.

While power relations with regard to democracy will be dealt with in exploring the theoretical framework that underpins this thesis, in the next chapter more extensively the above-mentioned limitations highlight the weaknesses in Dahl's theory and justify why the criteria—while necessary—cannot be sufficiently implemented unless additional mechanisms are put in place to strengthen these criteria and in so doing, counter power imbalances. The natural question, therefore, is what additional mechanisms are required for the successful implementation of these three criteria in order for them to be strengthened as accountability mechanisms. To explore these dynamics, it is therefore necessary to first understand the nature of accountability as a concept.

2.3 Accountability

Schmitter and Karl (1991: 103) posit that "modern political democracy is a system of governance in which rulers are held accountable for their actions in the public realm by citizens". However, the discourse around accountability is vast and complicated and stretches beyond the democratic theory literature. Concepts of accountability are found in the fields of public administration, business administration, public policy, constitutional law and governance. In spite of this, accountability and democracy have a longstanding history and democracy cannot be conceived or practiced without complex webs of accountabilities between people and those who govern on their behalf and in their name (Warren, 2015). Broadly, in terms of democratic accountability, there are three key ways in which one can be held accountable. The first is in parliament before a public arena, the second is via the electorate and the third is political accountability through the courts. These will in part be explored in this chapter.

The concept of accountability first surfaced in the 18th century with John Stuart Mill, who introduced the term with reference to representative democracy, and posited that accountable and feasible governments are the result of citizens controlling the business of government (Tsai, 2007: 11). In modern literature, the basis of accountability mainly takes the form of a principal-agent approach. Mulgan (2003) describes this as "a task or duty, which the agent is required to perform and for which he or she is responsible" (Mulgan, 2003: 38). Within the political accountability realm, accountability takes several sub-forms: governmental, legislative, bureaucratic or public accountability, judicial, and military accountability (Schedler, 1999: 9). Schedler also lists financial accountability, legal accountability, professional accountability, moral accountability and constitutional accountability, which could be applied under the umbrella of political accountability but is not confined to a political context. Under the realm of democratic political accountability, Dunn (2012) has also identified electoral accountability. And as the scope of accountability increases, societal accountability has also been introduced (Sarker, 2009).

Across these subtypes of political accountability, scholars (O'Donnell, 1998; Schacter, 2003) have identified both a vertical and a horizontal dimension of accountability. The horizontal dimension is defined as an accountability relationship between the state and institutions of accountability such as the legislature, the ombudsman. The concept is based on an accountability relationship where both the parties are on the same level. State agencies and institutions, for example, would be entitled to perform checks and balances on their counterparts and ombudsmen could provide oversight and checks and balances within the state (O'Donnell, 1998: 13).

In contrast, the vertical dimension is based on the accountability relationship between the state and the citizen, civil society and the media (Schacter, 2003). Neither the citizen nor civil society or the media are on the same level as the state but when they are able to question the state, the vertical dimension of accountability is engaged.

The two dimensions can be evaluated separately but are also "fundamentally interconnected" (Schacter, 2003: 326). Schacter (2003), for example, argues that one cannot exist meaningfully without the other while Fox (2000) argues that each, if not effective, has the capacity to weaken the other.

In evaluating accountability relationships that would be relevant for the three democratic criteria at hand, only two are pertinent: electoral accountability and societal accountability as they particularly engage with the relations between the state and society at large. For the purposes of this research, these two types of accountability will be evaluated in order to establish the possibility of strengthening Dahl's three democratic criteria as accountability mechanisms.

2.3.1 Electoral accountability

The dimensions of vertical and horizontal accountability can be applied to the realm of electoral accountability. A significant amount of scholarly work (Cheibub, 2007; Mainwaring & Shugart, 1997; Norris, 2008) has focused on electoral systems and their design, which is valid, considering the important and definitive role of elections in a democracy. In discussing the merits of electoral systems, accountability is one of the issues that has arisen. This is, because, as Horowitz (2003) notes, accountability to constituents is one of the six possible goals of the functioning of an electoral system. The value placed on electoral accountability conforms to the first of Dahl's criteria of political equality: equal voting rights. Accordingly, scholars have identified elections as a prime accountability mechanism because it allows citizens to hold their governments to account by voting in a particular manner (Cheibub, 2007; Mainwaring & Shugart, 1997; Norris, 2008).

However, both the vertical and horizontal dimensions of electoral accountability are affected by the way in which democracies are set up, and therefore the way democratic procedures are acted upon. For one, both the design of the electoral system as well as the different

systems of democracy are affected by the strength or weakness of these accountability relationships. In addition to these structural challenges, there are also elements of power that have an impact on the vertical and horizontal dimensions of electoral democracy.

In terms of the structural challenges related to electoral systems, Norris (1997: 310) for one, posits that the way electoral systems function "have consequences which reflect the essentially contested concept of representative democracy". The essence of her thinking is that both electoral systems and systems of democracy affect the manner in which electoral accountability is perceived and has the potential of affecting the strength of the accountability (Norris, 1997).

In evaluating electoral systems, there are two issues that come to the fore. The first relates to the choice of electoral system. Majoritarian electoral systems are thought to be more accountable than proportional representative systems. Majoritarian electoral systems, which require candidates to achieve a majority of votes in order to win, are thought to prioritize government effectiveness and accountability. This is because the government has the ability to implement programmes without any consultation or compromise with regard to the other parties in the parliament. In terms of accountability, theoretically, there are clear lines of responsibility relating to the electoral outcomes: citizens vote in individual candidates and the government – and the individual members of parliament -- remain accountable for their actions to the public. As Norris (1997: 312) notes, "at periodic intervals the electorate are allowed to judge their record, and vote for alternative parties accordingly". Therefore, in evaluating the majoritarian electoral system from a vertical accountability dimension, it appears that majoritarian systems provide the necessary accountability relationship that is needed between the populace and the state to hold them accountable (Norris, 1997).

Proportional representative (PR) systems, on the other hand, where parties get the same percentage of seats in parliament as the votes they got at the polls, are thought to have a

more limited sense of accountability. While these systems, on Norris's account, are thought to "promote greater fairness for minority parties and more diversity in social representation" (Norris, 1997: 299), she argues "proportional elections can produce indecisive outcomes, unstable regimes, disproportionate power for minor parties in kingmaker roles, and a lack of clear-cut accountability and transparency in decision-making" (Norris, 1997: 310). However, the benefit of PR systems is that it also adds to the number of parties, allowing the electorate to have more choices available to them. Additionally, proportional representation means that elections are more competitive. This in turn, means parties have a greater incentive to try to amplify their support in their constituencies. This means that parties are likely to make unrealistic promises that they are unable to follow through on once they are elected to power. Therefore, in evaluating the PR electoral system from a vertical accountability dimension, it appears that the populace is not able to hold their elected representative to account as easily (Norris, 1997).

The second issue relating to the choice of electoral system is connected to the legislative arm of the system, which affects the accountability of the state. In PR systems, when party-lists are used, whether they are open, partly open or closed is an important determining factor (Lijphart, 1994: 3-8). For example, when a closed list PR system is chosen, it means that voters are only able to vote for the party, and the party leaders effectively control the strings of who is taken into parliament. As Carey (2008: 14) posits, "there is no direct link between legislators and voters". Effectively, the legislators are only accountable to the party leaders, who control the resources. Carey argues that in these circumstances, the accountability is collective and only effected at a party level. In addition, in circumstances where party unity is not strong, accountability measures are unlikely to take place. Diamond and Plattner (2006) explain that party-list PR systems are used by more countries than any other type of system -- over a third of the countries that hold competitive elections in the world employ it. Closed systems are used in Argentina, Costa, Rica, Israel, Spain, and Uruguay and South Africa while an open list system is used in Finland. Here voters are able to choose their candidate on the list. Candidates are determined by their votes and not their order on the list. Belgium and the

Netherlands are among countries that have partly open lists. This means that voters can choose candidates, but the list ultimately prevails.

To encapsulate the discussion on electoral system design and its impact on accountability, the thoughts of Diamond and Plattner (2006) aptly sum up the concerns of various theorists. They posit that the appropriate design for a country depends on the particular historical context of that country and how much of a threat it is to democracy in that country. This, for example, could be the fact that there is not a decisive majority or the fact that important minorities have been excluded. The difficulty, they argue, is that badly designed electoral systems have the potential of polarising electoral politics and fragmenting a country's parliament so severely that it stalls all accomplishment. At the same time electoral systems that overcorrect for the potential threat of fragmentation, in effect manufacturing a majority, has the potential of omitting vital social and political groups or underrepresenting them (Diamond & Plattner, 2006).

With regard to systems of democracy, both presidential and parliamentary systems affect the accountability relationships. Parliamentary systems allow the prime minister of the country to be both the head of the government and the head of the strongest party or coalition in the legislative branch (Schulz, 2003). In presidential systems, the president leads an executive branch that is separate from the legislative branch. The arguments around presidential and parliamentary systems have been significantly explored over the last 15 years. Perrson, Roland and Tabellini (1997) advocate for presidential systems, arguing that "direct control by the voters keeps the executive more accountable, as it minimizes the danger of collusion between the legislature and the executive over reappointment of the latter" (Perrson et al., 1997: 9). They posit: "For accountability to work well, responsibilities must be clearly defined so that it is apparent whom to blame for a transgression" (Perrson et al., 1997: 9). They argue that the separation of powers that comes with presidential systems improves the accountability of elected officials under appropriate checks and balances.

However, several scholars have argued their preference for parliamentary over presidential systems. Lijphart (2008), for example, has a preference for parliamentary systems over presidential forms of government arguing that parliamentary systems have a provision for votes of no confidence and term limits (where presidents are elected for a fixed period and cannot be removed regardless of their performance) are not allowed. However, in contrast, Cheibub (2007: 24) argues that presidential systems are more valuable for accountability precisely because these systems rely on term limits. Cheibub (2007: 24) argues that this "prevents incumbents from taking advantage of their position in order to remain in power". In addition, he argues that "presidential term limits are important because they affect the link between the president and voters" (Cheibub, 2007: 24). Mainwaring and Shugart's (1997) thoughts are in line with Cheibub (2007) who argues that presidentialism is better than parliamentarism for accountability. However, in contrast to Cheibub (2007), they posit that the challenge that the term limit presents is they weaken the president's electoral incentive to remain responsive to voters. At the same time, they argue that multiparty parliamentary systems are also problematic for accountability because it means that even citizens with a clear understanding of how parties should be held responsible for the shortcomings of a government, are unable to vote for a certain party to increase the likelihood that another part will be excluded from the governing coalition.

The issue of the strength of the legislature, which relates to horizontal dimensions of accountability, also comes to the fore here. Fox (2000) argues that in parliamentary systems, horizontal accountability mechanisms are strengthened as a result of the legislature, in which the power is constitutionally vested, being able to scrutinize the executive's actions between elections. The legislatures have this authority because they authorize the expenditure and enact legislation. Due to the fact that the executive needs their support, the legislatures are able to subject the executive to critical, public investigation and engage with it in extensive debate about their actions. When ministers are members of the legislature,

ministers are required to answer questions put to them by their legislative colleagues (Fox, 2000).

However, Johnson (2005) argues that a cleaner separation between executive and legislative powers in presidential systems is important as it encourages presidential legislatures to play more independent law-making and oversight roles than their parliamentary counterparts. According to Johnson (2005), the unity between the legislature and executive, based on the fact that parliamentary majority party selects the chief executive as well as the cabinet members, disincentivises the legislature to develop a strong committee system or policy expertise that could challenge the executive. He argues:

> A loss of support or vote of no confidence in the government results in both the government and parliament leaving office. Overt executive – legislative conflict is not common in parliamentary systems, nor is the parliament likely to exercise aggressive oversight. Divisions within the governing coalition however, will reduce this executive – parliamentary unity (Johnson, 2005: 7).

However, in presidential systems, because both the president and legislature are elected separately. They are from different constituencies and are elected for different terms and cabinet is selected from outside parliament. This means parliament has an incentive to develop strong, effective committees (Johnson, 2005).

In addition to the challenges linked to the horizontal and vertical dimensions of electoral accountability presented, power imbalances further complicate these systems. These relate particularly to the relationship between the socio-economic elite and elective representatives. Both Machiavelli (McCormick, 2011) and Dunn (2012) -- despite five centuries between them -- have raised similar concerns about the dynamics of socio-economic and political power. Machiavelli's anxiety was centred on the discretionary power that sits with public officials and wealthy citizens within electoral democracies (as cited in McCormick, 2011). Accountability, according to Machiavelli, as cited in McCormick (2011), has the capacity to change the balance of power. However, the indirectness of popular participation means that "public officials are able to exercise prerogative in executing their

duties and wealthy citizens are able to manipulate politics to their own benefit" (McCormick, 2011: 31). Furthermore, Dunn (2012) argues that modern representative democracies are not set up to hold public officials to account adequately. Ultimately the voter does not hold the power because most citizens face informational obstacles when they try to sanction public officials (Dunn, 2012: 335).

Ferejohn (1999) also raises the issue of the informational obstacles as one of the three major challenges with electoral accountability. He argues that elected officials are able to enjoy a significant informational advantage over voters, limiting how accountable they truly are to their voters. This, he argues, is a consequence of the complexity of modern government. These impediments together limit the possibility of fully accountable democratic rule. The remaining two issues he raises with electoral accountability is that electoral heterogeneity makes it possible for officials to play voters against each other in order to undermine accountability. Secondly, he posits that officials are able to avoid electoral responsibility because these institutions operate in real time – either sporadically or periodically – and they can therefore underplay unpopular actions and highlight popular actions to their advantage. Ferejohn articulates what is echoed in the works of Stokes (2012), Dunn (2012) and Perrson, Roland and Tabellini (1997), who raised the same issue of the information gap, or what most of them have termed informational asymmetry (Ferejohn, 1999).

The challenges also need to be seen in the context of developing democracies, and particularly South Africa, in which the research is based. It is fair to note that the above-mentioned challenges linked to electoral accountability have been particularly pertinent in the world's established democracies in the last 10 years and have manifested in developments relating to Brexit in the UK and the US where President Donald Trump and his administration have repeatedly ignored congressional oversight measures. However, in developing democracies, and particularly Africa, these challenges are more acute. There are several reasons for this. Firstly, emerging democracies, and particularly those in Africa, have

a legacy as fragile post-colonial states which battled with ethnic divisions, differences in political culture and authoritarian rule that has been "centred on deeply entrenched corruption, favouritism, and 'neo-patrimonialism'" (Diamond, 2000: 193).

However, as is the case with many developing countries – noted by some of the most prominent thinkers on electoral system design such as Lijphart, and Diamond and Plattner – a particular electoral system cannot really be recommended as a one size fits all. Electoral design should be determined by the socio-political context of a country and the various threats to the specific democracy. Ultimately, deep divisions within a society could pose a grave problem for democracy, because it could result in the decisive majority being absent or minorities being excluded, thus detracting from the representativity of the system.

Here South Africa is a case in point. In the South African context, the choice of the electoral system was complicated by the fact that it is a divided society with significant racial tensions and ethnic clashes in the period that preceded democracy, as the autocratic apartheid state fell. In the apartheid state a First Past the Post (FPTP) majoritarian system was used. However, with the onset of democracy, South Africa became a parliamentary–PR system where the president also serves as the head of state. It is based on a closed list system. The closed list system means that party leaders decide on the order of the members on the list and the voters merely vote the party into power. The decision of who becomes a member of parliament rests solely with the party. What this does, posits Hamilton (2014), is ensure that the entire legislature reflects the success of the party rather than represents the populace as a whole or the "partisan interests of constituents and groups" (Hamilton, 2014: 76). This creates various challenges. For one, it "sacrifices the gap between the representation of the people and the people themselves, and the potential for competition amongst various visions and interests" (Hamilton, 2014: 77). Secondly, it also erodes the power of the legislative arm of government as members of the legislature are less likely to compromise their placement in parliament by effecting the necessary checks and balances in terms of accountability. Lastly, it also creates a scenario where the ruling party is unable to distinguish

between party and state (Hamilton, 2014). As Matolino (2018) argues, representatives should be accountable to their constituencies but the possibility creeps in of "representatives not fully representing their constituencies and being manipulated by their parties" (Matolino, 2018: 108).

Reynolds (1995) suggests that although the PR system has allowed South African parties to compile multiracial lists of candidates, which, to a degree may not have been possible under the FPTP system, it does not allow voters to hold representatives to account (or even know who their representatives are) as a result of the large districts in South Africa. The large districts, according to Hamilton (2014) means that although South Africa technically has 10 large constituencies, effectively, it is one large constituency as all the members of the National Assembly are elected by voters choosing political parties with pre-published party lists that determine national representation based on the proportion of the party's electoral success (Hamilton, 2014: 76). Reynolds (1995: 133) posits that "a simple parliamentary–PR system, however, is not enough: these fragile democracies are better served by a type of PR that maximizes the geographic representativeness of MPs, as well as their accountability to the voters". Had South Africa employed a plurality system in the 1994 elections, Reynolds (1995) argues that various minority interests would have been denied. Ethnic and regional polarization would have been exacerbated and this, in turn, would have jeopardised the development of a stable political system in South Africa. However, the decision to go with a PR system with large districts and closed lists, according to Reynolds (1995), has been problematic for ensuring accountability.

In addition to the points mentioned above, it is worth noting the role that the judiciary plays in the exercise of accountability in South Africa. While it is not the focus of this thesis to evaluate the structure of South Africa's democracy, an indirect consequence of South Africa's constitutional structure has meant that accountability has come to be heavily jurified, where accountability is conducted through the courts and political office bearers and representatives have to answer for their actions on that platform. Both Rasheed and Olowu

(1993) and Munzhedzi (2016) highlight the responsibility of the courts in this regard, noting that it has been critical in ensuring accountability takes place in the public sector. The judiciary essentially scrutinises administrative power to ensure that it is not abused. This forces political office-bearers and public officials to account for their actions (Rasheed & Olowu, 1993). In many of these instances the accountability through the courts is linked to legal disciplinary sanctions against erring political office-bearers and public officials, which could result in imprisonment. There have, however, been instances, where the courts are brought in to deliberate over administrative issues that link to accountability.

In democracy, the electorate should be well placed to take actions against officials who do not represent them sufficiently. However, closed lists in the PR system, referred to at an earlier stage in this chapter, often means that people have no direct link to the representative that eventually sits in parliament. The fact that the courts are brought in to deliberate in this regard, could be considered as a deficit to democracy.

The above explanation clearly sets out why it is not sufficient to use electoral accountability as a mechanism to strengthen Dahl's (1989) three democratic criteria to get citizens to develop the necessary autonomy to hold governments accountable. What the literature shows is that structural challenges with electoral systems and constitutional design impede this process, and power imbalances further hamper citizen's decision-making power. In light of the criticisms linked to the weakness of both the vertical and horizontal dimensions of electoral accountability, several scholars (Sarker, 2009; Hyden, 2010) have provided alternative accountability mechanisms in the form of societal accountability.

2.3.2 An alternative accountability mechanism

Societal accountability must be seen as an offshoot of public accountability, based on the work of scholars such as Haque (2000), Sarker (2009), Goetz and Jenkins (2001), Joshi and Houtzager (2012) and Hyden (2010). Public accountability is considered the mechanisms that

ensure officials in the public sector of the government are held to account for the way in which they utilize public resources so that they deliver the necessary services and engage in ethical and transparent administration and implement good corporate governance (Munzhedzi, 2016).

According to Sarker (2009) societal accountability grew out of the need for new modes of public accountability mechanisms in addition to the traditional mechanisms such as the "legislative instruments, executive means, judicial and quasi- judicial processes, official rules, codes of conducts, official hierarchies and public hearings" (Sarker, 2009: 1102). In quoting Haque (2007) and Hughes (2003), Sarker notes:

> Society-based accountability entails such elements as citizen participation in public programs in various forms and the role of citizen's association, movements and media in exposing governmental wrongdoing. Thus, these market- and society-based mechanisms differ significantly from those in the conventional mode of public accountability (Sarker, 2009: 1102).

Goetz and Jenkins (2001) posit that the need for societal accountability was established as a result of the shortcomings in conventional accountability systems. These, they argue, have created pressure which results in better means for vertical information flows and stronger accountability relationships that can take place between the state and its citizens (Goetz & Jenkins, 2001). Goetz and Jenkins (2001) note that the challenge with conventional horizontal accountability is that the oversight mechanisms between the state and bodies outside the state through which these checks and balances take place, are not fully shared with the populace. While the populace can be told about the engagements, they are not privy to their entire proceedings. This means that the officials are essentially insulated from the citizenry, who do not have access to the detailed government information. This would be used to check information that is put into the public domain and decisions that are ultimately made. However, they argue that "direct citizen engagement with the substantive work performed by institutions" as has been aligned with good governance (Goetz & Jenkins, 2001: 367).

Hyden (2010: 3) introduces the concept of societal accountability, as a means where "citizens check the use of government power via such means as the media, civil society organizations

and popular protests". Joshi and Houtzager (2012) in discussing mechanisms that strengthen accountability discuss the notion of public accountability and the value of expanding these mechanisms beyond electoral systems by strengthening the role of civil society and the media. They argue that public accountability mechanisms, "increase public sector transparency and openness" (Joshi & Houtzager, 2012: 149) and that the manner in which this can take place is for new horizontal dimensions of accountability, such as an ombudsman, to be combined with an independent quasi-legal regulatory body, and to introduce the right to information and transparency legislation to give the media, civil society organizations and even individual citizens greater oversight capacity.

What emerges from this literature is that there are two central elements in societal accountability: civil society and the media. When civil society plays a more involved role in oversight mechanisms, they are able to cross check the information that is provided -- and this ultimately empowers them to be able to hold the government of the day to account more sufficiently on behalf of the populace. Similarly, the media have a key role in improving oversight, by questioning the state about their intentions and decisions and sharing this information with the public in an attempt to hold the government to account.

2.4 Civil society and the media

Efforts by scholars to discuss the concept of societal accountability have drawn on the media and civil society as two crucial elements in the democratic equation. Both are critical tools in efforts to enhance accountability. Dunn (2012: 340) notes that accountability must take place on the "basis of knowledge and understanding" in order for it to benefit the political system and counter the state's ability to be secretive. He notes that in modern democracies, it takes place through "regimes of freedom of information" (Dunn, 2012: 340). These tools allow citizens to establish adequate democratic surveillance of their rulers and public officials.

Outside of Dunn, the media has been identified by several academics (Schacter, 2003; Darch & Underwood, 2010; Vieira Vasconcellos de Miranda, 2013) as an integral part of these regimes of freedom of information. Fox (2000) believes that the mass media fills the gaps of horizontal accountability that is often left by ineffective state institutions. It plays an instrumental role in encouraging existing institutions to do their jobs.

Within democratic theory, the media is often referenced as "one of the hallmarks of democracy" (Sandbrook, 1996: 69). A free press is one of the conditions that Dahl (1982) interprets as part of minimal procedural democracy. However, the role of the media in using freedom of information to realise this accountability has not been a focal point in many research areas in the political studies arena. In order to discuss the importance of the media in this context as well as one of freedom of information, it is critical to understand the role of the media within democratic theory.

Scholars see the role of the media in two ways. On the one hand there is the view of Amartya Sen (2009), who discusses the media's contribution to development and the quality of democracy. Sen argues that the roles the media play in society include improving the quality of human life, contributing to human security by allowing people to freely communicate with each other and helping people develop informed and unregimented formation of values (Sen, 2009).

Sen (2009: 336) makes a connection between the media and public reasoning through the informational role that the media plays: "disseminating knowledge and allowing critical scrutiny and facilitating public reasoning". Sen (2009: 336) emphasizes the importance of investigative journalism to "unearth information that would have gone unnoticed" but also "general information about what is happening where". Sen's (2009) discussion of the media, links to Dahl's (1989) matrix of the democratic process in that it emphasizes how the media facilitates the development of an enlightened citizen and how this, in turn, has an impact on how democracy plays out in a particular country.

On the other hand, there is the view of Dahl (1961), who highlights the media for its ability to influence the electorate. Dahl speaks directly to the "influence" of the media, positing that officials who want to influence the electorate must do so through the mass media. In his discussions on power, Dahl has engaged with the media's role in being able to link directly to citizens, labelling them as "a kind of filter for information and influence" (Dahl, 1961: 256). He posits that controlling the content of the media -- or monopolising it -- is a "political resource of great potential importance" (Dahl, 1961: 256), which is why democratic leaders try to prevent a monopoly of the media and dictators try to monopolise the media to control its content. It must be noted that media monopolies can also play out in patterns of private media ownership, as has been evidenced in South Africa (Wasserman & De Beer, 2006). The challenge with media monopolies, according to Dunn (2006) is that although the media offset the lobbying power of economic interests, in most countries they are still mostly owned by a small number of conglomerates.

The evaluations of the media also need to be considered in the context of power, particularly its agenda setting capacity, which ties in with Lukes' (2005) view on power – the ability to set the agenda by controlling the information at the disposal of others. The argument needs to be evaluated in two scenarios: the first is that the media are able to exercise power because of their ability to distribute information that they consider important. Based on McCombs, Shaw and Weaver's (1997) definition, they are also able to frame the information in the way they see fit, which has the outcome of influencing how the populace perceive the issue. This issue has also been raised by Page and Shapiro (1992: 63), who argue that the media have the ability to "teach members of the audience the issues and topics that they can use to evaluate candidates and parties during political campaigns as well as in the longer periods between campaigns". The crux of McCombs, Shaw and Weaver's (1997) theory dates to the early 1970s, which is that "news is able to tell us what to think about" (McCombs et al., 1997). This theory has evolved into the media being able to dictate how people should think about

topics based on what they decide to focus on and how they frame it. This inevitably dictates how issues are perceived by the public.

Despite this, the importance of the media in facilitating information transfer to the citizenry which, in turn, allows them to hold those in power to account, cannot be underestimated. This too holds true for civil society. Fox (2000) argues that civil society has a crucial space to fill in encouraging accountable governance along both a vertical and horizontal dimension. In a vertical sense, civil society is able to expose the state's abuse of power, raise standards and the public's expectation of the public's performance. In a horizontal sense they have the ability to directly encourage the way that institutional checks and balances are created and empowered, and to strengthen those institutions of vertical accountability that underpin them:

> Civil society brings political pressure to bear and has the ability to encourage oversight institutions to act. Civil society campaigns may also drive the creation of certain institutional checks and balances in the first place (Fox, 2000: 1).

Vieira Vasconcellos de Miranda (2013) expands on this concept, positing that monitoring, a central feature of civil society's work, can only be effective if governments make information regarding their actions available. Information ranges from posters to pamphlets and videotapes that help ordinary people understand what they can expect from the government and how they can take matters forward when they feel they have not been served. In addition to the basic information presented to the populace, Vieira Vasconcellos de Miranda (2013) argues that they should also receive comprehensive information about budgets, new laws, rules and statutes and procedures of the legislative bodies. These are routine in developed countries but in developing countries, the populace is often deprived of such information. Citizens should have a convenient means of presenting their complaints and must be protected from reprisals. (Vieira Vasconcellos de Miranda, 2013) Therefore, according to Vieira Vasconcellos de Miranda (2013) and Dunn (2006), accountability cannot take place without adequate access to information. In this way, the media and civil society play a pivotal role in providing the citizenry with information that can be utilised in their

pursuit of accountability. The next section will therefore look at the concept of access to information to evaluate its importance in terms of accountability.

2.5 Access to information

On a global scale, the introduction of access to information legislation has gained considerable traction in the last five decades. By 2006, most of Europe's nations had adopted freedom of information laws (Banister, 2006: 19). In the rest of the world the adoption of legislation increased to 120 of the 195 countries globally by 2011, covering about 90% of the world's population (Berliner, 2011). Access to information is globally recognised. The World Bank as one of the largest global governance institutions has recognized the value of access to information legislation, developing an Access to Information Policy (2010) and the United Nations has listed provisions on access to information under Article 19 in its Universal Declaration On Human Rights (1948:5). In 2015, the UN also declared September 28 International Day for Universal Access to Information (UNESCO, 2015).

Prior to engaging with the legal framework of access to information, it is necessary to briefly discuss access to information as a broader concept. The concept of access to information is embedded in a historical as well as a contemporary context. The rise of access to information as a concept has coincided with the onset of the information age: the global knowledge-based economy characterised by the vast digitalisation of data, information and knowledge, which can be accessed and transferred freely and instantaneously via the internet (Ashraf, 2017). For governments the information age has introduced the e-government as a potential mechanism to improve the flow of information between them and their citizens by creating an efficient and accessible telecommunications infrastructure (Calland, Fakir & De Villiers, 2001). With this in mind, it must also be acknowledged that the government's provision of access to information legislation is at the end of a spectrum of structures that it has created to engage with citizens. Outside of the e-government system, states engage with their

citizens in various manners. In South Africa, for example, there has been the “imbizo” in which government officials hold community meetings to engage with them about their needs and inform them of government’s plans to address these (Sikhakhane & Reddy, 2011) Citizens are also encouraged to engage in the local government structures of ward committees. As Ashraf notes:

> The primary role of the information is to equip the citizens to make informed choices. Information is the life-blood that sustains political, social and business decisions. It may pertain to quality, quantity, standard, and prices of products or services that are needed to make an informed decision. This is particularly true in a country where government and its numerous administrative agencies have expanded in a bewildering manner (Ashraf, 2008: 148).

In this respect, it is important for the purposes of this research to define access to information. Darch and Underwood's (2010: 8) definition of the concept as “the individual’s right of access to recorded information in the possession of the state”. Darch and Underwood (2010) also make several noteworthy points which are relevant for the research. The first is the idea that access to information is not used by the entire citizenry but only a small portion who do so on behalf of the rest of the citizenry (Darch & Underwood, 2010).

But, in South Africa, for example, there is a significant historical context to access to information. This is evidenced by processes such as the Truth and Reconciliation Commission hearings (De Vos, 2002; Dick, 2005) where citizens expressed the need for information and details of the atrocities that took place during apartheid and resulted in the death and disappearance of their loved ones. Access to information can therefore be seen as more than a democratic tool but within the historical context as a mechanism to redress and restore the dignity of people robbed by an authoritarian regime.

Darch and Underwood’s (2010) second point relates to the overall purpose of access to information. They argue that “freedom of information aids citizens to identify dishonesty and incompetence in government” (Darch & Underwood, 2010: 9). And importantly, they also argue that it “reconfigures the relationship between the state and citizen by changing the knowledge that is shared, which in turn changes the nexus of knowledge and power” (Darch

& Underwood, 2010:9). In South Africa while many citizens have not pursued access to information legislation through the formal channels created by the state, the notion has been understood by protesting communities who have demanded answers about services and service delivery, as an example (Alexander, 2010).

Darch and Underwood (2010: 8) also highlight that the availability of information, essential as it may be, is not sufficient for a democratic system to function effectively. Their definition, however, does little to explain how the concept of access to information is used within a democratic culture to make the system function effectively.

It is evident that the concept of access to information goes beyond the legal framework and that there are many alternative ways that people have found to access information. Both approaches have the ability to provide its users with autonomy and are therefore necessary.

The right to access to information and its implementation across the world will be explored more thoroughly in the next chapter of the research. In the interim, it is critical, for this chapter, that the ties between the right to access to information and accountability be explored.

Several scholars (Berliner, 2011; Banisar, 2006, Jenkins & Goetz, 1999; Cordis & Warren, 2012) have identified how beneficial it is for the populace to utilise their right to access information to improve democracy. Globally some studies have shown how the use of the right to access information has made governments more accountable. Berliner (2011) and Banisar (2006), for example, note the importance of freedom of information legislation for improved governance, while Cordis and Warren (2012) relate it to efforts to reduce corruption and Roberts (2002) notes that it contributes towards ensuring sound policy decisions. The laws have also helped to navigate the power balance by enabling journalists, opposition politicians and civil rights groups to hold the government to account (Roberts, 2002). Jenkins and Goetz (1999) refer to a case in India where a grassroots organization used

official documents to hold the government to account for failing to enforce minimum-wage regulations on drought-relief workers. The organisation collectively analysed documents it received and presented it in public hearings in the community (Jenkins & Goetz, 1999). By using the legislation, they were able to demand accountability from local authorities and create greater awareness of other malpractices that were taking place. A different study by Vadlamannati and Cooray (2017) has also shown that the adoption of freedom of information laws has been linked to a perception that government corruption has increased, which is driven by an increase in corrupt acts being detected.

However, there have been challenges around the implementation of access to information legislation. Legislation has been limited and enforcement mechanisms around the legislation is often weak (Banisar, 2006). In many countries, governments have resisted releasing information or have delayed the process considerably. In some instances, they have held information back until the last minute or insisted on a court challenge before releasing information. There are also cases where governments have imposed unreasonable fees to discourage access to information (Banisar, 2006). These challenges have been exacerbated by courts undermining the intent of the law (Banisar, 2006). One study on the laws in Canada has, for example, established that requests by journalists and political parties were met with informal "internal bureaucratic procedures" which delayed the information and diminished its usefulness (Roberts, 2002).

Another issue that has featured prominently in the literature is the issue of government secrecy. The need for secrecy laws versus the conflict of interest that it creates as a result of directly withholding some information is extensively debated (Duncan, 2018). Duncan (2018) argues that there is a global tension between national security and access to information. Secrecy in governments is justified to a certain degree to protect authorized national security activities and prevent government's effectiveness being undermined by having the information it has collected, developed or used, being exposed (Aftergood, 2010; White, 2002). However, some authors argue that governments can be heavily criticized when too

much information is classified and withheld from the public in the name of national security. (Aftergood, 2010: 840). They argue that secrecy laws prohibit them from completing their objects (Aftergood, 2010: 841) and that secrecy leads to public distrust and fear. In addition, people are unable to control their government if they do not have knowledge. Duncan (2018), for example, argues that increasingly governments are pursuing a more securitised approach to social problems. This has been more prolific after the terrorist attacks on the United States (US) on September 11, 2001. She notes that "secrecy is needed to protect operational secrets that may compromise legitimate investigations if they are exposed" (Duncan, 2018: 109) but that "policy or strategy documents do not need to be kept secret, as these documents usually set the overall framework for intelligence operations" (Duncan, 2018: 109). She posits that criminal justice arms of the state are easily susceptible to political abuse when they are not subject to transparency and public accountability as democratic controls.

Furthermore, the issue of secrecy related to access to information laws needs to be seen in the context of power. It is critical to evaluate how significantly power imbalances have been at play when secrecy laws are used to withhold information. These could be deliberate attempts by the state and the government officials at the forefront of dealing with the legislation, as Dahl's (1961) theory of power suggests, purposefully exerting influence on the decision-making process. Alternatively, as Bachrach and Baratz (1962) suggest, it could involve an attempt by the government to pre-determine the issues that are placed – or not placed -- onto the agenda. Or, as Lukes (2005) suggests, it could a case of suppressing information and manipulating citizens into putting different issues onto the agenda.

The interplay between secrecy and national security and power will all be explored at a later part of the research in the exploration of power imbalances and how they affect information action. With regard to the issue of access to information and accountability and how it relates to the three democratic criteria cited by Dahl to encourage a democratic procedure to ensure political equality in decision-making, it is clear that the populace's ability to access

information – whether through the civil society or the media – is a critical step to being in a position to hold their governments accountable. The examples have shown that getting access to the information held within a state have enabled both the media and civil society more broadly to develop an enlightened understanding of the issues that affect them. They were able to control the agenda by providing viewpoints on matters that affect them and in so doing, they were able to effectively participate in the matters that affect them. Ultimately the media and civil society were empowered by the use of access to information laws to hold their governments more accountable.

2.6 Conclusion

There is a clear relationship between access to information, accountability and democracy. Within a democracy, access to information plays a critical role in the populace being able to effect the democratic criteria and, in turn, being able to hold the government to account.

This chapter has framed procedural democracy, as conceived by Dahl (1989), in terms of three democratic criteria – enlightened understanding, control of the agenda and effective participation – that need to be met for the populace to achieve political equality. The crux of this idea is that citizens who have an enlightened understanding are in a better position to determine their own needs within society and question the agenda and in so doing, they are able to participate more effectively. However, if citizens are denied the opportunity to develop an enlightened understanding, the danger is that their needs won't be taken into account because their preferences are not known or correctly perceived. As a result, they are unlikely to participate effectively in their society or be considered political equals and effectively are caught in a system of domination. In order for citizens to develop this enlightened understanding, it is necessary for them to get access to information.

Linking this to accountability, this chapter has also shown that while various opportunities exist for the populace to engage in an accountability value chain, the available avenues of horizontal accountability often has the potential to be weakened as a result of the way that electoral system is formulated. This is particularly true of South Africa.

What this means is that in order for the populace to be in a position to hold their governments to account, societal accountability is a necessary mechanism. The media and civil society play a crucial role in this regard. They facilitate the transfer of information to the citizenry and encourage accountable governments by questioning the state's abuse of power. Additionally, they create an expectation in the mind of the populace about what is regular or irregular. In a horizontal sense of accountability, posits Fox (2000), they are able to encourage the creation and empowerment of institutional checks and balances.

The media's role cannot be understated in this equation. Scholars such as Dahl (1961) and Sen (2009) have extensively engaged in their role -- defining the informative aspects and highlighting the influence that they hold. This has linked to the agenda setting ability of the media, as posited by McCombs, Weaver and Shaw (1974) who placed significant emphasis on the media's ability to help the citizens determine what is important and in which way it is important.

Additionally, one of the issues that has arisen in this chapter is that of power. Accordingly, access to information and how effective it is in holding governments to account are relevant for the research and need to be seen in the context of power, which has been a central theme thus far. The power imbalances that affect access to information, not only affect the decision-making process during democratic procedures but also affect the way in which the democratic criteria are sufficiently engaged. The next chapter will evaluate how power affects the populace's ability to access information.

3

3. DEMOCRACY, ACCESS TO INFORMATION AND POWER

3.1 Introduction

Globally, access to information has been a tool that the citizenry is able to utilize to hold officials in government accountable (Banisar, 2006). Despite these legislative guidelines, many countries have experienced challenges with the implementation of this mechanism (Banisar, 2006). These have raised questions around whether or not this right does in fact result in governments being more accountable. Scholars of access to information such as Roberts (2002), Berliner (2011) and Banisar (2006) have belaboured various challenges associated with the implementation of the laws. These have included but are not limited to a) resistance from governments to release information, b) internal bureaucratic procedures that delay the release of information; c) weak enforcement mechanisms; and d) political pressure (Banisar, 2006). In each of these challenges, the issue of power arises.

These challenges intersect with the major tenets of this research, which looks at the interplay between access to information and accountability in South Africa and whether it contributes to an improvement in democracy. However, to do this, it is critical to evaluate whether power relations have any role in dictating how this right is implemented and if they do, how these power relations then alter this landscape.

The question that immediately arises is to what extent power dynamics play a role in the development of the challenges. Following from this, if the right to access to information is

considered an accountability mechanism, then it is critical to understand the role of power in this process. Therefore, to fully comprehend these challenges, the concept of access to information needs to be evaluated within a larger framework of power. This chapter draws on theories of power to establish a theoretical framework of power relevant for access to information and democracy that can help understand the interplay of these concepts.

The chapter will begin with a broad evaluation of the theories of power. It will then evaluate the concept of power within the context of each element of access to information as discussed in the preceding chapter, namely democracy, accountability, the media and civil society as well as access to information itself.

This will ultimately outline the effects of power on the implementation of access to information in South Africa. The next section will evaluate the main theories in the power debate.

3.2 Power

The specific debate on forms and dynamics power has spanned several centuries and included a wide variety of scholars from Weber (1922) to Foucault (2000) who have all made significant contributions. However, power still remains a contested concept. From the outset, however, it is critical to note that the majority of scholars are only in agreement about the fact that there is no "single authoritative concept of power" (Clegg, 1989: 110).

The various interpretations of power have included but are not limited to classifications of power as either 'power over' or 'power to' as well as classifications of power as either episodic, dispositional or facilitative. In addition to these, there has also been the structuration theory of power and conceptualised power as systemic, or constitutive, while other scholars have introduced the family resemblance concept of power. It would be practically unfeasible to provide detailed outlines of all of these theories, and, therefore, the

next section only provides a broad outline of the most significant discussions within the debate on power.

The two most relevant conceptions of power have been 'power over' versus 'power to' – or as Allen describes it:

> those who define power as getting someone else to do what you want them to do, that is, as an exercise of power-over, against those who define it as an ability or a capacity to act, that is, as a power-to do something (Allen, 2016: Defining power, para 2).

From the outset in the discourse of 'power over' versus 'power to' there is rarely a cross over to affiliate power with the alternative conception. And while the 'power over' has been the more dominant of the two, increasingly more emphasis is being placed on the empowerment aspect of power, more commonly known as the 'power to'. At the centre of the 'power over' literature, Dahl's (1957) agency model has been considered one of the most influential definitions of power. In the *Concept of Power*, Dahl (1957: 203) explains what he terms the "intuitive definition of power". Dahl's definition is strongly tied to the decision-making process. He explains his definition with the use of a simple illustration of a traffic officer directing traffic on the road:

> (W)hat I conceive to be the bedrock idea of power to say that the policeman acting in this particular role evidently has the power to make automobile drivers turn right or left rather than go ahead. My intuitive idea of power, then, is something like this: *A* has power over *B* to the extent that he can get *B* to do something that *B* would not otherwise do (Dahl, 1957: 202-203).

Accordingly, the conditions for power, Dahl (1957) argues, is that power is a relation among people better termed as "actors" (Dahl, 1957: 203). These actors may be "individuals, groups, roles, offices, governments, nation-states, or other human aggregates" (Dahl, 1957: 203). One actor exerts power over another actor as a result of their "base of power" (Dahl, 1957: 203). This base consists of all the resources that the actor can exploit to affect the behaviour that they wish to evoke from the other actor. These resources can include opportunities, acts or objects. In addition to these elements, the actor also has a certain extent of power as well as a range or scope of power. To illustrate these conditions, Dahl (1957) uses the analogy of the power that a president has over a senator. The base of his

power would be his support and his influence over the national electorate through his charisma or charm, that could either take place by threat or the promise of an incentive (Dahl, 1957).

Dahl's (1957) definition of power, has, however, been widely criticized. In the main has been the restrictions that his definition places on power being a "behavioural" process that takes place when a decision is being made. Clegg (1989) argues that Dahl's definition fails to consider the meaning of the surrounding context as well as the context of power itself. He labels it "structurally, a remarkably flat, one-dimensional topography" (Clegg, 1989: 12) in that it fails to consider the contextual differences that limit the behavioral aspects of power identified by Dahl (1957). According to Clegg (1989), the challenge with Dahl's definition is that he fails to consider that people in a particular community can be excluded from the political community by not participating in formal participatory mechanisms like elections and, therefore, do not have access to political agency.

The most significant criticism of Dahl's theory has come from Bachrach and Baratz (1962), who have argued that Dahl's definition has failed to consider the matter of intentionality. They introduced what was popularly termed as the second face of power. In Bachrach and Baratz's (1962) understanding of power, power is defined as Dahl (1957) would suggest, that A partakes in decision-making that affects B". However, they extend the definition to argue that "power is also exercised when A devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration of only those issues which are comparatively innocuous to A" (Bachrach & Baratz, 1962: 948). Bachrach and Baratz (1962) argue that the evaluation of power cannot be limited to instances of power being exercised as a result of "concrete decisions" but in evaluating power, one also needs to evaluate the "sources of power" (Bachrach & Baratz, 1962: 948). Dahl's (1957) approach, they argue, fails to evaluate the "routine" political decisions that need to be made, or identify the people who did not take part in the decision-making process (Bachrach & Baratz, 1962: 948). There are two fundamentally important disadvantages to the approach of Dahl (1957) and his peers, argue Bachrach and Baratz

(1962). The first is that "the model fails to take into account the fact that power may be exercised by confining the scope of decision-making to relatively safe issues" (Bachrach & Baratz, 1962: 952). The other is that "the model provides no objective criteria for distinguishing between important and unimportant issues arising in the political arena" (Bachrach & Baratz, 1962: 948). They posit that:

> Dahl thereby excludes the possibility that in the community in question there is a group capable of preventing contests from arising on issues of importance to it. Beyond that, however, by ignoring the less apparent face of power Dahl and those who accept his pluralist approach are unable adequately to differentiate between a 'key' and a 'routine' political decision (Bachrach & Baratz, 1962: 948).

Thus, they argue, "a person or a group has power when they are able to consciously or unconsciously create or reinforce barriers to the public airing of policy conflicts" (Bachrach & Baratz, 1962: 949). The empowered party ensures that people only air non-controversial matters, by influencing community values and political procedures and rituals. Ultimately, there are always latent power conflicts (Bachrach & Baratz, 1962: 949).

Bachrach and Baratz's (1962) conception of power furthers Dahl's conception by adding the dimension that power can also be played out when there is no action rather than only when there is an actual decision-making process. Their conception of power has, however, in turn, been criticised for being too narrowly defined. Specifically, Lukes (1974 and 2005) argues that while their view of power – which he has termed a two-dimensional view – examines bias and control, their definition conceives of these two issues too narrowly. He argues that Bachrach and Baratz (1962) failed to evaluate the various ways that power has been used to suppress latent conflicts within society (Lukes, 1974: 68). Lukes's (1974) conception of power therefore goes beyond this definition, to conceive of power in terms of the ability to set the agenda.

In this regard, Lukes (2005) sketches three scenarios. In the first sense, setting the agenda can take place through a process of controlling another party's thoughts, socializing them in a particular way and controlling the information they have. This, Lukes identifies as a supreme exercise of power, "where one party is able to secure compliance by controlling

another party's thoughts and desires by influencing, shaping or determining their wants" (Lukes, 2005: 36). In the second scenario the agenda can also be set through "inaction" or what Lukes terms "political inactivity directed by the process of non-decision-making (Lukes, 2005: 36). This has the ability to "stunt the political consciousness of the local public" (Lukes, 2005: 36). In the third scenario, setting the agenda can take place by suppressing knowledge. Here, Lukes (2005: 112) identifies institutions at the core of the display of power: these should represent the public interest but are "embedded in the hidden exercise of power and the protection of special interests". In most instances, Lukes argues, there are

> powerfully placed actors that frame issues, present information and structure arguments and how the less powerful and the powerless either acquiesce in or feebly resist a process which culminates in most people ending up worse off (Lukes, 2005: 112).

Here power is being deployed in a manner that Lukes calls the "power to mislead", which takes the form of straightforward censorship and disinformation. (Lukes, 2005: 124). At the centre of this paradigm is what Lukes (1974) explains as a concern about how the preferences of the powerless are formed based on the power imbalances they are subjected to, their ability to resist the power, set the agenda or determine what is allowed on it in the first place. In the second edition of his book *Power: A Radical View*, Lukes (2005) posits that the central meaning of power as it had been understood traditionally, is to answer the question: How do the powerful secure the compliance of those they dominate? One answer that Lukes (2005) offers is that the powerful enlist people into wider patterns of normative control, where the people believe: they are their own overseers, that they are free of power, make their own choices and pursue their own interests, make rational assessments and come to their own conclusions.

Discussing the notion of power as domination, Lukes argues that when power relations result in domination, it means that groups' interests are stunted, diminished and their power of judgment is undermined:

> Domination can induce and sustain internal constraints upon self-determination – ways of undermining and distorting people's confidence and sense of self and of misleading and subverting their judgement …. To best advance their [the powerful's] interests (Lukes, 2005: 131).

Lukes argues that “people’s wants may themselves be a product of a system which works against their interests, and in such cases, what they would want and prefer,” (Lukes, 1974: 34).

Essentially, power, according to Lukes (2005) is understood in terms of control. If the powerful actor is able to control the other actor’s interest by limiting the information regarding the options they believe they have, or by controlling the narrative by not taking any action or by suppressing their knowledge, they will retain their power.

Although Lukes (2005) in his later book retreats from his conception that citizens are unable to determine their own best interests, his focus on interest has come under criticism. Hamilton’s (2013:50) criticism is that Lukes fails to acknowledge that people’s “preferences are subject to complex hierarchies of preferences and values”. When people feel powerless, the way that they conceive their needs may have a significant impact on how they determine their preferences. Hamilton posits: “In situations in which only certain kinds of needs and preferences, say, are deemed permissible or desirable, it is likely that [citizens] will experience these as needs and preferences” (Hamilton, 2013: 50). Hamilton’s argument is that preferences are determined by “context, location, group and class” (Hamilton, 2013: 55) and that there may “always be differences and possible conflict around [their] determination” (Hamilton, 2013: 55).

He argues that instead of attempts to specify specific needs, the focus should be on creating scenarios in which the possibility for citizens to be subjected to conditions of domination are limited. Hamilton’s solution is twofold. Firstly, citizens need to have the power to determine their own needs where they are able to identify, express and evaluate needs, interests and their formative practices and institutions. And secondly, institutional arrangements need to be put in place that provide citizens with procedural power that enable them to enforce their vital and agency needs. This would enable citizens to withstand domination. He posits that

while “democratic participation does not depend on the existence of fully autonomous individuals” (Hamilton, 2013: 11), citizens need to have the power to determine their own needs (Hamilton, 2013).

With regards to the citizen, Hamilton distinguishes between three types of needs that citizens have:

> a) vital needs, or the necessary conditions for everyday minimal human functioning, such as sufficient food, adequate shelter, safety, periodic rest, social entertainment; b) agency needs, or the necessary conditions for political agency, that is, the requirements or pre-requisites for the ‘causal power’ necessary for agents to form and carry out intended actions and participate in various political institutions including active and creative expression and autonomy; and c) particular social needs, or the largely uncontested particular needs that are felt in everyday experience, which could be felt instances of vital and agency needs, or wants becoming needs, or wants parading as needs (Hamilton, 2013: 59).

When citizens are unable to determine their needs, they can find themselves subjected to various conditions of domination. Accordingly, Hamilton outlines four scenarios: 1) they are misled in their attempts to identify their needs, either denying their needs, being manipulated into believing other citizen’s needs are theirs or are misled due to fixed or traditional norms and practices; 2) They live in regimes where institutional arrangements mean they are unable to express their needs; 3) there are formal means and freedoms to identify and express their needs but the regime does not allow them to meaningfully evaluate their needs and interests due to economic terms based on practices and institutions that do not allow for the evaluation of needs and interests; 4) The system allows them to objectively evaluate their needs, via discourse, but there is little or no institutional means that citizens can use to evaluate their needs or those of people around them (Hamilton, 2013).

In addition to empowering citizens to be able to identify their needs, Hamilton (2013) posits that it is the purpose of the state or the state-like authority to act against actual and potential states of domination:

> For governments to make efficient, responsive, and farsighted decisions for citizens that can satisfy the needs of the citizens that they serve, they need insight into the existing needs and norms within the citizenry (Hamilton, 2013: 55).

Hamilton's (2013) thinking on power is heavily influenced by Foucault (1991: 97-8) who argues that "individuals are both subject to the constraints of social relations of power, that is, subject to a power that is being exercised over them, and simultaneously enabled to take up the position of a subject in and through these constraints or operations of power". Hamilton (2013: 51) posits: "Power therefore simultaneously enables the constitution of subjects and constrains the options, choices and preferences of those same subjects".

Central to Hamilton's (2013) theory on power is the ability to determine one's own needs in a bid to develop autonomy.

Hamilton's concerns about institutional power and conditions of domination are in line with Foucault, who notes that there are power relations that "enable freedom at one end but constitute states of domination on the other end (Foucault, 2000). As a result of this, according to Foucault, interpreted by Hamilton, there are "practices, techniques or technologies of government" (Foucault, 2000: 299) that need to be constantly analysed, as these techniques are often the sites where conditions of domination are established and maintained. Another concern of Foucault is that political power is often exercised through institutions, appearing to be independent from it, while they are not (Chomsky & Foucault, 1997: 130). Foucault argues that "the state centralizes power to maintain and strengthen the power of the state" (Foucault, 1997: 317–23).

The dimension that Foucault adds to the conception of power is that he provides the insights of power in terms of how the state is able to institutionalize power for their benefit. This is important, for the sake of this thesis because of the role that the state has in the access to information equation. Foucault's (2000) version of power interprets it as the ability of the

more powerful actor to effectively organize power in a way that it is not seen to be activated by them. However, the activation of this power is ultimately to their benefit.

Therefore, for the purposes of the research, the theories espoused by Lukes (2005), Hamilton (2013) and Foucault (2000) can be drawn together to argue power as 1) a relation between actors that needs to be navigated to limit the scope of domination, 2) a set of mechanisms that can be used to set the agenda, 3) the ability of citizens to gain agency that can be linked to their autonomy, and 4) procedural arrangements that are set up within the state in an attempt to aid citizens in identifying, expressing and evaluating their needs and in so doing having the potential to minimise domination or vice versa, to maintain a state of power.

A set of mechanisms that can be used to set up the agenda includes securing compliance by controlling the thoughts of the populace by socializing them in a particular way and controlling the information they have or through political inaction and suppressing knowledge through censorship and disinformation. In terms of the ability of citizens to gain agency, these could include any processes, initiatives, pieces of legislation or actions that citizens take or find useful in their quest for autonomy. The same applies to the procedural arrangements.

Henceforth, power will be conceptualised in this way for the purpose of this research.

This combined conception of power is critical to evaluate the power relations linked to access to information mechanisms in South Africa and how these contribute to the enhancement of democracy in the country. The next section will evaluate this combined conception as regards the implementation of access to information mechanisms in South Africa's democracy.

3.3 Power, democracy and PAIA in South Africa

To fully understand the interplay between power and access to information, it is necessary to evaluate each of the elements that are critical for the implementation of access to information, which have been explored in the preceding chapter, within a context of power. These include democracy, accountability, the media, civil society and the concept of access to information itself.

Democracy is central to the discussions of the right to access information. The framing of democracy, as outlined in the previous chapter, is through the lens of Dahl (1989), who articulates a procedural conception of democracy. Thus, political equality is required, effectively limiting the scope of domination in decision-making processes. Dahl (1989) lists five conditions that need to be met during these democratic procedures. Only three of the five conditions are pertinent for the research: a) enlightened understanding b) control of the agenda and c) effective participation. To understand how power affects democracy, it is important to view the three conditions that Dahl seeks in a democratic procedure, in the context of the power relations that surround them. Collectively, the three criteria provide the citizen with the necessary autonomy to hold their leaders to account. However, the power relations that surround Dahl's (1989) three criteria have the propensity to weaken them as accountability mechanisms (Gordon, 2001; O'Flynn & Sood, 2014; Dunn, 2012). Power relations are enacted through an inequality in resources which engenders political inequality seen through large differences in wealth, income, status, skills and the information that is available to them (Dahl, 1961); difficulties in securing control over the agenda to determine which political issues will be discussed (O'Flynn & Sood, 2014); a lack of information at the disposal of citizens or information being too copious or complicated for citizens to grasp, limiting their ability to develop an enlightened understanding (O'Flynn & Sood, 2014).

The purported concept of power can be applied to the democratic procedures (effective participation, control of the agenda and an enlightened understanding). Power influences the way that these three democratic procedures are enacted collectively and within their individual capacities. Navigating the power relations successfully, means that the citizen is in a better position to achieve political equality. Put a different way, by controlling the agenda, having an enlightened understanding, and participating effectively, citizens would limit the scope of domination on their lives, thereby achieving political equality.

Each of the democratic procedures can be applied to the combined conception of power in turn. For example, the democratic procedural 'control of the agenda' can be affected by power considered as a 'set of mechanisms that is used to set the agenda'. If the more powerful actor (being the state) uses mechanisms such as controlling the information available to the populace, engaging in political inaction or the suppressing of knowledge, the populace is no longer in control of the agenda. Effectively, this means that the power has been navigated unsuccessfully in favour of the populace and in favour of the state.

It follows from this that if power is a relation between two actors, it means that one actor is likely to be more powerful than the other and that this relation would need to be navigated in order for the less powerful actor to be able to reach a position where they feel they are in control of the agenda. The same therefore applies to the development of an enlightened understanding as well as effective participation. In both these cases, one actor is likely to have more power than the other and in order for the less powerful after to become empowered enough to develop an enlightened understanding they would need to navigate this power relation. When the less powerful actor successfully navigates this relation, they are in the position to determine their own course and limit the potential for domination. Powerful actors are able to shape, influence and determine the wants of the powerless actors and in so doing secure their compliance. And it follows from this that by securing this compliance they are then able to control the agenda, ultimately resulting in less powerful actors not being able to effectively participate in the decision-making process. In line with

this, when the power relations are skewed, the party in whose favour the power relations are in a specific circumstance is able to control the agenda.

Limited information, censorship and political inaction have an impact on the populace's ability to develop an enlightened understanding. It follows that they are unable to effectively participate and have no control of the agenda.

It must be noted that control of the agenda cannot realistically be interpreted with the general meaning of directly controlling the agenda, or in other words, being actively and directly in control and setting the agenda. Citizens often don't have this ability or prerogative. A more nuanced understanding of control of the agenda is that citizens have a degree of control of the agenda in that they're not dominated by elites and their representatives. In essence, it links to being able to control how their representatives determine their needs.

Power conceived as the ability of citizens to gain agency linked to their autonomy can also be applied to the three democratic criteria. When the citizen undertakes an initiative that helps them to gain agency, they automatically start to develop an enlightening understanding about their needs, interests and wants. They are able to determine which of these are more important for them and can take control of the agenda in terms of asking the necessary questions and holding the state to account more effectively. This in turn, results in them being able to participate more effectively. Although citizens can never be completely autonomous, a level of autonomy provides citizens with the ability to be able to evaluate and express their needs, and understand which institutional arrangements have been put in place to aid them in this process. Ultimately this provides them with an enlightened understanding of their particular needs. Based on these links, it can be argued that skewed power relations hamper citizens' ability to develop an enlightened understanding.

Lastly, the same pattern follows with power applied as a procedural arrangement in the state to help citizens express their needs and vice versa to maintain a state of domination, in terms of how it links to the three democratic criteria. When the citizen is afforded an opportunity to engage in procedures that improve their decision-making processes, they automatically experience a level of freedom that enables them to engage in the democratic state more readily. Conversely, if there are procedures that work against them, the ability to engage in these three democratic criteria diminish. It then follows that the state has the ability to either encourage the democratic process by instituting mechanisms that allow citizens to have autonomy and develop an enlightened understanding, control the agenda and participate more effectively, or stunt it by limiting these conditions from thriving.

3.3.1 Power and democracy in a South African context

As this research is set in South Africa, it is worthwhile to apply the power-democracy lens in a South African setting. In conducting this evaluation, it must however, be embedded in an historical context. Power relations in the pre-democratic era of South Africa were severely skewed as a result of the country being subjected to racist, authoritarian rule for close to half a century (Merrett, 2001). The system which entailed a white minority enforcing a widespread system of racial segregation with more than 100 laws that limited the freedoms of the vast majority of the citizens ultimately resulted in the apartheid state preventing citizens from effective participation, control of the agenda and ability to develop an enlightened understanding (Wasserman & De Beer, 2006). In addition to the draconian laws that were used to control the populace and limit their ability to determine their needs, the apartheid state also enforced a system of censorship to control the media and limit the information that citizens could access to gain autonomy. Several authors note that censorship was a key feature of the apartheid government's approach generally, and particularly towards the media (see Wasserman, 2010; Berger, 2001; Harber, 2004; Dawson, 2003). Censorship, generally defined as the suppression of freedom of expression (Newton & Artingstall, 1994), is understood as attempts by the government to withhold information that they believe

could be harmful or offensive and could create dissent among its citizenry or impact negatively on their perceptions of the government.

Merrett (1982), in discussing the state of censorship in South Africa, posits that censorship can take several forms, including the suppression of facts, propaganda and denying access to information and manipulating and suppressing dissenting opinions as well as silencing opposition. In line with this, Fieser (2017) explains that the consequence of censorship is that it intimidates people to constrain themselves, sometimes more than is even necessary. Merrett (2001) argues that censorship has the ability to destroy basic beliefs in civil rights, and in the case of South Africa, he argues that censorship did not die in 1990 with the onset of democracy.

In this context, in line with Hamilton's (2013) thinking in relation to conditions of domination, the vast majority of citizens were therefore consistently subjected to conditions of domination as they were unable to determine, identify or express their agency and vital needs.

Although South Africa's transition to a democratic state in 1994 reversed these injustices and facilitated the freedoms that the vast majority of citizens were previously denied in theory, there are still power imbalances that exist in democratic South Africa today. At the centre of these imbalances is the Constitution. South Africa introduced a Constitution, which was promulgated with the intention of recognizing and undoing the injustices of the pre-democratic state (SA Constitution: 1996). At the heart of this -- as stated in its preamble -- has been the vision to "establish a society based on democratic values, social justice and fundamental human rights" (SA Constitution, 1996: 1). One of the mechanisms created by the state to rectify the injustice and create political equality was the Constitution. This would be in line with the concept of power as a set of mechanisms created to foster autonomy by helping the populace identify and express their needs.

However, despite these freedoms being awarded to citizens, the power relations have still remained skewed. In addition to the rights equally afforded to all citizens, the Constitution also attempted to create a system of accountability, openness and responsiveness by including the democratic principle of the separation of powers (SA Constitution, 1996). In it, the power of the state is divided between parliament, the judiciary and the executive. However, the challenge linked to power relations lies in the democratic system and the design of the electoral system that was decided upon by those who designed democracy.

In the preceding chapter it was shown that South Africa's democratic system choices have been problematic for accountability, effectively removing the power from the citizens to hold the government to account. Voters are only able to vote for a party; and the party leaders effectively determine who is chosen to be representatives in parliament. In addition, the legislators are only accountable to the party leaders, who control the resources. Although the state has effected legislation and institutions that encourage the three conditions that Dahl (1989) suggests need to be present for democratic procedures to take place, the implementation of these institutions have been problematic in certain instances and have necessitated citizens to have to navigate various power relations in order for them to encounter the conditions that Dahl suggests. This will be shown in subsequent chapters. The next section will evaluate the challenges with the legislation and various institutions from the perspective of the media and civil society.

3.4 Power, the media and civil society

An understanding of the power relations surrounding the media in South Africa needs to begin with broad understanding of the role of the media in a democracy. Various normative press theory models have informed the operations of the media, including the authoritarian theory, libertarian theory, social responsibility theory and soviet communist theory (Siebert, Peterson and Schramm, 1974). These press theory models have been widely cited and influential in defining what the press should do in society (Christians & Nordenstreng, 2004).

Social responsibility theory, as posited by McQuail (1987: 117), is considered the "dominant, mainstream doctrine in journalism and media policies" (Christians and Nordenstreng, 2004:7), and dictates that a socially responsible press has an obligation to society to be truthful, accurate, fair and objective. It should pursue high standards of informativeness, balance and it should be self-regulating within the framework of law and established institutions. It should also be accountable to society (Christians & Nordenstreng, 2004). These are all important and characterise the role of the media in society.

However, to understand the power dynamics that surround the media broadly, as well as the power relations surrounding the media and the state, it is important to evaluate the media's power in terms of its agenda setting ability. The crux of the theory proposed by McCombs, Shaw and Weaver and dates back to the early 1970s is that "news is able to tell us what to think about" (McCombs et al., 1997: 8). This theory has evolved into the media being able to dictate how people should think about topics, based on what the media decide to focus on and how they frame it (McCombs et al., 1997). This inevitably dictates how issues are perceived by the public. This theory is important as it provides a clear link between the media and 'control of the agenda'.

The argument, however, needs to be evaluated in terms of two scenarios: the first is that the media are able to exercise power because of their ability to distribute information that they consider important. The second scenario is that the media are also important because they facilitate the distribution of power to the citizen to help them hold officials to account. Based on McCombs, Shaw and Weaver's (1997) definition, they are also able to frame the information in the way they see fit, which has the outcome of influencing how the populace perceive the issue. As was highlighted in the preceding chapter, the media affect accountability by playing a critical role in encouraging existing institutions of horizontal accountability to do their jobs, questioning the state on its deliverables and informing society (Fox, 2000). What is evident is that the media is critical in facilitating the fundamental rights of citizens by disseminating information, which is critical to the democratic agenda. Often

colloquially referred to as the fourth estate, at the core of the media is the concept of accountability.

In this sense the media must be seen in the context of power conceived as a tool that can help the citizen develop agency and autonomy. The media play an important role in providing the citizenry with information that aids them in their decision-making processes. By contributing to the citizenry developing a more enlightened understanding, which in turn helps them to control their agendas and participate in their democracy more effectively, the media must be noted for the power that they hold in this regard.

From a democratic theory perspective, the discourse pertaining to the media has been varied – with various theorists (see Dahl, 1961; Sen, 2009 for example) arguing for the central role of the media and the importance of the media in entrenching democracy. Dahl (1961), for one, in alluding to the importance of the media, has argued that voters need information to make informed decisions. Information, however, is only possible through freedom of the press, freedom of assembly and freedom of speech. In his discussions on community power, Dahl highlights the media's particular role in being able to link directly to citizens, labelling them as "a kind of filter for information and influence" (Dahl, 1961: 256). He posits:

> The media of mass communications-newspapers, radio, television, and magazines-enjoy a unique immediacy and directness in their contact with citizens. They regularly and frequently enter the homes of citizens: newspapers once or twice a day, magazines once a week, television and radio several hours a day. They do not force their way in; they are invited. They receive the willing and friendly attention of the household; they are, presumably, welcome guests. The mass media are a kind of filter for information and influence. Since few citizens ever have much immediate experience in politics, most of what they perceive about politics is filtered through the mass media. Those who want to influence the electorate must do so through the mass media. Control over the content of the mass media is thus a political resource of great potential importance. Dictators and democratic leaders alike recognize this fact, the one by establishing, the other by trying to prevent a monopoly of control over the mass media (Dahl, 1961: 256).

Dahl (1961) speaks directly to the "influence" of the media, positing that officials are able to use its content as a political resource. When this is placed in the context of Dahl's criteria that need to be met in a democratic process, it is evident that the agenda setting ability links directly to access to information in that it facilitates Dahl's criteria: having an enlightened

understanding and controlling the agenda. Citizens are able to develop an enlightened understanding and are therefore able to hold those in power to account by sanctioning their behaviour. In turn the ability of citizens to exercise a constitutional right such as freedom of information means they are exercising their freedom. The challenge here arises in what Dahl calls information asymmetries. If, as Dahl suggests, the media is a political resource through which "people are able to gather information and knowledge to influence, directly or indirectly, the conduct of other people", particularly if it is concentrated in the hands of one person or group, the end result is that information can be unevenly distributed and accountability can therefore be skewed (Dahl, 1998: 178).

In addition to the democratic theory perspectives on the media, it is also imperative to evaluate the media in the context of power, as it has been defined in this thesis. From the perspective of power being the ability to set the agenda -- and in the context of the media's agenda setting ability posited through McCombs, Weaver and Shaw's (1997) agenda setting theory -- the media can be considered a powerful actor as it has the ability to set the agenda by controlling the information at the disposal of others. However, the converse is also true. The media can also find itself at the mercy of more powerful actors who exercise power over this institution through mechanisms such as censorship. This in turn places limitations on their ability to operate as an independent, free press, and adequately inform the public. In addition to this, 'disinformation' as another mechanism can also be used to exercise power over the media by weakening their ability to empower citizens to hold governments to account for their actions. Like disinformation, censorship is a mechanism of power that aims to suppress knowledge and mislead in order for the powerful actor to set and control the agenda. In so doing, ultimately, they can secure compliance. Although the media's ability to exercise power in terms of access to information will be discussed at a later stage in this chapter, it suffices to mention at this point that information is at the centre of the power discourse linked to the media, the state and citizens.

When power is conceptualised as a tool that gives the populace agency, the media is a critical institution, based on its ability to empower citizens to develop the autonomy they need to be able to identify, express and evaluate their own needs. Linked to this are the institutional mechanisms that have been put in place by the state to aid citizens in this process. If this is applied to the context of the media, the question that arises is whether or not the state-like authority has put any institutional mechanisms in place that aid the media in its ability to empower the public. If, the state, for example, limits media freedom, the ability of the media to aid citizens is significantly diminished. A culture of media censorship would effectively work against such institutional mechanisms. As Merrett (1982) states, this is dangerous as censorship has the ability to destroy basic beliefs in civil rights. However, the converse is also true: when the state ensures media freedom, it enshrines the role of the media as an institution that empowers the public. This can be seen in the South African context, where various pieces of legislation uphold the freedoms of the media. These include the Constitution (SA Constitution, 1996) as well as PAIA (PAIA, 2000).

Evaluating the media in terms of the fourth conception of power, in other words, as a tool set up by the state to empower the populace – or vice versa – there are various elements that apply to the media. For one the media needs to be monitored on a constant basis to ensure that the state does not use it as a site of domination. Secondly there are issues with political power being exercised through the media, which falsely appear to be independent.

Following from this, it is necessary to consider the power relations surrounding the media within South Africa.

3.4.1 The media and power in South Africa

In discussing the power relations surrounding the media in South Africa, it must be noted that the state and the media have had a strained relationship since the early years of apartheid. Various academics, particularly within media studies, have expounded this relationship (see Switzer, 2000; Jacobs, 1999; Berger, 2001; Wasserman, 2010), noting that

the media's reportage posed such a significant threat to the apartheid government that it instituted censorship laws as a mechanism to control the media. On the one hand the state had a warm relationship with the Afrikaans media and the public broadcaster, the SABC. In effect the media was seen as an extension of the state apparatus of apartheid and resulted in a general climate of distrust of the media and its intentions. On the other hand, the government struggled to contain the voice of the mainstream English and the alternative resistance media, which attempted to criticise its rule. Post-apartheid investigations into the media as an institution, that formed part of the Truth and Reconciliation Commission, highlighted the depth of the relationship between the Afrikaans media and the state and how it perpetuated the apartheid atrocities (TRC report: 1998).

The post-apartheid relations between the ruling party and the media in South Africa is one that has periodically been littered with tensions, triggered by various developments within the country's landscape. The distrust and the tensions were particularly relevant after the transition to democracy when the media houses were no longer subjected to the extreme censorship laws that came with the apartheid regime but were still mostly under the same ownership that they had been under apartheid. The differences between the media and politicians in post-apartheid South Africa came as a result of everyone in the political communication process not sharing the same view on how much freedom the media should have in the new democracy, or how that freedom should be applied (Wasserman, 2010). The clash, according to Wasserman (2010) is due to the way that the media believes it should fulfil this role, often differing from the state's version. Although these freedoms entertain an expectation of the media to perform "a 'watchdog' function, governments often prefer the media to support them in achieving national and developmental goals" (Wasserman, 2010: 241). This results in a constant tension between the state and the media.

In post-apartheid South Africa, a central element of the Constitution was the introduction of a Bill of Rights as the cornerstone of democracy, which enshrines the rights of all South Africans: espousing equality, human dignity, various freedoms such as freedom of

expression with freedom of the press as a subclause (SA Constitution, 1996: 7). Access to information is a central tenant of the Bill of Rights (SA Constitution, 1996: 13), stipulating that "everyone has the right to access any information held by the state" and specifying that national legislation needs to be enacted to give effect to this right. The media's role has been ratified by the Constitution in section 16 (1), enshrining the right to freedom of the press and other media (SA Constitution, 1996). On several occasions, the Constitutional Court has further defined this protection and spoken to the role of the media (Klaaren, 2014). In line with these constitutional obligations, the Promotion of Access to Information Act was established in 2000. This piece of legislation will be further analysed in the next chapter.

However, a stumbling block in the path of access to information has been the Protection of State Information Bill, which criminalises the possession and distribution of leaked state documents, has been tabled (Magome, 2015). The bill was tabled in 2010 and passed by both houses of Parliament (Magome, 2015) but has not yet been signed into law. Both former South African President Jacob Zuma and current president Cyril Ramaphosa have sent the bill back to parliament for reconsideration due to challenges by civil society that it is unconstitutional. The legislation has unfailingly managed to resurrect the tensions between the media and the state. The media believe the piece of legislation will curtail them from fulfilling their obligations as journalists but, the state believes the legislation is imperative to protect them from the media's reportage. The pending legislation presents an unprecedented threat to freedom of the press in post-apartheid South Africa but is stuck in legislative purgatory. The fact that two presidents have not signed it into law, however, reflects the agenda setting power of the media and civil society who have managed to successfully render it a political landmine.

In addition to the bill, there have been several efforts that could be seen as attempts to curtail the operations of the media. These have taken several forms.

For the last two decades, the ruling party (the African National Congress) has argued that the current self-regulatory system, guided by a press ombudsman and a press council is largely ineffective (ANC, 2007). Aside from public criticism of the media, the ruling party's official viewpoints of the media have been offered through a media policy and several subsequent discussion papers and policy documents. These views have, however, not remained consistent and their motivations have, on occasion, been questioned. The ruling party in 2013 resurrected the call for a media appeals tribunal and several high-ranking politicians, including former ANC secretary-general Gwede Mantashe (News24, 2012) and Blade Nzimande, general secretary of the party's alliance partner -- the South African Communist Party -- (Letsoalo, 2015), have lashed out at the media. Central to their rhetoric have been calls for a media appeals tribunal as an independent body to regulate the media. These are all indicative of the party's insistence on a heavy-handed approach to the media – and potentially the power imbalances that affect the media-state relationship.

It must be recognized that tensions between the ruling party and the media are not unique to South Africa -- or to the developing world (Boczkowski & Papacharissi, 2018) -- and can also be seen in many developed countries the world over. The challenge lies in the need to balance the rights to access information that is in the public interest and the state considering issues of national security. This will be discussed later in this chapter, specifically with regards to access to information.

However, if the interactions between the media and the state are seen in the context of the combined conception of power, there are two conclusions that can be drawn with regards to the media. First, power relations in South Africa's pre-democratic era were massively skewed in favour of the state which controlled the agenda with mechanisms such as censorship of the media and disinformation. As a result, most citizens were subjected to conditions of domination where they were misled in their attempts to identify their needs, and furthermore, they lived under a regime where institutional arrangements made it impossible for them to express their needs. Second, while post-apartheid South Africa

facilitated significant change in the form of freedom of the press and various pieces of legislation that encourage these practices, the state, through the ruling party, has attempted to use the pending Protection of State Information Bill, as well as threats of other regulatory measures, as techniques to exercise power over the media, which also has the potential to disempower citizens. It is necessary to specifically apply these scenarios in the context of the implementation of access to information in South Africa. The next section, therefore, evaluates the power relations that surround access to information broadly, but also in the context of South Africa.

3.5 Power and access to information

The preceding chapter has outlined how access to information laws enable citizens to develop an enlightened understanding, control the agenda and effectively participate in a democracy. At the centre of this is the idea of accountability and that the media and civil society as the main users of access to information mechanisms are central players, providing citizens with the ammunition that empowers them. However, to evaluate the power interactions in relation to the implementation of PAIA and how it impacts on the ability to improve democracy in South Africa, it is necessary to evaluate access to information in the context of the combined conception of power that has formed the basis of this chapter.

There are several power dynamics that affect access to information, and accordingly, two issues need to be unpacked: the implementation of the law itself and the issue of national security.

3.5.1 Implementation of the law

To understand the power challenges with regard to the law itself, it is necessary to briefly outline the different actors that engage with access to information and are therefore party to the power relations in some form or another. In the case of South Africa, in addition to the Constitution, which has made explicit provisions for the right to access information (SA

Constitution, 1996), there are citizens, media organisations and civil society groups as well as businesses that can make use of the access to information mechanisms. There is also the state broadly, which manages PAIA requests (PAIA, 2000). The state is represented here by officers that have been appointed within the bureaucracy to manage access to information requests as well as political appointments within government departments and entities that may come into contact with these requests.

A deeper evaluation of the challenges pertaining to the law itself will be dealt with in subsequent chapters. However, to understand the power relations that need to be navigated within this space, it is necessary to delve into a brief understanding of how the access to information law has been set up in South Africa. South Africa enacted PAIA in line with the Constitutional provision, which allows the populace to be able to access any information in the possession of the state. A member of the public who wishes to access information must make a formal application to the government department or entity from which it wishes to obtain the information. Once the application is submitted, the onus lies with the government department to release the requested information or to deny access. If the information is denied, the member of the public is able to appeal the decision. This appeal process is handled by the same department or entity through which the application was made. The only remaining remedy following a second refusal is for the applicant to approach the high court for the dispute. Information requests can be denied on the basis of the collation of the documents being too cumbersome and time consuming a process. And should access be granted, the department or entity involved can attach a cost to the processing of the documentation.

The provision of access to information must be seen in the context of the conception of power as a means to enable agency and autonomy by allowing the populace to identify their own needs and interests. In this regard, by providing the populace with an ability to access information empowers them by satisfying their political needs, which in turn provides them with the agency and autonomy to question the system. In addition to their political needs

being met, there is also the prospect that they are able to use the information that they gain access to, to aid them in their vital needs. For example, a community with no access to water that has been waiting on the government to fulfil its promise could use a request to the government about its expenditure on infrastructure to pipe water to their community. This could help them uncover why they do not have access to water and whether corruption or other foul play was involved in the delay. In line with this is the citizens ability to withstand domination by being empowered to question and constantly monitor the basic services they should receive.

At the same time the process needs to be seen in the context of the conception of power as the ability to set the agenda, particularly in relation to the manner in which access to information laws are implemented. Section 32 of the Constitution provides the populace with the right to access information effectively giving citizens the power to hold officials accountable for the actions. In addition to this, the PAIA legislation provides a provision also allows the state to deny the request. This must be seen in the context of the control of the agenda conception of power. When power is exercised through political inaction, the government ultimately controls the agenda.

PAIA legislation in South Africa can also be seen as one of the institutional mechanisms that the state has set up to guard against domination. Effectively, it can empower citizens to withstand domination when information is granted to the citizen. However, the state does have the ability to deny requests based on various prescripts within the legislation. Although the citizen can appeal this decision internally, often the final decision lies with a political appointee, who may still deny the information. This forces the citizen to seek recourse in order to uphold their rights through a potentially costly court case. This illustrates that institutional mechanisms in and of themselves are not a guarantee in guarding against domination.

3.5.2 National Security

The state's ability to deny requests for information, can also be seen as power conceived as a procedural arrangement set up within the state to maintain the power of the state. A prime example is the issue of government secrecy and the use of national security as justification to deny access to information. National Security is defined by the International Working Group on National Security as

> the first and most important obligation of government. It involves not just the safety and security of the country and its citizens. It is a matter of guarding national values and interests against both internal and external dangers – threats that have the potential to undermine the security of the state, society and citizens. It must include not just freedom from undue fear of attack against their person, communities or sources of their prosperity and sovereignty, but also the preservation of the political, economic and social values – respect for the rule of law, democracy, human rights, a market economy and the environment – which are central to the quality of life in a modern state. (IWGNS, 2013: np).

Globally there have been long standing scholarly debates on the need for secrecy laws versus the conflict of interest that it creates by withholding information (Aftergood, 2010). In the preceding chapter, it was shown that while secrecy in governments can be justified to protect authorized national security activities and prevent government's effectiveness from being undermined by having the information it has collected, developed or used being exposed (Aftergood 2010, White, 2002). Simultaneously, too much information being classified and withheld from the public in the name of national security (Aftergood, 2010: 840) can be seen as attempts by government to control the agenda. Duncan (2018) has argued that operational secrets should remain issues of national security and should not be released. But policy documents should be made available to the public for the sake of transparency and public accountability as democratic controls (Duncan, 2018).

The issue of national security vis-à-vis access to information has been addressed at a global level on multiple occasions in the last 30 years, most recently through the *Global Principles on National Security and the Right to Information*, the Tshwane Principles, signed and ratified in 2013 by several countries, including South Africa. The principles are collectively the work of 22 organizations and academic centres in consultation with more than 500 experts from

more than 70 countries who attended 14 global meetings on the matter. Four special rapporteurs on freedom of expression and/or media freedom and the special rapporteur on counter-terrorism and human rights were also consulted on the principles, which are based on international law, standards and good practices in an effort to guide those who drafted, revised, or implemented laws or provisions relating to the state's authority to withhold information on national security grounds or to punish the disclosure of such information (Open Society Justice Initiative, 2013).

The principles note that there are often tensions between governments' wish to keep information secret on the grounds of national security and the public's right to information held by authorities. While states can have a legitimate interest when they withhold information, including on the grounds of national security, it is critical for there to be an appropriate balance between the disclosure and withholding information (Open Society Justice Initiative, 2013).

The Tshwane Principles posit that national security interests can only be protected when the public is well informed about the state's activities. This must include decisions taken to protect national security. A legitimate national security interest is defined as an interest where the genuine purpose and primary impact is to protect national security, consistent with international and national law (Open Society Justice Initiative, 2013). It notes:

> A national security interest is not legitimate if its real purpose or primary impact is to protect an interest unrelated to national security, such as protection of government or officials from embarrassment or exposure of wrongdoing; concealment of information about human rights violations, any other violation of law, or the functioning of public institutions; strengthening or perpetuating a particular political interest, party, or ideology; or suppression of lawful protests (Open Society Justice Initiative, 2013: 5).

It argues that enabling public scrutiny of state actions safeguards against abuse by public officials and allows the public to engage in determining the policies of the state. Linked to this, barriers in oversight created by national security increases the risk that illegal, corrupt, and fraudulent conduct may take place and not be exposed. The violations of privacy and

other individual rights often occur under the cloak of national security secrecy (Open Society Justice Initiative, 2013).

In line with the Principles, when governments withhold information, it should be subject to the principle that the public interest in maintaining the information's secrecy clearly outweighs the public interest in access to information. The Principles also define information that could legitimately be withheld. This includes information about on-going defence plans, operations, and capabilities for the length of time that the information is of operational utility. The second is information linked to the production, capabilities, or use of weapons systems and other military systems as well as any communications systems. The third relates to information about specific measures put in place to safeguard the state's territory, critical infrastructure, or national institutions from threats or use of force or sabotage. For these to be effective, secrecy is critical. The fourth is linked to information from the operations, sources, and methods of intelligence services, which concern national security matters. The fifth is information is about national security matters supplied by a foreign state or inter-governmental body with an express expectation of confidentiality; and other diplomatic communications. However, it argues that violations of international human rights and humanitarian law should be disclosed (Open Society Justice Initiative, 2013).

Prior to evaluating national security in the context of power, it is critical to look at the two concepts in the context of South Africa. In South Africa, state security is managed through four pieces of legislation: The Constitution (1996), the Intelligence Service Act (2002), the National Strategic Intelligence Act (1994) and the Intelligence Oversight Act (1994). In addition to these, there are also the Minimum Information Security Standards (MISS) regulations (1996). These regulations relate to the manner in which documents are classified. In terms of this classification, documents are classified by the head of the institutions where they originated, who is also the only person who can authorise reclassification.

However, Cawthra (2013) argues that South Africa's current approach to national security and access to information needs to be embedded in an historical context. It is important to note, he argues, that South Africa has moved from being described as a police state in the 1950s to one that was heavily militarized by the late 1970s to one in the new South Africa where national security was no longer predominantly viewed as a military and police problem. He explains that through the Constitution, South Africa's democratic approach to national security has been one of safety and security for all citizens (Cawthra, 2013).

However, there are challenges with the country's approach to national security. According to Cawthra (2013), there is no coherent national security policy and an internal intelligence structure has been responsible for drafting the strategy despite it being against the tenets of good governance. This approach lacks transparency. He also raises the issue of the Protection of State Information Bill, discussed earlier, as well as the General Intelligence Laws Amendment Act, both of which have been questioned as mechanisms the government could possibly use to override the generous provisions of PAIA with regard to national security. In the case of the General Intelligence Laws Amendment Act, which seeks to enable any state department to request the intelligence services to establish a 'vetting field work unit' in gathering information (General Intelligence Laws Amendment Act, 2013), it has been criticised for its provisions that may be subject to abuse similar to the abuses in the previous political dispensation. Cawthra (2013) argues that there is currently a balance between right to information and national security because the current and pending legislative and administrative arrangements are not skewed in favour of anyone. However, he posits that there are "worrying signs that the balance is shifting away from the right to information to state security imperatives" (Cawthra, 2013: 14). He surmises that this move could be as the result of the spread of disinformation for intra-party politics and the concern that the government is seeking to cover up what appears to be a gold-rush of corruption (Cawthra, 2013).

Africa (2009: 156) argues that although the 1982 Protection of Information Act has been replaced, there are various "vestiges of the old political order, the law and administrative instruments designed to protect classified information rest uneasily with the new constitutional right of access to information". The classification of documents is a significant concern for access to information, says Africa as all the structures that perform the oversight duties on the intelligence community operate in the circle of secrecy of the intelligence services' and accept what the intelligence services consider as classified (Africa, 2009: 165). Africa (2009) argues that while MISS is a post-1994 cabinet directive, it is based on an administrative instrument inherited from the apartheid era. The challenge, argues Africa (2009: 156), is that under the MISS, "officials outside the intelligence services are allowed to classify information in their possession, and limit its disclosure and distribution [... as] there is very little oversight of this process, information that may not require protection is beyond ordinary public scrutiny".

To understand the power dynamics relating to South Africa's national security matters, the points raised by Cawthra (2013) and Africa (2009) need to be seen in the context of power in its combined conception. The agenda control element of power is applicable in this instance in the sense that the current MISS regulations, which allows the government the unfettered ability to classify documents at will, could be considered as mechanisms by the government to unnecessarily control the agenda by withholding information from the populace. In the same vein, in line with the conception of power as procedural arrangements that are set up to maintain power of the state, the MISS regulations particularly, and the pending legislation in the form of the Protection of State Information Bill, as discussed earlier, also skews the power balances between the populace and the state.

3.6 Conclusion

Power remains a much-debated topic within democratic theory. As has been established in this chapter, power has been conceived as a) a set of relations between two actors that must

be navigated to limit domination; b) a set of mechanisms that can be used to set the agenda by controlling the information at the availability of the populace; c) the ability of the citizenry to develop the agency to determine their own needs; and d) procedural arrangements within the state that either maintain domination or help the citizen identify and express their needs.

It is important to recognise that power has been conceived as both 'power over' as well as 'power to' and that it is necessary for power within a democracy, and within the access to information space particularly to be considered as a fluid concept.

This chapter has clearly set out how power relations need to be navigated on various levels within a democracy generally but also with regard to South Africa and specifically as regards the populace's ability to access information in the country.

It has shown that although the South African state no longer officially uses mechanisms such as censorship, they are still able to exercise power over the populace and set the agenda through political inaction or the suppression of knowledge. This is particularly the case with regard to the access of information in its possession. However, through the use of the legislation – and with the help of the media – the citizens can be empowered to hold the state to account. The fluid situation relating to power in the South African context speaks to insights into power relations being part and parcel of the populace's lives which are formed based on their beliefs, wills, preferences, subjectivity and willingness to consent to domination.

Broadly evaluating power relations in the landscape of access to information rights in South Africa, the promotion of access to information law itself must be seen as a mechanism created by the state to enable freedom broadly. However, as has been shown, there are various instances where the state has the ability to hold the power by using technologies and techniques to maintain sites of domination.

There has also been a significant focus on the importance of the populace being empowered by the state through institutional mechanisms that provide them with the necessary autonomy to question the power relation and navigate instances of domination.

South Africa's Promotion of Access to Information laws need to be considered in this context, as they fundamentally empower citizens to request information that they need to question and navigate the power relation and therefore potential cases of domination. The populace is able to use the legislative prescripts to inform their political needs and this agency in turn has the ability to inform their vital needs. Simultaneously, it must be noted that the challenges with regard to the implementation of the law – and specifically the populace's limited ability to appeal instances where information is denied – can be seen as the state not providing sufficient institutional arrangements for the populace to affect the procedural power that they need to enforce their agency needs and withstand domination.

The next chapter will evaluate the practical application of PAIA. It will outline how the PAIA laws work and provide context for the application of the law in South Africa by evaluating how access to information laws work in other countries. It will evaluate the number of requests that are made on a daily basis and it will outline some of the successes and challenges on an international basis in an attempt to eventually set out how the local landscape of access to information in South Africa compares. This will be done on an international basis in addition to the perspective of countries implementing access to information on the African continent.

4

4. AN EVALUATION OF THE LEGAL FRAMEWORK OF ACCESS TO INFORMATION IN SOUTH AFRICA

4.1 Introduction

Globally, access to information (ATI) has been recognised as a driver of sustainable development, and has been noted on the 2030 Agenda for the UN's Sustainable Development Goals, specifically under goal 16, to promote just and inclusive societies (UN SDG goal 16) (UN, 2015). Target 10 of this goal is that "all countries pledge to ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements" (UN SDG goal 16) (UN, 2015). It is important to note that in addition to the targets relating to goal 16, access to information has also become recognised as "a tool to improve the implementation and monitoring of other SDGs at national and international levels" (Africa Freedom of Information Centre, 2018: 32).

Compared to other ATI laws globally, the law is in line with general freedom of information standards. However, when the law was first promulgated in South Africa, it received global recognition from ATI scholars for progressively targeting both the public sector and private bodies, which is not common across the world. A number of scholars have dedicated significant academic activity to comparative studies of access to information reforms in an attempt to understand which model -- or approach to access to information, also often termed as freedom of information -- is ideal (La May et al., 2013). These have included studies that monitor the trends in the adoption of legislation by countries (Banisar, 2006) as well as other studies that have scored or analysed the content and implementation of these laws to

understand how these mechanisms of access to information have played out in specific contexts (La May et al., 2013).

In conducting a global comparison of access to information laws, South Africa is categorized as one of close to 30 countries that passed freedom of information laws as part of a process of democratic transition, or in the process of drafting a new constitution (Ackerman & Sandoval-Ballesteros, 2006). These include Spain, the Philippines, South Korea, Portugal, Mexico, Thailand, and the 22 countries that were part of the Soviet Union. According to Ackerman and Sandoval-Ballesteros (2006), who evaluated the laws in these countries, these laws all tend to be strongest on paper. However, their application – and ultimately the success of the legislation – is dependent on the status of democracy in these countries and on other external pressures that may limit the spread of the freedom of information.

These countries are in contrast to the historic pioneers: ten countries that were able to pass laws before the worldwide wave of democratisation of the 1980s, which include Sweden, Finland, Denmark and Norway, the ex-British colonies – being Canada, Australia the United States – as well as France and Colombia. Within these historic pioneer countries, according to Ackerman and Sandoval-Ballesteros' analysis, the laws function relatively well but fail to have any innovative or progressive legislative prescripts. For example, the Swedish law, which is the oldest freedom of information law in the world, has not been revisited to ensure that it reflects some of the more recent developments and innovations with regard to public information being classified as documents in the possession of the state (Ackerman & Sandoval-Ballesteros, 2006: 103). Another example can be seen in the US, where the freedom of information law that was introduced in 1966 also fails to include access to information to certain government offices nor includes public interest overrides (Ackerman & Sandoval-Ballesteros, 2006).

While global comparisons are helpful to establish how the access to information laws compare and establish which elements are included in ATI laws, for the purposes of this

research project, it is more important to evaluate the legislation in South Africa to understand the value of the law to the people who should utilise it regularly.

In South Africa, the right to access information is underpinned by the country's Constitution which outlines how all citizens have the right to access information in the possession of the state as well as information held by private bodies (PAIA, 2000: 11). In order for this Constitutional objective to be fulfilled, the South African government formally promulgated the Promotion of Access to Information Act (PAIA) in the year 2000 – four years after the country adopted its new democratic Constitution (SA Constitution, 1996), with the act coming into effect in 2001. The designers of the Constitution included the right of access to information to "promote a human rights culture and formally strengthen the country's mechanisms of social justice" (PAIA, 2000: 12). This would be in contrast to the previous authoritarian dispensation, which relied on a heavy culture of secrecy, censorship and the dismissal of political rights, to the vast majority of the country's population.

However, to understand how the promulgated law provides credence to the right to access information and ultimately contributes to democracy in South Africa, it is necessary to evaluate and unpack the legislative prescripts of access to information in South Africa.

The overarching aim of this chapter is therefore to understand the legal framework within which access to information is embedded and, in so doing, to evaluate the goals of the law with regard to the country's obligations to democracy. This would contribute to creating a framework that will aid in the understanding of the practical application of the law that will follow in later chapters.

This chapter is therefore divided into three parts. In the first part, to contextualise this legal framework, the chapter will begin by unpacking the law, to understand how the law is envisioned to function. As part of this exercise, it will evaluate the effectiveness of the law, looking at it in comparison with a model framework for access to information in an

international context. Following from this, in part two, the chapter will evaluate the validity of the law looking at its goals and objectives and how these objectives can be interpreted. Finally, in part three, it will examine how the law enables access to information and whether this is in line with the democratic obligations of the state.

4.2 The South African legal framework for PAIA

The right to access information is clearly set out in the South African Constitution, in section 32, under the Bill of Rights. The section notes that "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 exercise or protection of any rights" (SA Constitution, 1996: 13). It goes on to say that "national legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state" (SA Constitution, 1996: 13). Following this instruction, the constitutional obligation was given effect in the Promotion of Access to Information Act 2 of 2000 (PAIA, 2000).

The PAIA law provides extensive direction on the application of PAIA, providing guidance on the law for the users -- or requesters of information -- as well as the officials that must administer the law as well as those that must oversee and monitor the administration of the law. When the legislation was first promulgated, the South African Human Rights Commission was appointed as the custodians of the Act, under the auspices of the Department of Justice and Constitutional Development. However, the responsibility has been transferred to the Office of the Information Regulator, which was established under the Protection of Personal Information Act (POPIA) (Act 4 of 2013). The Office of the Information Regulator manages the access to information law as well as the privacy law.

PAIA also sets out how information can be released and under what conditions it cannot be released along with the process that needs to be undertaken in each instance. There are

various stakeholders that exist in the application of the law. Primarily, there is the person requesting information – the requestor – as well as the information officer and a deputy information officer that needs to be appointed in each public body. In private bodies, a designated information officer should be appointed.

The law sets out the procedures to follow when someone wants to navigate a request for information. It also outlines the responsibility of the state in response to these requests. Within public and private bodies, the deputy information officer is the person who will receive the initial request for information and manage the process of retrieving the information from the necessary departments within the body. The deputy information officer is unlikely to have all the records needed on hand and will have to request for the information. The information officer is, however, the official who will maintain contact with the requester of information.

In its current form, PAIA applies to any record held by a public body as well as any record held by a private body, "regardless of when the record came into existence" (PAIA, 2000: 11). According to the law, the information officer cannot use a reason that someone has provided to request a record from a public body as a basis of denying them access to that record (PAIA, 2000: 14). For instance, should someone require information for a book they are writing, the information cannot be denied based on the fact that the information will be used in a book. However, when the records are in the possession of private bodies, the applicant needs to explain how the record is required for the exercise or protection of any of their rights (PAIA, 2000: 36).

4.2.1 Procedures for requests

To obtain a record – or piece of information – there are various procedural requirements on requesters as well as those who manage the act, in terms of PAIA. For the user to access a record, the requester needs to complete a prescribed form which should be given to the

official physically or via email or fax (PAIA, 2000: 17). Requesters need to specify which record is being requested and include their particulars in order for the official to notify them of the outcome of the request (PAIA, 2000: 17). Requests can be made on behalf of someone else, provided that there is proof of the capacity in which the person making the request is acting. In addition, if someone is unable to complete a request due to illiteracy or a disability, they are, according to the law, allowed to make the request orally to the information officer, who is responsible for reducing the request into writing (PAIA, 2000: 17).

Information officers have 30 days to make a decision on whether or not access to a particular record is being granted (PAIA, 2000: 22). If the request is granted, the officer needs to inform the requester of the cost attached to the request as well as the manner in which access will be given. The information officer is also obliged to indicate that the requestor has the right to lodge an internal appeal or court application against the fee that is required to be paid or the manner in which access is being granted. If, for example, this fee is unaffordable for the requester, this could form the basis of the internal appeal. The official also needs to explain the procedure to lodge the appeal process against the decision relating to the release of the information and explain the period in which this appeal can be lodged (PAIA, 2000: 22).
Should the officer require more time to deal with the request, the officer can extend this period by another 30 days (PAIA, 2000: 22). There are several reasons on which this extension can be based. For one, the period can be extended if the request is for a large number of records or requires a search through a large number of records. The argument would be that compliance would unreasonably interfere with the public body's activities (PAIA, 2000: 22). Alternatively, it could be because the request requires a search for records in a different office or town to where the information officer is based. Due to the distance the request would not reasonably be completed within the original period. Another reason is that the office needs to consult with divisions of the public body or with another public body to decide on the request, meaning that the request cannot reasonably be completed within the original period. According to the law the applicant must consent to the extension. However, if an information officer does not make a decision on a request for access within 30 days, the

information officer is, for the purposes of this Act, regarded as refusing the request (PAIA, 2000: 23).

4.2.2 Grounds for refusing a request

There are various records that can be withheld, according to PAIA, which are listed under chapter 4 of the Act (PAIA, 2000: 26). There are, however, various processes that need to be followed in this regard. If access is not granted to a record, the information officer must provide a notice with a reason for the refusal in line with the provisions of the Act, and provide details on how this decision can be appealed. In these instances, the information officer must have relied upon sufficient evidence that the ground of refusal applies (PAIA, 2000: 22).

Sections 23, 34 and 36 to 45 under chapter 4 of the Act provides specific grounds for the refusal. These grounds range from a provision that a record cannot be found or that it does not exist (section 23) to the disclosure resulting in the unreasonable disclosure of personal information about a third party (section 34) (PAIA, 2000: 26). In the case of the latter, information can be withheld if the information is designed to protect the that third party, which could be commercial information of the party itself. This could be a document that contains trade secrets of the body or third party, as noted in section 36 (PAIA, 2000: 27) or info that violates the safety of a person (section 38) (PAIA, 2000: 28). In addition, information supplied in confidence by a third party, which could disadvantage the body in a contract or other negotiations or prejudice the body or third part in commercial competition can also be refused. Information officers can also refuse access to a record if the disclosure of the record could result in a breach of the duty of confidence owed to a third party in terms of an agreement. For public bodies, a request may also be refused if the record consists of information that was given by a third party in confidence, particularly if this information -- once disclosed -- could prejudice the future supply of similar information. This could also be applied if it is in the public interest that similar information or information from the same

source should continue to be supplied. If the record relates to research information (section 43) (PAIA, 2000: 32) or if it reveals the operations of public bodies (section 44) (PAIA, 2000: 33), the request can also be dismissed.

According to PAIA, records held by the South African Revenue Service can also be withheld (section 35) (PAIA, 2000: 27), or if it is a police docket from bail or other legal proceeding that would hamper the protection of the law (section 39 and 40) (PAIA, 2000: 28-30). In addition to this, an information officer may refuse a request for access under various conditions that would impact the operations of the body. For one, a denial could be based on a record containing an opinion, advice, report or recommendation that was obtained to help formulate a policy, take a decision or perform a duty conferred or imposed by law.

Another ground of refusal is available if the disclosure could frustrate the deliberative processes in a public body, or inhibit candid communication of an opinion, advice, report or recommendation. Additionally, if an information officer considers a request as frivolous, vexatious or a substantial and unreasonable diversion of resources (section 45) (PAIA, 2000: 33-34), the information can be withheld.

There are also several grounds under national security in which a record can be refused. An information officer may, for example, refuse a request if disclosure could prejudice the defence, security or international relations of the republic (section 41) (PAIA, 2000: 30) or the financial welfare of the country (section 42) (PAIA, 2000: 31). The information officer may also refuse access to the record if it reveals information supplied in confidence by another state or international organisation.

However, in all these instances, it is important to note that there is a public interests override. According to this provision in section 46 (PAIA, 2000: 34), despite there being a ground of refusal for information, the information officer must grant a request for access if disclosing the record reveals evidence of a substantial contravention of the law; a and

serious public safety or environmental risk; and if the public interest outweighs the harm considered in the refusal. Also, there is also a provision that a redacted version of the record could be made available.

As has been illustrated, while there are a number of reasons why information requests can be denied, the law has made provision for a public interest mechanism to ensure that denials are not abused. This includes an internal appeals process as well as the ability of people to approach the court for further reprieve.

4.2.3 Appeals

When requesters are unhappy with a denial of information, the Act provides them with the opportunity to appeal the decision via an internal appeals mechanism (PAIA, 2000: 47). Sections 74 to 77 lay out the procedures that the requester should undergo to engage with an internal appeal. It also set out the responsibilities of the appeal body. The requester has 60 days from the time they have received the decision to deny information to lodge an appeal. There is, however, an appeals fee that must be paid before the appeal can be deliberated on. Once this fee is paid, the information officer needs to provide the appeals body with the internal and their reasons for the decision concerned.

In section 78 of PAIA (PAIA, 2000: 50), the Act outlines the process that requesters can undergo if they wish to approach a court to review a decision made with regard to an application for access to information. This includes the denial of a request, an appeal against an information officer's decision to extend the time period for responding to a request, the decision to charge a fee for the request as well as the amount being asked by the information officer and the decision by an information officer to grant access in a form other than that outlined in the original request. Third parties may also approach the courts to review decisions to release records that contain information about them. The act specifies that appeals to the court for judicial redress must be made within 30 days. Further to this, section

82 of the Act allows the court to grant any order that confirms, amends, or sets aside the decision that is the subject of the application.

4.2.4 Responsibilities of public bodies

According to the Act, public bodies are required to publicise and make certain records available. Sections 14 to 16 of the Act makes reference to a manual that each public body must publish on an annual basis. The aim of this manual is to explain the functions of the body, provide an index of the records that it holds and the records that are voluntarily available to the requester without the need for a formal application. The Act stipulates that within all public bodies, the information officer of the body concerned is responsible for the compilation of this manual, which needs to be printed in at least three official languages and must include comprehensive contact details for all the information and deputy information officers. The manual should be available online and through physical copies at the offices of the department it represents. It should also explain the remedies available to the person requesting the record, should the request be denied or if the body fails to act in accordance with the law. The act gives the minister the power to exempt any public body or category of public bodies from producing this manual, based on the discretion of the Justice and Constitutional Development Minister (PAIA, 2000: 15). In addition to this, it also places an onus on the information officer to, on an annual basis, provide the Minister with a list of records that is voluntarily disclosed and automatically available to the public. The official needs to identify the fees attached to records requested and which are free of charge as well as an explanation of how to access these records. Each public body, under sections 17 to 32, is obligated under the law to appoint deputy information officers to manage requests for information as well as an information officer.

The law also places a significant responsibility on information officers to assist people who request access to information, stipulating that information officers must render “reasonable assistance to people to ensure that their requests are compliant with section 18 (1) by

providing them with information that could ensure that their requests are compliant and by transferring requests that do not fall into the scope of their departments" (PAIA, 2000: 17).

Under section 32 of the law, each information officer is required to provide the South African Human Rights Commission with a comprehensive report each year that details the number of requests for access to information they received as well as the number of requests that were granted in full; those only partially granted in terms of section 46; the number refused in full as well as those refused partially. The report also needs to elucidate the following:

- the number of times each provision of the act was relied on to refuse access in full or partially
- how many cases were extended
- the number of cases that resulted in an internal appeal being lodged
- how many requests were granted after the appeal
- how many were still refused
- how many cases went to court, and
- how many of those cases were overturned

According to the act, the SAHRC was tasked with monitoring the implementation of the Act. In order to ensure the effective implementation of PAIA, the body has to educate and train information and deputy information officers as well as the public more broadly about the law and how it works. In addition, the SAHRC has the following roles, which include a) being given the power to make recommendations to develop, improve, modernise, reform or amend the Act or other legislation; b) recommending procedures that public and private bodies should engage in to make information electronically available; and c) making recommendations to any public or private body on the changes it can make to improve how it administers the Act (PAIA, 2000: 52-53).

As stated in the Act, as part of its obligations and functions, the SAHRC has been responsible for the compilation of a guide that is to provide information on how to use this Act. The

Commission has also had to submit reports to the National Assembly providing updates on the progress of the legislation, and develop and conduct educational programmes to help people understand how to exercise their rights alongside training information officers and deputy information officers of public bodies on the law and its implementation. They were also tasked with promoting accurate information by public bodies about their activities. They needed to obtain reports from both public and private bodies about the problems they encountered in trying to comply with the Act. In addition to this, they had to obtain advice and proposals or recommendations from any public or private body, official of such a body or member of the public.

These responsibilities have since been transferred to the Office of the Information Regulator, which was established through a clause in the newly promulgated Protection of Personal Information Act (POPIA, 2013). The establishment is one of the amendments to PAIA that has taken place in the last five years and will be discussed in the next section.

4.2.5 Amendments to the Act

Following the initial version of PAIA, there have been various amendments to the act. The first is the Promotion of Access to Information Amendment Act, 2002. This includes a provision for Magistrate's Courts in South Africa to hear PAIA appeal cases, provided that the presiding officer of the court hearing the matter has received training on PAIA.

The second amendment follows the promulgation of the Protection of Personal Information Act in 2013, which resulted in PAIA being amended to reflect the appointment of an Information Regulator, and the Office of the Information Regulator as the body responsible for the management of the Act as opposed to the SAHRC. There are now three sessions in PAIA that outline the responsibilities of the Information Regulator. In terms of POPIA, the information Regulator was established based on section 39 of the act to exercise the powers conferred on it within PAIA. The aim of the POPIA is to a) promote the protection of personal

information that is processed by public and private bodies; b) establish requirements on how personal information is processed; c) establish an Information Regulator to exercise certain powers and to perform certain duties and functions in terms of this Act and PAIA ; d) provide for the issuing of codes of conduct; e) provide rights for people regarding unsolicited electronic communications and automated decision-making; and f) regulate how personal information flows across the country's borders.

The importance of the Office of the Information Regulator for the purposes of PAIA is that it has provided requesters with an additional avenue of recourse. People who unsuccessfully request information in terms of PAIA are able to appeal the decision via the Information Regulator as set out in section 77a of PAIA. The Information Regulator, according to section 77c, will have set up an enforcement committee that will deliberate over appeals and make a finding on the matter along with a recommendation which the Regulator will communicate to the appellant. The Information Regulator will also issue an information notice to the implicated information officer with the necessary action that should be taken (section 77I). The final enforcement notice will either confirm, amend or set aside the decision which is the subject of the complaint.

The third amendment to the Act, is linked to the Political Party Funding Act. In May 2020, President Cyril Ramaphosa signed into law the PAIA Amendment Act (Act 31 of 2019). The Act has amended PAIA to provide information that records how political parties and independent candidates are privately funded. This information must be preserved and made available.

The amendment was based on a Constitutional Court ruling in June 2018 which confirmed a ruling by the Western Cape High Court that PAIA was unconstitutional in that it did not provide for the disclosure of political parties' private funding information. In the ruling, Chief Justice Mogoeng Mogoeng ruled that the appropriate amendment of PAIA to allow for the disclosure of this information be done by Parliament within 18 months. The Portfolio

Committee on Justice and Correctional Services called for oral submissions on the amendment of PAIA (Masangwana, 2019).

Following this amendment, the Political Party Funding Act came into fruition in April 2021, which regulates public and private funding of political parties. It also established a fund that would provide political parties represented in Parliament and legislatures with funding to undertake their work. It requires donations be disclosed by parties and donors to the Electoral Commission of South Africa. The Act prevents donations to parties by foreign governments or agencies, foreign nationals or entities, organs of state or state-owned enterprises. Parties may, however, receive funding from foreign entities for training, skills development or policy development. A member of a political party may not receive a donation other than for political party purposes. The relevance of the PAIA amendment along with the Political Party Funding Act is that it now compels parties to record, preserve and make available these records and allows the records to be accessible through requests for access to information. In a statement released by the Presidency after the announcement was made, Ramaphosa said:

> The implementation of the Political Party Funding Act will have far-reaching consequences for good governance and ethical political activity. It will strengthen the confidence of citizens in the democratic political process and enable them to assert their right to information. The commencement of the Political Party Funding Act on 1 April 2021 is part of the commitment of this administration to improving transparency and accountability in government (SA Presidency, 2021).

In addition to the amendments, it is noteworthy to mention that there are various civil society groups that have been agitating for further reforms to PAIA. Led by Media Monitoring Africa, the South African National Editors Forum, the groups have embarked on a process to draft the proposed amendments to PAIA. The proposed amendments seek to bring PAIA in line with the regional human rights standards on access to information, which includes the Declaration of Principles on Freedom of Expression and Access to Information in Africa and the Model Law on Access to Information for Africa, collated by the African Commission on Human and Peoples' Rights (ACHPR).

There are also various regulations that have been issued in terms of the act. The Department of Justice and Constitutional Development's website notes close to 100 regulations that have been issued since the promulgation and deals with the practicalities of the act. These include issues such as exempting private bodies from producing PAIA manuals.

Based on the detailed explanation of the act, the question that remains is how effective the act is in its current form. The next section aims to interpret the objectives of the law and to evaluate whether the legal arrangements of the law are the most efficient way of achieving the goal of access to information.

4.3 The fundamental objective of the law

In assessing the law, it is important to evaluate the way in which the law has been designed, to understand what the law aims to achieve as well as whether it is able to achieve its objectives given its current formulation. In the South African context, there are two elements that need to be considered: first, the links between PAIA and the Constitution and what this means; and second, the objectives of the law, which need to be weighed up alongside the implementation of the law to establish how realistic they are.

4.3.1 Links to the Constitution

From the start of this chapter, references have been made to the inclusion of the right of access to information in the Constitution of South Africa. The inclusion of the right in the constitution needs to be seen broadly in the context of developing countries' commitment to constitutionalism, as posited by Shyllon (2018). It is important to note that globally many countries have not included the right of access to information in their Constitutions. Research conducted by the website Right2Info.org in 2018 shows that only 60 of more than 119 countries that have access to information laws have afforded it constitutional status (Right2Info, 2018). However, according to Shyllon (2018), access to information has

become a common feature of newly adopted constitutions, and particularly those on the African continent, as the introduction of the constitutional protection of human rights has become the norm. This, in turn, has been considered a sign of good governance and has therefore become a crucial condition for countries to receive financial aid (Shyllon, 2018). Good governance, based on the United Nations' Development Programme's (UNDP) overarching definition is an "array of practices that maximise the common good of a country" (UNDP, 1997: 5). This includes the participation of citizens in the decision-making processes of the country, respect for the rule of law, transparency, with the free flow of information and accountability with governments and the private sectors being accountable to the general public (UNDP, 1997). What this means is that while many developing countries have included the access to information ideals in their governing frameworks, their implementation of access to information has not been as forthright.

In developing countries particularly, access to information has been associated with fostering a culture of transparency and participatory and accountable governance as well as attempts to combat the arbitrary exercise of government power, corruption and mismanagement of national resources. As Shyllon (2018: 74) notes, "the alignment of constitutional provisions with democratic principles has become a method of affirming commitment to constitutionalism and respect for human rights". The inclusion of the right in the country's Constitution therefore affords it constitutional protection, which means that there is an obligation on the state to respect, fulfil, promote and protect the right (Bovens, 2002).

From a South African perspective, Peekhaus (2014:23) argues, the inclusion of this right "reflects an underlying belief in the critical linchpin role this right plays in advancing the civil, political, and socio-economic rights contained in the Constitution's extensive Bill of Rights". This is a sentiment echoed by several other scholars and ATI proponents (Tlakula, 2015; Diallo & Calland, 2013; Calland & Bentley, 2012; Calland, 2003; Adeleke & Ward, 2015; Adeleke & Mabaso, 2016; Adeleke, 2019; Bovens, 2002), who similarly argue that access to

information is an “enabling right” (Tlakula, 2015) or “power right that redefines power relations between different social and governmental actors” (Diallo & Calland, 2013) and has the ability to unlock and realise other socio-economic rights for citizens. Calland and Bentley (2012: x) argue that while rights are usually understood as claims and liberties, access to information is “a different species of right”. This is because the right to access to information does not result in a concrete outcome of socio-economic rights such as healthcare, education or housing, but empowers the right holder to demand information from the state (or private body) to question the delivery of a socio- economic right. By doing this, it makes the state liable and changes the balance of power to hold the body to account. What is critical here, according to Calland and Bentley (2012) is the fact that less powerful actors have the opportunity to engage meaningfully with more powerful actors over political choices that will have an impact on their interests.

Since the access to information law was promulgated and came into effect in South Africa, there are countless examples which bear testimony of the way that the law unlocks socio-economic rights. Adeleke and Ward (2015) refer to a seminal court case on PAIA that has shown the utility of the right to enforce socio-economic rights in South Africa. The Vaal Environmental Justice Alliance, a community group, took on steel manufacturing giant ArcelorMittal, challenging it to close its disposal site because they alleged that the company was dumping hazardous waste. The community group requested access to the company’s environmental impact assessment documents that proved their allegations. The community’s argument was that the information was needed to protect their right to an environment unharmful to their health, as guaranteed under section 24 of the Constitution. The information request was denied by the relevant information officer, but the community appealed to the High Court, which affirmed that community-based civil society organisations are entitled to monitor, protect and exercise the rights of the public. It noted that they could seek information to assess the impact of various activities on the environment. It granted the appeal and directed the company to release the documents. This decision was upheld by the Supreme Court of Appeal when ArcelorMittal appealed.

In another case at a pilot ATI law clinic set up at the University of the Western Cape in 2010, PAIA was used to access information from the City of Cape Town on behalf of a community forum that represented over 200 families who were to be evicted (Adeleke & Mabaso, 2016: 881). Access to these documents eventually led to litigation by the clinic on behalf of the communities. At a similar pilot site set up in Soweto as a partnership between the SA Human Rights Commission and the University of the Witwatersrand's Centre for Applied Legal Studies, PAIA was used for a woman who was billed exorbitantly by Eskom for an alleged outstanding electricity bill more than a decade after selling the house (Adeleke & Mabaso, 2016: 892–3). After the request for information was sent to Eskom, it provided the records which revealed that due to an error at Eskom, it had failed to correctly record that the client was no longer the registered owner of the property, and was therefore no longer liable for electricity usage. The matter was successfully resolved without the need for litigation (Adeleke & Mabaso, 2016).

These three brief examples highlight how PAIA can help people to exercise and protect other constitutional rights and in fact, realise their rights. However, in addition to these constitutional links that can be drawn, it also demonstrates the significance of community involvement in the fight for socio-economic rights and how the PAIA is central to navigate the power relations between actors by giving a voice to people who could be overlooked in a political space. They also underscore the constitutional justifications offered by Peekhaus (2014), Calland and Bentley (2012) and Diallo and Calland (2013), which provide an ideal basis to begin unpacking the PAIA law and its objectives. The act clearly outlines the South African government's intention to institutionalize societal participation and civil engagement, given the historical context of South Africa.

4.3.2 The objectives

The preamble of the Act recognises various injustices that took place during apartheid in South Africa and notes that the pre-democratic system of government resulted in "a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations" (PAIA, 2000: 3). According to the preamble, the Act "was established in order to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information" (PAIA, 2000: 3). The Act aims to "actively promote a society in which the people of South Africa have effective access to information to enable them more fully to exercise and protect all of their rights" (PAIA, 2000: 3). In section 9 of chapter 3, under general introductory provisions, the act also notes several objectives (PAIA, 2000: 12). At the core of the legislation, and plainly stated in the objects of the Act, is the aim of "promoting transparency, accountability and effective governance of all public and private bodies" (PAIA, 2000: 12). In so doing, the act aims to "help the public understand the functions and operation of public bodies; and aid them to effectively scrutinise and participate in decision-making by public bodies that affects their rights" (PAIA, 2000: 13). It acknowledges that there are limitations but notes that the spirit of the law can be interpreted to establish voluntary and mandatory mechanisms or procedures to give effect to that right to enable people to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible. These clauses are very important as they underscore the value that is placed on access to information in building a transparent and accountable society in South Africa and showcases the government's intentions of providing tools that can aid this process.

Efforts to improve accountability, transparency and good governance, as the PAIA objectives suggest, are rightly placed within the freedom of information laws and are justified in a developing country context such as South Africa which has a long history of inequality and is plagued by educational, cultural, and socio-economic divisions. The law clearly provides for measures that could contribute to a solution that addresses these issues. Calland (2003: 2), for one, argues that "access to information laws create a unique opportunity to profoundly

alter the relationship between governed and government – to build a new covenant of trust and to "change the rules of the game".

The challenge, however, with these objectives – and therefore the law -- is that the legislation has failed to accommodate or acknowledge the inherent nature of the state in South Africa in terms of its default position to withhold information as well as the populace, who are not inclined to question the state based on years of suppression and censorship under the apartheid government. The law in this instance provides structural limitations on the right to access to information which can be illustrated at various points in the legislation and explained with the use of four broad categories that are used globally to evaluate freedom of information laws: coverage, exemptions, enforcement and ease of access (Ackerman & Sandoval-Ballesteros, 2006). These categories establish how much of the state's activities can be accessed, how easily governments can withhold information, how effectively governments enforce compliance to the law and how easy it is for the public to access the information procedurally. Ackerman and Sandoval-Ballesteros (2006) argue that full accountability can only be achieved if public servants actively inform and explain what they are doing and provide plain language justifications for their actions. What the next section will show is that in each of these categories of the access to information legislation in South Africa, the legislation is in conflict with the objectives of the law and the intent of the protection that the right of access to information has been afforded by the constitution.

a) Ease of access

There are several points at which the legislation falls short in terms of ease of access. Sections three to eight in chapter two of PAIA, under the general application provisions of the Act, notes that the Act only applies to information in a "record" in the possession of a public or private body (PAIA, 2000: 11-12). The limitation of the Act is that while it is titled as "access to information", requesters must request information in a specific "record". The challenge with PAIA being limited to recorded information is that it omits information that is

not contained in a record. It also places significant pressure on requesters to specify the exact record that they require access to, for these requests to be successful. Should a requester not understand and therefore specify which record they require, they are likely to be unsuccessful in their request. Arko-Cobbah (2008: 188) argues that this is in direct contradiction to Section 32 of the Constitution, which stipulates that "everyone has the right of access to any information". In addition to this, it also places a substantial limitation on the transparency and accountability objectives of the legislation.

Ease of access is one of the recurring issues raised by the Access to Information Network (ATI Network), a network of civil society organisations and media organisations which have co-operated since 2001 to advance the realisation of the right of access to information to the public. To date the ATI Network has provided nine shadow reports reflecting on the experiences of about nine civil society groups and media entities based on their use of PAIA and its effectiveness. The network includes the investigative journalist centre amaBhungane, the Centre for Applied Legal Studies, the Centre for Environmental Rights, Corruption Watch, the Equal Education Law Centre, the Oxpeckers Centre for Investigative Environmental Journalism, the Public Service Accountability Monitor, Right2Know and the South African History Archive. While each of the network's reports have provided detailed analysis and narration of statistics derived from the submission of freedom of information requests submitted using PAIA, specific attention is drawn to the network's reports from 2017 and 2018, which holistically reflect and reiterate the ongoing sentiment of their frustrations with the law.

In relation to ease of access, the ATI Network has consistently called for the PAIA request process to be deformalised to allow the public to access records more informally. In its 2017 report, it argues that many South Africans do not have access to the prescribed forms, which effectively limits them from requesting access to information (Abdullah, 2017). In its 2018 report, it notes: "This (formalisation of requests) significantly hinders the ability to send requests of individuals who do not have access to the technology that this prescribed format

requires. There are numerous individuals who could benefit from the material released through a PAIA request, yet are limited because of the forced format" (Zulu, 2018: s14).

Ease of access is also compromised in terms of the cost provisions stipulated in the legislation. In Ackerman and Sandoval-Ballesteros' 2006 model one of the areas that determine ease of access relate to cost. There are four areas in which costs are incurred by freedom of information requests: searching, reviewing, reproducing and sending. They argue that the amount charged for fees is crucial for determining the real level of accessibility of information. Although they posit, a fee is justified to inhibit frivolous requests, high fees for using the legislation exclude large segments of the population from having access to public information. Following from this, it can be argued that the legislation in South Africa is indirectly prohibitive on the objective of transparency and accountability in that it only obliges a requester to pay an access fee for the reproduction and search and preparation of the records they have requested (section 22) and insists on an appeals fee when a decision is questioned. Further to that, it allows the Minister to determine the maximum costs associated with requests (PAIA, section 22 (8)(b)) and allows the information officer to withhold a record until the requester concerned has paid the applicable fees. According to the law, this fee can be exempted by the Minister. However, the scenario that this creates is that people who are unable to afford the associated costs associated for the reproduction of a record are likely to refrain from attempting to access the record.

b) Enforcement

Another technicality that is in conflict with the objectives of the legislation relates to compliance and enforcement. There are several challenges with the legislation in this regard. As noted previously in this chapter, the legislation allows information officers a provision of 30 days to respond to requests for information, noted in section 25(1) (PAIA, 2000: 22). According to section 26 (1) they are able to extend this period by 30 days should they require additional time to respond to the request (PAIA, 2000: 22). It also places a responsibility on

information officers to provide PAIA manuals which detail how to make a request for information and stipulate which information is freely available from that department. However, reports from the ATI Network consistently noted poor compliance with this aspect of PAIA. In the network's 2010 report, which is the first full year of statistics from 1 August 2009 to 31 July 2010, it reported that of the 109 requests that were submitted to public bodies, only 21% of the requests were responded to within the 30 day timeline. In its 2017 report, it reported that of the 386 requests made to public bodies between 1 August 2016 and 31 July 2017, only 27% (or 107 requests) have been responded to in time. A total of 252 requests – or 65% -- were not responded to in time. According to the report, the 65% non-compliance in 2017 was the largest percentage of non-compliance within the time frames by public bodies. It noted that the "increase was worrying" (Zulu, 2018: 4) because many public bodies only received a notice of extension, after being told they failed to respond within the time frame. In the 2018 report, only 45% of the requests sent to public bodies received responses in time, while 86 requests (51%) did not make the timeframe. The network noted that there were lower numbers of PAIA applications that were submitted to public bodies in the 2017 reporting (1 August 2017 to 31 July 2018). This could partially have been as a result of organisations being discouraged from using PAIA as a result of the risk of wasting limited time and resources. The ATI Network accordingly notes that "this demonstrates a laid back attitude, with the public body waiting for pressure from the requester before taking, legally invalid, steps to increase the time available to search for records and decide on access" (Zulu, 2018: 4).

This laidback attitude can be seen in the case of a PAIA request by the Equal Education Law Centre (EELC), to the Department of Basic Education in 2018. The Centre had asked the department to provide the nine provincial plans which detailed how the Education Departments' norms and standards for infrastructure would be rolled out in public schools. The plans had been due by the end of November 2017. Although the department provided eight of the plans, in the response to the PAIA request, the department simply noted that the ninth plan from the Eastern Cape was still outstanding. It provided no further justification.

The ninth plan was eventually received on 22 August 2018, two months after the EELC's request, and almost 9 months after it was due in terms of the regulations.

Shyllon (2018) has argued that the practise of 60 days to respond (which includes an extension of 30 days) weakens the effectiveness of South Africa's access to information law. In addition to this, the further shortcoming of the legislation is that there are no legislated penalties on information officers nor the public bodies and private entities that they are in the employ of for failing to comply with these prescripts. Although the SAHRC has been appointed as the custodians of the legislation until 2016, they lacked enforcement powers in relation to ensuring compliance by public and private bodies. The Network has repeatedly called for tougher sanctions on information and deputy information officers who do not respond to PAIA requests within the statutory time frames. In its 2017 report, they note that:

> Parliament cannot be unaware of the issue, as they have, year in and year out, been briefed by the SAHRC on the state of non-compliance with PAIA. Furthermore, every single shadow report, published by the ATI Network, has clearly expressed concern that there are extreme levels of non-compliance with the statutorily prescribed timeframes in PAIA. Thus we recommend that the legislature do justice to access to information and amends PAIA (section 90) to include sanctions for not responding to PAIA requests (Abdullah, 2017: 28).

Enforcement is critical, according to Ackerman and Sandoval-Ballesteros (2006), as it helps to counter the culture of bureaucracy which works against the implementation of openness being effected automatically. Accordingly, they argue that ideally a special public body should be created to receive appeals and enforce the right to freedom of information. This has, however, been elucidated more clearly by Roberts (2006) who argues that there are three different approaches in terms of enforcement which are ideal. Firstly, individuals should be given a right to make administrative appeals to another official in the institution in which the request was made. Denials on this level must then be referred to a court or a tribunal (Roberts, 2006). Individuals should also be given a right of appeal to an independent ombudsman or information commissioner, who is able to make a recommendation about the disclosure. If the institution ignores the recommendation, appeals to a court should be permitted (Roberts, 2006). Thirdly, individuals should be given a right of appeal to an

information commissioner with the power to order that the information should be disclosed (Roberts, 2006).

In line with this, the South African legislation does make a provision for an appeals mechanism with regard to public bodies. Should an information officer deny a request for information, the requester is in the position to lodge an internal appeal (section 74) (PAIA, 2000: 47). Should that prove unsuccessful, the requester is able to approach the High Court for a further appeal (section 78) (PAIA, 2000: 50). However, as early as 2007 (six years after the act was first promulgated), members of an ad hoc Parliamentary Committee highlighted the fact that the appeals mechanism was complex and potentially expensive and was therefore an obstacle in the way of ordinary individuals wishing to access information. Peekhaus (2014) notes that "the cost and complexity of such processes often make it difficult if not impossible for individuals or groups without adequate resources to exercise their right to information through the act. It is significant that only a handful of cases reach the courts" (Peekhaus, 2014: 23-4). Peekhaus (2014) argues that the prescript in the law offering the court as an effective mechanism to adjudicate access to information disputes for transparency is questionable. Although the amendments to the PAIA law based on the POPIA act of 2013 has established an Office of the Information Regulator, which takes over from the SAHRC and has the power to deliberate over an appeal process once the internal appeal process has been exhausted, by 2021, six years had passed since the information regulator had been appointed (Gallens, 2016) and the office was not yet fully functional and therefore not taking any complaints from the public with regard to PAIA. Consequently, until the information regulator is fully fledged, the public still needs to engage in the costly route of the courts to appeal any decision on access to information, which many are unable to afford and access. This can therefore also be construed as prohibitive of the objectives of transparency, accountability and good governance laid out in the act. The ATI Network, in its 2018 report noted:

> As it stands, the Information Regulator, established under the Protection of Personal Information Act (POPIA), has the ability to enforce sanctions against public and private

> bodies. However, the provisions granting these powers are not yet operational. Granting the Information Regulator the ability to enforce penalties under PAIA will give the Act more substance and weight as an operational tool to attain access to information. Our advanced access to information laws are rendered ineffective through their inability to penalise or sanction public or private bodies who fail to comply with their provisions. Any attempt to frustrate the process of releasing information should be punishable, indicating to public and private bodies alike that transparency and accountability are core constitutional values that must be upheld, and legislation governing access to information must be taken seriously in South Africa (Zulu, 2018: 15).

Lastly, with regard to enforcement, the SAHRC, according to the section 83 (3), under part 5 of the legislation, has been required to produce a report on the state of PAIA to the national legislatures on an annual basis (PAIA, 2000). Once the Office of the Information Regulator becomes fully functional, this responsibility will be handed over. According to the prescript, the Commission is tasked with making recommendations on the development, improvement, modernisation, reform or amendment of the act or procedures in terms of the act. Despite this accountability mechanism being included in the act, in line with the objectives, the law does not in any way produce an obligation on the National Assembly to consider, debate and make declarations or sanctions on these recommendations. This shortcoming has also been identified by Salau (2017).

c) Coverage

Coverage looks at how the information can be accessed from specific bodies and whether or not there is information within these bodies that can still be excluded (Ackerman & Sandoval-Ballesteros, 2006). Ideally the public sector and private entities that get funding from the state should be included in coverage. As has been stated previously in this chapter, in this instance South Africa's law is exemplary as it allows requesters to access information from both the public sector as well as private entities such as private corporations and non-profit organisations. However, despite these extensive clauses, there are challenges in that entities within the state are not covered by PAIA. Section 12 of PAIA notes that the act does not apply to the records from Cabinet and its committees, those relating to the judicial functions of South Africa's court as well as a Special Tribunal set up by the special investigating units and

records relating to the decision to appoint a judicial officer or anyone by the Judicial Service Commission. The challenges relating to coverage with the legislation are closely linked to exemptions.

d) Exemptions

Exemptions, according to Ackerman and Sandoval-Ballesteros (2006), allow the authorities to withhold information at their discretion to the detriment of the public. Typical exemptions include the protection of national security, personal privacy, public security, commercial secrets and internal deliberations. What is central, however, is how these exemptions are defined as well as how decisions are made about information covered by an exemption, and whether there is a public interest override that could make exempted information public.

This is evidenced by the ATI network's reports. In its 2017 report, it notes that close to 50% of the PAIA requests received no response. Only 13.5% of the requests were granted in full while just under 20% were partially granted (Abdullah, 2017). In the 2018 report, of 169 PAIA requests submitted to public bodies, only 27.2% of requests to records were granted in full and in 13,6% of requests, access was only granted to part of a requested record. Another 76 requests were either expressly refused or were ignored and then deemed refused. About 35.4% of the requests (56 in total) received no response at all and were deemed as being refused while about 20 requests were denied (Zulu, 2018).

According to Chapter 4 of PAIA, as stated previously, when a request for access to information is denied the response must provide a specific ground for the refusal (PAIA, 2000: 26). However, based on the accounts from the ATI Network in its reports, a large number of submitted requests were ignored by information officers without a reason. Alternatively when they provided a reason it was inadequate. It notes: "This regular failure to cite any, or adequate, reasons for refusing access to records frustrates the objectives of

PAIA and demonstrates poor recordkeeping and a lack of accountability on the part of the relevant public body" (Zulu, 2018: 4).

The Network has also cited examples where public bodies have denied possession of a record that does exist. In its 2018 report, for example, it recounts a case by the South African History Archive (SAHA) which requested records of a tender that was awarded based on reports from the public body's website and via various news reports. The request was denied based on section 23, which stipulates that the record does not exist, or could not be found (Zulu, 2018). The network notes that the denial and refusal of PAIA requests "reflect an increased lack of transparency amongst public bodies in South Africa" (2018: 7). The ATI Network has provided an extensive list of reasons for requests not being attended to and released sufficiently. These include "an ignorance of PAIA processes; insufficient training of public bodies on PAIA; a nonchalant attitude of information officers towards PAIA requests; poor communication within relevant bodies, and a disregard for the prescribed timeframes within which requested records should be provided" (Zulu, 2018: 4).

The challenge, according to Adeleke's analysis in a personal interview (2019), is when the law was drafted, there was an assumption that the government would be inherently compliant with the law. However, he argues, the South African government has consistently resisted the disclosure of information and has gone to the extent of going to the courts to fight the public release of information.

> It shows that there is this inherent state of secrecy in the South African state. It also shows that in PAIA itself, there is a recognition about the importance of secrecy. So for instance, PAIA excludes access to cabinet records and if you look at more progressive forms of access to information laws there is no justifiable reason for this. You can exclude access to current decisions that have been made, gazetted and have been debated within cabinet. But progressive access to information laws does not exclude access to previous decisions related to the current administration. So within PAIA itself there was already a recognition about the importance of secrecy for certain aspects of the governmental work (F. Adeleke, 2019, pers. comm.).

Adeleke (2019, pers. comm.) argues that although it is necessary to maintain secrecy with regard to information that relates to internal policy as well as the management of public

institutions in order for it to encourage open and frank discussions on policy issues, there is the need for the records to be released expeditiously, after some time, especially not long after the policy has been finalised:

> The reason is that this is necessary for the purposes of accountability. In any case, to deny right of access to Cabinet records, in particular, makes it difficult for the general public to follow the process used by a very powerful public institution that is privileged to make decisions that affect their lives. It is also a strong indictment of the lack of public participation in policy making and thus, good governance, and totally inconsistent with the constitutional right of access to any information held by a public body (F. Adeleke, 2019, pers. comm.).

The assumption that can be made, based on the extensive examples from these four categories, is that while the act promotes transparency, accountability and the effective governance of all public and private bodies in its provisions, as is reflected in objectives of the law, there are structural limitations on the realisation of these objectives that have slipped into the process of drafting the law. These concerns have been highlighted by various scholars on various occasions. Adeleke (2019, pers. comm.), for one, who was critical in the initial development of the law, argues that the law was based on "too many assumptions". He argues that there were assumptions that the public would be more willing to engage with government by exercising their right of access to information, by using the law and similarly, there was the assumption that the government would engage in more transparency and accountability" (F. Adeleke, 2019, pers. comm.). Added to this, Calland (2003: 2) argues that "the South African law is too ambitious in its range and scope and that the capacity of the South African executive is insufficient to cope with the demands of the legislation". He argues that framing access to information as a power right

> would appear to have an obvious resonance in any society that has suffered from an authoritarian past, where notions of citizenship are only vaguely secured in the political consciousness or traditions, or where socio-economic conditions are so meagre and wealth inequality so extreme that the capacity of poor communities to assert their interests is slender (Calland, 2013: 37).

The above exercise shows while the law can be utilised to realise socio-economic rights for the public and to navigate a difficult power imbalance by providing a platform to discuss issues, there are elements in PAIA that fail to encourage transparency, accountability and openness in line with the law's objectives. While it is pertinent to evaluate the law with regard

to the objectives that it is aligned to, it is equally as important to evaluate the law more broadly, in terms of the democratic obligations of the South African state.

4.3.3 PAIA and the democratic obligations of the state

There are two provisions within the Constitution, adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly, that broadly engage with the obligations of the state with regard to democracy. The first, in the preamble of the Constitution, notes that the Constitution

> lay(s) the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; improves the quality of life of all citizens and frees the potential of each person; and builds a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations (SA Constitution, 1996: 1).

Secondly, the founding provisions of the Constitution (chapter 1) notes that the Republic of South Africa is founded on values of "human dignity, the achievement of equality and the advancement of human rights and freedoms and to ensure accountability, responsiveness and openness" (SA Constitution, 1996: 3). Put simply, at the centre of South Africa's democratic vision is the intention of the state to create an equal, just and open society that preserves human rights and affords all people equal opportunities. Access to information is central to the realisation of several of the rights held in the Constitution and to contribute to democracy, as has been elaborated in earlier chapters.

To see the links between the PAIA law and democracy, it is important to understand whether or not PAIA as a law speaks to democracy and to SA's democratic obligations. For the purposes of this exercise, South Africa's democratic obligations should be considered in the context of Dahl's view of democracy, as has been discussed in earlier chapters. This centres the concept on the democratic process linked to the principle of political equality because it provides citizens with an "array of rights, liberties and resources" (Dahl, 1989: 80) and allows them to participate as equal citizens and make decisions to which they are bound. Of the five

criteria that Dahl cites in this democratic process, which need to be met to achieve political equality being "effective participation, voting equality, an enlightened understanding, control of the agenda, and inclusion of adults" (Dahl, 1989: 80), three remain pertinent for the issue of access to information. These being: effective participation, an enlightened understanding and control of the agenda; which engage with the core of the concept of democracy and access to information. They form the basis of why citizens need to be in a position to access information in the first place.

At the same time the law and its links to democracy need to be considered in the context of citizens' ability to navigate instances of domination, as has been shown. Power, for the purposes of this research, has been drawn together into a combined theory, drawn from the work of Lukes (2005), Hamilton (2013) and Foucault (2000) to argue that power is: 1) a relation between actors that needs to be navigated to limit the scope of domination; 2) a set of mechanisms that can be used to set the agenda, which could be about securing compliance by controlling the thoughts of the populace by socializing them in a particular way, controlling the information they have, through political inaction, or suppressing knowledge through censorship and disinformation; 3) the ability of citizens to gain agency that can be linked to their autonomy; and 4) procedural arrangements that are set up within the state in an attempt to aide citizens in identifying, expressing and evaluating their needs and in so doing realizing their potential to minimise domination.

The pertinent issues are whether PAIA, as a law, creates an equal, just and open society that preserves human rights and affords all people equal opportunities, whether it helps citizens navigate instances of power or whether it is used as a mechanism to control the populace. Another issue is based on PAIA being a procedural arrangement set up within the state in an attempt to aid citizens in identifying, expressing and evaluating their needs and, in so doing, realizing the potential to minimise domination. To engage in these issues, it is important to put PAIA requests into context and to unpack their importance in the broader picture. Take for example the Equal Education Law Centre's PAIA request, referred to earlier in this

chapter. The Centre asked the Department of Basic Education for the nine provincial implementation plans around public school Infrastructure, as is required by the law (Equal Education, 2019). These implementation plans are important because they provide the National Government with the Provincial Education Department's annual plans for implementing the regulations. The plan includes a detailed backlog analysis of the infrastructure needs, details on how infrastructure will be provided for and maintained, as well as proposals on the procurement, implementation and monitoring of the projects as well as the annual reports detailing how the plans would be implemented (Equal Education, 2019).

For school communities, which include educators, parents, pupils and the larger community, having access to these plans can help them understand how their children's health and safety are being considered while they are exercising their right to education. It is critical to help them understand if resources are being prioritised in the correct manner. This could help them, for example, make better choices about which schools they should choose for their children to attend and how they should hold the government accountable for the promises they are made about how schools in a specific area are going to be fixed.

Following the PAIA request, access to eight of the reports were forthcoming. However, the ninth plan, that of the Eastern Cape education department, was only released two months after the request was made, which was nine months after it was due by the National Department and only partially as a result of persistent follow up by the lobby group. When Equal Education finally received the Eastern Cape's implementation plan they were able to reveal that a year after the Eastern Cape Education Department should have met the deadline to eradicate pit latrines toilets at schools, there were still 2 127 Eastern Cape schools that only had access to plain pit latrines. There have been several media reports of children drowning in pit latrine toilets in South Africa (Africa Check, 2019) including five-year-old Lumka Mkhethwa who drowned at Luna Primary School in the Eastern Cape province in March 2018. In addition to this, the Law Centre could also report that although the Provincial

Education Department had provided a progress report, all the annexures – which contain the bulk of the data – were missing. According to the report, the Provincial Department said that it was failing to meet the Norms and Standards deadlines due to budget shortages and would need R70 billion to meet all the Norms and Standards targets.

However, since the report was not forthcoming, parents were unable to verify the figures mentioned on their own accord. They had no idea how many pit latrine toilets had been eradicated since the previous year and they would have had to accept all the government's statements – if any – on the matter as truth. This example speaks directly to why the public should be able to access information to help them navigate the power relations that surround them.

Bovens argues that the right of access to information is important in the life of citizens through their citizenship.

> Citizens, as members of society, need to act with 'legal certainty, lawfulness and cognisance', and this is only possible if subjects are certain of being informed timeously and adequately about their rights and duties. Their contribution to democratic accountability and control of the executive and legislature through participation in the making of laws and policies is impossible without information from the state. Individuals need information to make rational decisions and plan their lives accordingly (Bovens, 2002: 324).

Adding to this, Shyllon (2018: 24) argues that while the citizen is one of the most powerful stakeholders in a constitutional democracy as the power rests with them to elect and remove governments, "they are also often the most marginalised power brokers" as their voices can be assumed by various interests who then manipulate it for their own benefit and cause. The Equal Education Law Centre's struggles can be used to illustrate two points about PAIA, power and democracy. The first is that PAIA can be used to bring critical information to light which has the ability to help the public hold their governments to account. Without invoking the ATI law, it would have been unlikely for the document to surface. Similarly, the public would not have been made aware of the delays from the Eastern Cape Education Department to submit the document to the National Department, significantly after the deadline. This information helps them to hold their local government to account better. This

speaks directly to the prospect of improving democracy in South Africa by encouraging the public to develop an enlightened understanding of the issues that could affect them.

The second point relates to transparency remaining a challenge – as is evidenced by the delayed response to the PAIA request – which compromises the state's democratic obligation of openness. It can also have the effect of compromising the power balance between the citizen and the state, to the detriment of the citizen. It can be interpreted as attempts by the government to control the agenda by withholding information and securing the compliance of the citizens for their own aims.

Beyond the case presented by the Equal Education Law Centre, there are several points to be made about PAIA and democracy more broadly. It must be noted that there are positive attributes of PAIA. The law has been crucial to help citizens navigate power relations and hold government to account. In theory the law reflects the government's intention to aid citizens to evaluate their needs and make informed decisions. Its inclusion in the Bill of Rights in the Constitution speaks to the seriousness of the state in respecting that right and to their commitment into this process, which should be highlighted.

The public interest clause in the legislation, which has the ability to override various grounds for the refusal of access to records, is also encouraging in that it helps people who use the law understand that the broader public's interests are considered.

The three amendments to the law have also resulted in more equal access to the law. The most pronounced being the establishment of the Office of the Information Regulator, which should be seen in a positive light. This is due to the fact that the Office provides a more equal mechanism for the public to appeal decisions to denied requests for information as well as decisions to unfairly charge members of the public for access to information.

In terms of the challenges, various ATI scholars such as Calland (2003), Peekhaus (2011), Razzano (2015) and Adeleke (2016) among others have belaboured the challenges that have stifled the implementation of PAIA. These include untrained or incorrectly trained officials who are unfamiliar with PAIA processes along with insufficient record keeping within the state as well as the formalised process of the law.

There are also substantial challenges with the structural make-up of the law that encourages inequality and makes PAIA unable to adequately promote democracy. One of the most substantial challenges in this regard is the unequal access to the law. This is due the fact that people are unable to utilise the law unless they comply with the specific format in which the law requires you to make the request by filling in a specific form, which is available online and at the office of the public body that is being approached. What this means is that people who are unable to access the prescribed form will not have the ability to utilise the law. Those, for example, living in rural areas far from the city-based head offices are unlikely to be able to access these forms.

Another challenge is the costs attached to PAIA requests. Information officers can charge successful requesters fees for the duplication and collaboration of records that they receive. These fees are not set. In addition to this, people who have unsuccessfully gone through an internal appeal process are forced to approach the courts for redress, which is also costly and can be cumbersome. The issue of costs is particularly relevant in a country such as South Africa with high levels of poverty and unemployment. According to findings of the Living Conditions Survey produced by Statistics South Africa just under half of the 35.1 million people who made up the adult population in the country in 2014/2015 were living below the upper-bound poverty line (Statistics SA, 2017).

In addition to this there are the challenges linked to responses. The first relates to the failure of the law to include clauses that ensure information officers are penalised for not responding to requests within the statutory timeframes. This has the ability to undermine

the effectiveness of the law. The second relates to high numbers of denials of requests. This is based on the latest statistics released by the ATI Network which shows that 35% of requests for records were ignored while another 25% were expressly denied. This in itself is concerning as it shows that 45% of requests are not successful and speaks to a lack of government transparency and high levels of secrecy as regards certain pieces of information. Considered in the context of democracy and power, the above points to citizens having a compromised ability and power to utilise the law effectively.

4.4 Conclusion

If PAIA is considered as the South African state's primary intention of improving transparency, accountability and openness, the conclusion that could be drawn is that the law fails to effectively facilitate this. While there are instances where the public through social justice bodies, civil society groups, the media and community organisations have been able to rely on PAIA to facilitate accountability and the transparency of the state, it can be argued that PAIA is not democratic in character in that the mechanisms that it has created to facilitate access to information in South Africa do not adequately offer equal access to the law. The use of PAIA depends on the public's ability to access the legislation and use it effectively.

In addition it must be understood that the effectiveness of a law is not the only measure of democracy. The primary aim of democracy is for citizens to have the power to elect representatives in office and ensure that these principles act in a way that is in line with their interests. However, what follows with PAIA is the ability of the populace to effectively develop an enlightened understanding, control of the agenda and to therefore effectively participate in their democracy is severely hampered by the manner in which the law has been constructed.

Further to this, the ability of the public to manage and navigate power relations is compromised by the restrictions that are evident in the subtext of the law and the ability of the government to control the agenda by deciding how much information is shared. The deficit of PAIA is that citizens are therefore mostly at the mercy of officials and their interpretation of the law with regard to their requests. It is also important to note that ultimately, the law itself is not a representative institution and neither are officials who are appointed into the positions that manage the bureaucratic processes of the law. The law should rather be seen as a technocratic tool that citizens can use to address their problems. The democratic deficit here lies in the fact the citizens are short-changed in this process in that there is a possibility for their needs not to be met and that they are unable to navigate this instance of power successfully to their benefit.

The next chapters will unpack the core tensions around PAIA in South Africa and evaluate the seminal cases that have shaped the PAIA landscape in South Africa, by providing an in-depth discussion on two key cases with regard to PAIA in the country.

5

5. CASE STUDY: PAIA AND ITS ACCESS RIGHTS FOR ALL

5.1 Introduction

There are various ways in which the tensions between the state and the public, with regard to the access to and release of information, has played itself out in South Africa. For the purposes of this thesis the next two chapters will primarily focus on two case studies that showcase the nuances of these tensions.

This first case study relates to a PAIA application in which the Right2Know Campaign wanted the South African Police Services to release a list of places officially declared National Key Points. National Key Points are defined as places or areas that, if damaged, subjected to disruption or immobilized may prejudice the safety of the republic (National Key Points Act, 1980: 4). When the Police refused, citing a risk to national security, the Campaign was forced to approach the South Gauteng High Court to ask it to set aside a decision. The aim of this chapter is to unpack and analyse the National Key Points PAIA case study to show the tensions in the relationship between access to information and democracy and showcase how the dynamics of power have played out in this relationship. Ultimately, it aims to understand what it means for the PAIA landscape in South Africa.

The analysis of the case study shows how the state is able to invoke national security concerns in order to withhold information. At the same time, however, the case study has illustrated how the access to information law in South Africa has been able to expose the inappropriate use of national security to withhold information from the general public. The

chapter will also outline the role of the media and civil society in the application of PAIA and what this says about PAIA and democracy in South Africa. In addition to this, it supports the theory that the access to information law in South Africa is able to provide a democratic benefit for the public, provided they have access to the necessary resources.

The chapter begins by outlining the parties involved in the case study, followed by a section that explains the process of the court case. Following this, the chapter discusses the six key themes that arise out of the case study: the legal framework, national security, public interest, and the role of the courts, civil society's contribution and power.

5.2 Context

The National Key Points had first arisen four months prior to the Right2Know Campaign's court case when the investigative arm of the Mail and Guardian newspaper, amaBhungane, filed a PAIA request to the National Department of Public Works for details on "the procurement by the state of goods or services to improve, upgrade, alter, add to or secure the Nkandla estate of the then President Jacob Zuma" (De Wet, 2012). The newspaper submitted the PAIA request after an expose it carried in 2009 in which they reported that the security upgrades at the then president's private homestead was alleged to have cost R65 million (Rossouw & Roper, 2009). The PAIA application was to seek the documents in the possession of the state following tip-offs that the upgrade costs were more than double this amount of R65 million. At the time the Department of Public Works and the Presidency denied that the upgrades were paid for by the state, arguing that it was private renovations. In the months that ensued, however, these upgrades were found to have escalated to R248 million at the cost of South African taxpayers. When the newspaper filed the PAIA request in July 2012, the official response was that the homestead was a national key point and therefore the information relating to security upgrades was classified (De Wet, 2012).

On 4 October 2012, the Right2Know Campaign filed an official PAIA request to the SAPS. In the initial request by the R2K, the organisation asked the police to release a list of places and areas that had been declared National Key Points or national key points complexes, in line with the National Key Points Act 102 of 1980 (Right2Know Campaign v Minister of Police, 2013). This thus prompted the organisations to seek clarity on what areas were considered a National Key Point.

5.3 The parties involved in the case study

The case study centres on the court case about National Key Points. The applicants of the court case were, the South African History Archive and the Right2Know Campaign, as well as the respondents: the Minister of Police and Colonel Amelda Crooks, who is the Promotion of Access to Information Officer at the police. The Mail and Guardian Newspaper, which joined the court case as an *amicus curiae,* is another party that needs to be included.

5.3.1 Right2Know Campaign

The Right2Know Campaign is a civil society organisation that launched in August 2010 to fight the Protection of State Information Bill (News24, 2011). It then grew into a movement that campaigns on a wide range of issues, mainly challenging authoritarianism and advancing the free flow of information (R2K, 2010). Their aim has been to advance public interest by protecting and advancing people's right to access information. This includes "the right to transparency, accountability, a free and diverse media, effective governance affecting both public and private bodies and the promotion of a human rights culture" (R2K, 2010). The campaign has tried to raise public awareness, mobilise communities, conduct research and targeted advocacy to ensure that there is a free flow of information that is necessary to meet people's social, economic, political and ecological needs (R2K, 2010).

5.3.2 South African History Archive

The South African History Archive (SAHA) is an independently owned human rights archive. It has been utilising archiving and access to information laws to create awareness of South Africans' struggles for justice. The archive was created in the 1980s and has been collecting, preserving and cataloguing materials of political, social, economic and culturally significance, from both a historical and contemporary perspective (SAHA, 2021).

SAHA became the second applicant in the court case and are therefore a critical part of the case study. One of SAHA's motivations for getting involved in the case was due to a trend in refusals that they had seen, which was seriously undermining the culture of transparency and accountability and governance that the constitution mandates and is fundamentally at odds with the projects of PAIA. In various cases, information was refused relating to the content of the requested records with some refused in full or in part on grounds relating to national security. When SAHA got involved in the National Key Points PAIA application, the organisation had been one of the most significant contributors to the PAIA landscape in South Africa. As part of its work, SAHA has initiated a Freedom of Information Programme as one of its core activities. The programme helped people and organisations with applications for access to information and also tracked and archived the cases electronically (SAHA, 2021). By its own admission, it had filed close to 2000 requests for information from various government departments (Right2Know Campaign v Minister of Police, 2013); brought numerous appeal applications to high courts in the country arising from refusals of requests; and had intervened as an *amicus curiae* in a number of PAIA court applications. Some of these cases had to be taken through an internal appeal process for the refusals to be overturned. Others were released in out of court settlements (Right2Know Campaign v Minister of Police, 2013).

In addition to its engagement with the legalistic elements of PAIA, it's also important to note that SAHA had been extensively involved in the application of the law in communities. It had

developed comprehensive NGO and community-based organizations capacity training programmes to help these organisations understand how to use PAIA effectively. It had also developed resource kits, workshop guides, PAIA case study DVDs and an online management system to monitor PAIA requests from the general public. These efforts need to be seen in the context of the vested interest that SAHA has had in the successful and effective implementation of the PAIA legislation and attests to its good intentions of making the law accessible to the populace.

5.3.3 The Mail and Guardian as Amicus Curiae

The Mail and Guardian newspaper, which at the time was the media house that controlled the investigative unit amaBhungane, is an important part of the case study due to the fact that they made an application to be admitted as an *amicus curiae* (friend of the court) in the court case.

The Mail and Guardian is an important party in this case study as it represents the element of the media, and in the court case provides insight into the role of the media in using PAIA to contribute to enhancing democracy, in line with the research question. The Mail and Guardian is well established as a media house that is known for its investigative journalism capacity. The Mail and Guardian has on several occasions utilised PAIA (interviewee, 2019, pers. comm.). amaBhungane, its investigative arm, has since become a separate entity, independent of the newspaper with its own advocacy unit that manages PAIA requests and litigation (interviewee, 2019, pers. comm.). The Mail and Guardian argued that it wanted to be attached to the court case because the release of the information would be of interest to the newspaper. In the course of the media house's work there had been numerous incidents in which reporters had been advised that a particular location could not be photographed or reported on because it was a National Key Point (Right2Know Campaign v Minister of Police, 2013). An understanding of what places were key points would therefore provide them with

clarity and prevent their reporters from suffering unnecessary arrest when they were in the field reporting (Right2Know Campaign v Minister of Police, 2013).

5.3.4 The state

The state, in this instance, is represented by the Ministry of Police, which handled the initial application for information. In the court case, the Police Minister as well as the Police's National Deputy PAIA officer, Colonel Amelda Crooks, were both respondents. In terms of the Police's general engagement with PAIA, it must be noted that the police are one of the state departments that have had the most engagement with PAIA, particularly with regard to requests for information (SAHRC official, 2019, pers. comm.). In eight of the 10 annual reports submitted to the Human Rights Commission by public bodies to declare their annual PAIA caseloads, the Police Service have been shown to receive the most PAIA requests. These have mostly been in excess of 20 000 cases (SAHRC, 2012). By Crooks' own admission during the interview with the researcher in 2019, on average the police receive on average 23 000 cases a year and between 48 to 50 appeals a month, which is a significant caseload.

In an interview with the police, Crooks (2019, pers. comm.) also explained how the police had set up a simple but advanced system that could help officers deal with PAIA requests particularly in light of the fact that the police's PAIA systems were still paper based. As Crooks (2019, pers. comm.) explained, the system needed to fit into their existing paper-based system. As result of their hard work, the Police have been awarded the Golden Key Award by the National Information Officer's Forum on several occasions (Crooks, 2019, pers. comm.). The awards were set up to commend departments that were trying to comply with PAIA prescripts.

It is important to highlight the police's engagement with PAIA as it showcases how the police, as a state department, are familiar with the prescripts of the law and their obligations as a public body, particularly in terms of how and when they respond to requests.

5.4 The process of the court case

The National Key Points court case took more than a year to reach finalisation (SAHA v Minister of Police, 2014) which in and of itself should be concerning. The delays in the court case translates into delays for the requester to get access to the documents they seek and to be able to exercise their right to access information. The next section unpacks the processes in the run up to the National Key Points court case as well as the court case and why it is an important element of the case study.

5.4.1 The initial PAIA request

As has been noted, the initial PAIA request centred on SAHA and the R2K Campaign seeking access to the list of places and areas that had been declared National Key Points or national key points complexes, in line with the National Key Points Act 102 of 1980 (Right2Know Campaign v Minister of Police, 2013).

The National Key Points Act was promulgated in 1980 by South Africa's apartheid government which at the time wanted to protect various buildings and locations from apparent threats of sabotage during the height of apartheid (NKPA, 1980). According to the preamble of the Act, it was established to provide for National Key Points and for the safeguarding of these points, with the Act describing incidents as "any occurrence arising out of or relating to terroristic activities, sabotage, espionage or subversion" (NKPA, 1980: 3). The function of these areas were thought to be vital to national security. There are three parts of the act that bear relevance in this regard. According to section 2 and section 2A of the Act, the Minister of Police has "the ability to declare any area a National Key Point if they believe

that the loss, disruption or immobilization of that specific place can cause harm to the republic" (NKPA, 1980: 4-5). The minister has no obligation to inform the public of their decision to declare a National Key Point (Right2Know Campaign v Minister of Police, 2013[1]). According to section 2(2) of the Act, the Minister is only required to notify the owner of the key point (NKPA, 1980: 5). Alternatively, the minister can take the necessary security measures and recover the costs from the owner. If an owner fails to take the measures they can be fined R20 000 or be jailed for up to five years (NKPA, 1980). In addition, according to section 10 of the Act, people can be charged for committing offences at the key point (NKPA, 1980: 7). Anyone who illegally furnishes information relating to the security measures of a key point without the authority of the minister, or if it is not necessary for the performance of their tasks, is guilty of an offence and can be fined up to R10 000 or imprisoned for three years (NKPA, 1980).

Based on the provisions of PAIA, the police had 30 days to respond to the request for information from the organisation. The police, however, only responded 42 days later, on November 16, 2012, denying the requested information (Right2Know Campaign v Minister of Police, 2013). The denial, according to their response, was based on section 38 of PAIA, which allows for a request to be dismissed based on the mandatory protection of the safety of individuals and the protection of private property.

In terms of section 38 of the Act, an information officer can refuse a request for access to a record of the body if its disclosure could reasonably endanger the life or physical safety of an individual, or if the disclosure would prejudice or impair the security of a building, structure or system. This includes but is not limited to a computer or communication system (PAIA, 2000). In the email attached to the response, the police explained that the basis for their refusal on this ground was that access to the records would jeopardise the operational strategy and tactics that ensured security at the relevant property and safety of the individual

[1] Right2Know Campaign and Another v Minister of Police and Another (2013/32512) [2014] ZAGPJHC 343, Second applicant's founding affidavit, p8, para 9

who lived at the property from which the information was sought. They stated that if a person planned or intended to try to harm the relevant individual or to prejudice or impair the security of the building, the information would prejudice the effectiveness of these methods, techniques, or procedures used to ensure the safety of such individuals or the building (Right2Know Campaign v Minister of Police, 2013).

Based on this response, SAHA launched an internal appeal against the decision. The basis for SAHA's internal appeal was centred on what they believed was a misunderstanding on the part of the police's information officer. SAHA contended that the information officer had made an incorrect assumption that their request was a query on the security status of the homestead of the then President Jacob Zuma (Right2Know Campaign v Minister of Police, 2013). SAHA explained that that was not the case. They argued that the information officer had "failed to apply her mind" (Right2Know Campaign v Minister of Police, 2013[2]) to the actual requested records as the requested information did not fall within the category of information exempted from disclosure in terms of section 38 of PAIA. In addition, SAHA argued that they did not wish to get information concerning the security of National Key Points but only a list of places or areas declared as National Key Points. However, the information officer had failed to provide adequate reasons for the refusal, as is required under the act in clause 3a of section 25 and she failed to apply her mind about whether parts of the record could be disclosed if other parts were redacted, as per section 28 of the act (PAIA, 2000) (Right2Know Campaign v Minister of Police, 2013).

The internal appeal was handled by the Minister of Police, who upheld the decision in an email response to the organisation in February 2013. The minister maintained that the clauses referenced by the information officer to dismiss the request were valid and added that the refusal to disclose the identity of National Key Points was justified under section 45(b) of PAIA. This provision states that "a public body may refuse a request for access where

[2] Right2Know Campaign and Another v Minister of Police and Another (2013/32512) [2014] ZAGPJHC 343, Second applicant's founding affidavit, p18, para 25.6

the work involved in processing the request would substantially and unreasonably divert the resources of the public body" (Right2Know Campaign v Minister of Police, 2013[3]). The Minister added an explanation on what National Key Points were, noting these were places or areas which were extremely important and that their

> loss, damage, disruption or immobilisation may prejudice the Republic or its safety and it is in the public's interest that they be secured and that such declaration as a national key point not be publicly advertised. Such places or areas are very likely to become soft spots or targets for the enemy or a person that intends to harm the republic endanger the life or physical safety of an individual at or from such a place or area. Knowledge of exactly which places or areas are declared as such points is highly likely to prejudice or impair the security of such places or areas when such knowledge is used by person who tend to do such harm to such building, structure or system (Right2Know Campaign v Minister of Police, 2013[4]).

In his response, the Minister also explained the categories of places or areas which constituted National Key Points. These included "banks, munitions industries, petro-chemical industries, water supply nodes, electricity, communication, transport, air, government institutions, data processing, and research or technology information systems" (Right2Know Campaign v Minister of Police, 2013[5]). In addition to citing section 45(b) of PAIA, the Minister also cited section 34(1) of PAIA, arguing that many of the 200 National Key Points were privately owned and that as a result, revealing the address of these, would entail disclosing the personal information of a third party. Accordingly, the police would have to notify each of the private owners of the request. This would substantially and unreasonably divert the resources of the SAPS and request could therefore be refused in section 45(b) of PAIA (Right2Know Campaign v Minister of Police, 2013).

5.4.2 The court case

Following the negative outcome of the internal appeal, SAHA along with the Right2Know Campaign, on whose behalf the application had been made, then approached the South Gauteng High Court to declare the dismissals unlawful and unconstitutional. An appeal of a

[3] Ibid, p20, para 29.3
[4] Ibid, p19, para 29.1
[5] Ibid , p20 para 29.2

decision through a court is condoned in PAIA under section 78 of the Act. The application filed in the High Court was made against the Minister of Police, the Deputy Information Officer of the SAPS, Colonel Amelda Crooks, as well as the Minister of Defence and Military Veterans as the official who is able to decide on National Key Points.

At the centre of SAHA's appeal to the court were the National Key Point Act of 1980 and the provisions of the Act that gave the minister the sole discretionary ability to determine a National Key Point. Their appeal to the court was based on three arguments: public interest, the potential undue exercise of ministerial discretion and the issue of public spending. In the court papers, SAHA contended that the contents of the records they were seeking would have profound public interest and importance because it primarily concerned the ability of the Minister to exercise their own discretion about what constitutes a National Key Point. This discretion could have the effect of restricting activities at certain places as people could be arrested and criminally charged for their actions at a key point. The media, for example, could be restricted from reporting on a specific event or people participating in a political protest could be prevented from doing so. In both these instances people could be arrested. However, the general public was not aware of the consequences that could be attached to their actions due to the fact that they would not have known it is a National Key Point in the first place (Right2Know Campaign v Minister of Police, 2013).

As part of their notice of motion in the court case, an affidavit filed by SAHA director at the time, Catherine Kennedy, noted that one of the major motivations behind the request was the blatant lack of transparency relating to a law. The government was not required to publish a public notice to announce the designation of a National Key Point despite the fact that there were various criminal offences attached to activities committed at these National Key Points. They had launched the National Key Points campaign to expose how the act was an excessive, apartheid-era-secrecy law that undermined political rights and the rights of access to information, freedom of expression and freedom of association. In addition to this, South Africa was a country that had – and still continues to have – limited funds to meet the

considerable demands of a developing economy. As a result, it was important to understand where the priority of public spending lay and whether this was appropriate (Right2Know Campaign v Minister of Police, 2013).

Their third argument placed on record was based on the fact that the non-disclosure of National Key Points had generated widespread speculation among the public that the Minister of Defence was abusing her powers to declare places and areas National Key Points or complexes. Public spending had taken place at places declared the National Key Points. This contravened sections 3 and 3A of the National Key Points Act. This, they argued, harmed the public's confidence in the state and members of the Cabinet. While the Minister of Defence declares key points, these key points are guarded by the police. Kennedy noted that the magnitude of public concern relating to the identity and public expenditure of National Key Points could be seen in a series of news reports on the President's Nkandla estate as well as the investigations for the National Department of Public Works, and the Public Protector into the public expenditure and security upgrades at the Nkandla estate. This issue will be unpacked in more detail later in this chapter (Right2Know Campaign v Minister of Police, 2013).

The organisation's appeal to the High Court was important for two reasons. First, based on the information that would be revealed if the court overturned the minister's decision. Second, and more importantly, it is also significant because it tested the boundaries of the PAIA law. In addition to their arguments about public interest, ministerial discretion and public spending, SAHA's overarching motivation behind the appeal to the high court was linked to public power, and the mechanisms that could be used to stem the abuse of this public power. The organisation argued that the disclosure of the National Key Points was a critical step that would reveal evidence of serious unlawful conduct which would prevent government officials from abusing public funds and inappropriately spending this money in the name of national security. Their arguments, in terms of the PAIA, was that the default position of the law in terms of information held by the state, is that access should be granted,

unless there is a ground of refusal that is relevant. They also evoked section 46 of the law, which places an obligation on the public body to provide evidence that could reveal how the information they sought would result in harm if it was disclosed. In addition, they were concerned about the manner in which the police had issued a blanket refusal and the careless attitude in which the request was dealt with. They noted that the police's approach to the PAIA request was "indicative of a harmful culture of secrecy that existed in South African public bodies. This culture had manifested itself in repeated and unjustified blanket refusals to PAIA requests" (Right2Know Campaign v Minister of Police, 2013[6]). In addition to this, there was an over-ready reliance on the security exemptions under PAIA by state officials in order to withhold information from the general public. This undermined the Constitutionally mandated culture of transparency and accountability in governance and is fundamentally at odds with the objects of PAIA (Right2Know Campaign v Minister of Police, 2013[7]).

5.4.3 The judgment

In the judgment, Justice Roland Sutherland set aside the Minister of Police's decision to refuse the requested information, deeming it unlawful and unconstitutional. The court's interpretation of the National Key Points Act was that the essence of the Act was to secure areas, places and infrastructure, not the personal security of individuals who frequented these places. According to the court there was therefore nothing in the Act that noted that the identity of the key points should be kept secret and that the law only expressly noted the confidentiality of security measures by putting limitations on the dissemination of information about the security measures that were in place (Right2Know Campaign v Minister of Police, 2013).

[6] Right2Know Campaign and Another v Minister of Police and Another (2013/32512) [2014] ZAGPJHC 343, Second applicant's founding affidavit, p22, para 35
[7] Ibid, p23, para 36

Further to that, the judge found that it was unconstitutional for an Act to prescribe criminal sanctions on citizens if the citizenry could not know what places were key points and how they could avoid transgressions. Sutherland cited the examples used by SAHA where protesters, homeless people and photojournalists had been arrested at National Key Points, to illustrate how damaging it was not to disclose key points. He argued that it was problematic for South Africa's Constitutional values if the populace did not know how to avoid committing an offence but could be charged after the fact because a place "enjoyed special status" (Right2Know Campaign v Minister of Police, 2013[8]) as it amounted to a "secret law" (Right2Know Campaign v Minister of Police, 2013[9]). The significance of this pronouncement lies in the fact that the police were being called out by the courts for using one element of law (the security measures) to engage in blanket secrecy, therefore denying the request, rather than engaging potential concerns linked to national security. He ruled that the decision to deny information and effectively engage in blanket secrecy could be considered flagrant disregard of a principle of freedom enshrined in the Constitution (Right2Know Campaign v Minister of Police, 2013). This initial decision is therefore concerning for the exercise of democracy.

The judgment must, however, be evaluated beyond the victory that it provided for SAHA. The judgment is significant because of the manner in which it has managed to expose discrepancies in the PAIA process: uncovering how government departments are able to use elements of the Act to withhold information, thereby disregarding the spirit of the Act. It is also significant for the pronouncements that it makes on PAIA, the Constitution and how the access to information mechanism should be utilised effectively. The court case effectively reiterates the place of PAIA within the Constitution as a tool that must form part of democracy. In addition to this, it cements the need for transparency and accountability on the part of the state. Lastly, its importance should be considered in the context of the

[8] Right2Know Campaign and Another v Minister of Police and Another (2013/32512) [2014] ZAGPJHC 343, Judgment, p28, para 51
[9] Ibid, p27, para 48

institution that is the judicial system – and specifically the courts -- have been utilised to strengthen the provisions of PAIA by upholding the tenets of democracy, encouraging accountability and transparency and providing citizens with information that aides them in controlling the agenda.

The judgment provided evidence that government departments have been inconsistent in their responses to PAIA requests and have not necessarily relied upon the correct reasons for denials of information. In the case of the Police for example, according to Sutherland, they had initially relied on the exemption under section 34 of PAIA that releasing information on National Key Points would infringe on the privacy of individuals whose personal information would be released (Right2Know Campaign v Minister of Police, 2013[10]). However, Sutherland noted that when they later needed to defend their actions in court, they failed to mention the plight of individuals. What this meant, he noted, was that there was no foundation laid for the idea that individuals would or even may be harmed. The Police had used this exemption despite SAHA reiterating at several points that they were uninterested in the addresses of the places declared to be key points (Right2Know Campaign v Minister of Police, 2013[11]).

There was also a serious flaw in the efforts of the Police to justify the non-disclosure: they failed to provide an argument to support the conclusion that the National Key Points Act objectives include keeping secret the status of places as key points. The Police, under section 38 of PAIA, had an obligation to present evidence to show the effects of the disclosure of information and how it would endanger someone's life or prejudice as security measure of a building or a person (PAIA, 2000: 28). The exemption could also have been based on the fact that the disclosure of information was expected to prejudice the state's security, as noted in section 41 of PAIA (PAIA, 2000: 30). The challenge for the police, as noted by

[10] Right2Know Campaign and Another v Minister of Police and Another (2013/32512) [2014] ZAGPJHC 343, Judgment
[11] Ibid.

Sutherland, was the conduct of the Government itself, which provided evidence of Ministers having furnished details of key points to Parliament as the public announcement that Nkandla, the private home of President Zuma, had been declared a key point. There were other examples. These included:

- a government official who in 2008 explained the arrest of homeless people who slept outside a Department of Justice building which was a key point,
- a matter where the Police, in 2012, arrested protesters outside the Rustenburg Magistrates' Courts on the grounds that the court was a National Key Point, and
- a case reported in August 2012 where the Chairman of the Parliamentary Portfolio Committee for Correctional Services justified the forcible destruction of photographs that journalists took showing how warders at Groenpunt Correctional Facility beat an inmate to death. The photos were to be deleted on the grounds that prison was a key point.

Another significant point made in the judgment pertained to the lack of accountability and transparency of the state and the manner in which the Court was able to ask the pertinent questions that the general public should be able to get answers to. He noted that it was "wholly unsatisfactory for political office bearers and senior civil servants to perform their duties under a cloud of suspicion of incompetence or dishonesty" (Right2Know Campaign v Minister of Police, 2013[12]). Sutherland (2012) argued that "transparency about all the facts is necessary to either repair the rot, if any exists, or dispel the lack of confidence which the citizenry will continue to nurse if the facts are concealed" (Right2Know Campaign v Minister of Police, 2013[13]). In this instance, the court identified the importance of access to information in relation to the National Key Points but also more broadly, it exposed how the populace would ideally be able to question decisions made by the state – and ultimately how they would be able to utilise their power more adequately and effectively, if they have access

[12] Right2Know Campaign and Another v Minister of Police and Another (2013/32512) [2014] ZAGPJHC 343, Judgment, p25, para45

[13] Right2Know Campaign and Another v Minister of Police and Another (2013/32512) [2014] ZAGPJHC 343, Judgment, p26, para45

to information. In addition, the judgement underscored the significance of public interest, as is noted in PAIA under section 46.

The court effectively articulated the most pressing questions that citizens would want to know in relation to the National Key Points issue. For example, how much public funds have been spent on security at key points? Also, if no special account was opened, in line with section 38 of the act, how was the public money used at these key points managed? Based on the Police's admission that there is no special account, which is a prescript of the law, why is the state failing to comply with the law? In addition to this, does this mean that the provisions of the Public Finance Management Act 1 of 1999 (PFMA) have been breached? Does the absence of an account mean that the Minister of Police, and his predecessors, have culpably failed to recover money due from owners of key points who, by law, were required to bear the cost of the security of key points? Are key points, in truth, not being properly secured?

Although the police had initially made an application for leave to appeal the high court decision, in 2015, they withdrew their application and made public the list of National Key Points. As a result, in 2015 an extensive list of National Key Points was released to the public (Kennedy & Hunter, 2015). There were 204 National Key Points listed, which included the country's airports, presidential residences and the residences of the former presidents, the South African Broadcasting Corporation, power stations, government buildings such as the provincial legislatures, the union buildings and the South African Reserve Bank (R2K, 2015). What is, however, as significant as the release of these buildings is the further impact that that the outcome of the court case had. In 2015, the wheels were set in motion in Parliament for the National Key Points Act of 1980 to be repealed for its questionable constitutionality and for the Critical Infrastructure Protection Bill to replace the apartheid law and to be adopted in parliament. (Mthethwa, 2015). The draft version of the bill was published by the Civilian Secretariat for Police Service in 2016 and the Critical Infrastructure Protection Act was signed into law in 2019. Aside from the fact that the Act was enacted during a democratic

dispensation, the act secures critical infrastructure against threats and ensures that information pertaining to security measures at these sites remain confidential and maintain a certain level of security. The main difference in the new act is that it focuses less on criminalisation and more on the procedures, processes and applications related to declaring a site 'critical infrastructure'.

5.5 Evaluation based on themes

Beyond the court case, there are several additional elements that need to be unpacked as part of the analysis of the case study. This includes the legal framework that surrounds the case, the issue of national security, the political and media climate at the time of the case along with the role of the media and civil society in the success of the case as well as the issue of power that the case exposed. The next section will expand on each of these themes.

5.5.1 Theme 1: The legal framework

One of the integral issues to consider is the use of the National Key Points Act in South Africa's democracy despite it being a piece of legislation that was introduced during apartheid. In South Africa's transition to democracy in the early 1990s, a collection of apartheid era legislation was repealed including the Population Registration Act of 1950, The Group Areas Act, the Land Act and the Separate Amenities Act (South African History Online, 2019). However, there were still some laws that remained in the transition agreement including the Prohibition of the Exhibition of Films on Sundays and Public Holidays Act, Riotous Assemblies Act and the Public Gatherings Act (Caxton Central, 2018). The National Key Point Act was also not repealed at the time.

In the context of the Act being utilised by the democratic government of South Africa, it is important to look at the history of the Act. The National Key Points Act must be seen in the light of the comprehensive information-control regime that formed the basis of apartheid

where there were draconian restrictions placed on security information (Cawthra, 2013). The Act was promulgated in 1980 by South Africa's apartheid government to protect various buildings and locations from the apparent threats of sabotage in the height of apartheid. According to the preamble of the Act, it was established to provide for National Key Points and for the safeguarding of these points, with the Act describing incidents as "any occurrence arising out of or relating to terroristic activities, sabotage, espionage or subversion" (NKPA, 1980: 3). The functions of these areas were thought to be vital to national security.

The government's denial of the information requested about National Key Points and its use of the National Key Point Act in democratic South Africa is concerning, particularly because it is in stark contrast to the ruling party's previous stance on the Act. Despite its use of the Act in this instance, as the ruling party, the African National Congress (ANC) is on record in the early 1990s, voicing its disapproval of the Act. In the ANC's 1997 submission to the Truth and Reconciliation Committee on the role of business during apartheid, the party makes specific reference to the National Key Points Act of 1980 as "one of the mechanisms used by the apartheid government to privatise repression and to institutionalise the collaboration between the apartheid state and the private sector" (ANC, 1997).

In its submission to the TRC, the ANC argued that the business community was integral to the militarisation of the country and went to lengths to describe the motivation behind the Act (ANC, 1997). The party included a justification read by the Deputy Minister of Defence in the 1980s, who at the time, argued that the Republic was in the middle of an unconventional low intensity war, and that "terrorist onslaughts were expected to increase both in frequency and intensity" (ANC, 1997). According to the document, the only way to safeguard the Republic was to designate National Key Points such as mines, power stations, oil refineries and various factories. As a result, according to the submission, owners of these key points were required to provide and pay for security as well as set up security committees jointly with the South African Defence Force. They were to hire recommended private security consultants and make the provision for arms to be stored on these premises. The ANC

argued that some of the financial responsibility for national security was effectively shifted onto the private sector by the legislation, releasing apartheid security forces for other activities; and created a multi-million-rand bonanza for the private security industry (ANC, 1997). It stated:

> The required appointment of private security consultants, and the use of private security companies to guard national key points led to the integration of state and private sector security companies with a uniform security strategy. The militarisation of South African security companies is evident to this day. Many senior personnel from the state's security establishment joined private companies on retirement (ANC, 1997).

However, in 2013, in what appears to be an about turn, the Ministers from the security cluster -- who were all members of the ANC -- warned media houses against publishing photographs of then president Jacob Zuma's Nkandla residence arguing that it could expose the security upgrades, citing the National Key Points Act (Hawker, 2013). In a sitting in Parliament in 2013, Public Works Minister at time, Thulas Nxesi, argued that the security concerns relating to strategic institutions and infrastructure had to be located "within the current global context where terrorist activities are on the rise and South Africa, playing an ever-increasing role in the African continent and the world, becomes more exposed" (Hawker, 2013). He argued that "part of the onerous legacy of apartheid was the existence of the huge body of legislation, which needed to be reviewed over time and brought into compliance with the new democratic constitution" (Hawker, 2013). As Nxesi put it:

> There is no doubt that some of these residual policies, legislation and practices may not fit comfortably with the new ethos. But while we search for proper alternatives, it would be irresponsible to allow for a policy vacuum, especially in areas which involve national security (Hawker, 2013).

The issue that needs to be unpacked is that, despite the African National Congress' vehement opposition of the use of the National Key Points Act during apartheid South Africa and its contribution to the militarisation of the country, the party was still willing to engage with, make use of and reference the apartheid-era legislation in the midst of its democratic dispensation. In fact, statistics quoted in the annual reports of the South African Police Service, reveal that between 2007 and 2017, there was a 66% increase in the number of

National Key Points and a 87.5% increase in sites designated as strategic installations (R2K, 2017).

The concerns about the usage of apartheid-era legislation by the ruling party in the midst of South Africa's democracy is directly linked to the contravention of the Constitution. For one, its reliance on oppressive authoritarian legislation, which was designed for the oppression of the majority of the citizens, who were denied various political rights. As Cawthra (2013) argues, despite the ANC's intention to put in place new policies that promote access to information, its use of the National Key Points Act to justify the denial of access to information shows that "undemocratic practices persist and that the balance may be shifting away from freedom of information towards national security concerns" (Cawthra, 2013: 2). Secondly, it also contradicts the Constitution in terms of Section 35 of the Constitution, which relates to the arrest, and detainment of accused persons. Section 35 notes that everyone who is detained, has the right to be informed promptly of the reason for being detained. Hence, Sutherland's judgment that "if a law imposed a criminal liability on someone, it needs to have been known" (Right2Know Campaign v Minister of Police, 2013[14]). He noted that if the populace did not know how to avoid committing an offence, how could someone be charged after the fact because a place had a "special status" of which no-one was in fact aware (Right2Know Campaign v Minister of Police, 2013[15]).

Concerns about the use of the National Key Points Act have also been vocalized by the Right2Know Campaign in their submission to Parliament during the consideration of the Act being repealed. The organisation argued that the act had "privatised and outsourced the use of national security as a tool to promote secrecy and undermine freedom of expression and accountability in the public and private sector" (Right2Know Campaign, 2015). They argued that the act was too broad and vague; that it lacked oversight mechanisms and that it gave

[14] Right2Know Campaign and Another v Minister of Police and Another (2013/32512) [2014] ZAGPJHC 343, Judgment, p27, para48
[15] Ibid.

the minister draconian powers, which led to numerous abuses and allowed officials to exercise powers of secrecy and repression that went beyond the provisions of the Act. The law was not rooted in openness or transparency, nor did it have strong independent oversight through formal institutions or public participation. And importantly, activities that were in the public interest, (whistleblowing, journalism, protest and dissent) were not protected from prosecution.

The issue at the centre of the National Key Points Act is linked to the government's view of national security and its protection of the state from threats. However, there are several ties between national security and access to information that the state has failed to consider.

5.5.2: National Security

As noted in the previous chapter, national security, according to the International Working Group on National Security, is defined as "the first and most important obligation of government … involv[ing] not just the safety and security of the country and its citizens [but the] guarding [of] national values and interests against both internal and external dangers" (IWGNS, 2013). These are threats that could potentially undermine the security of a state, society and its citizens and must therefore consider the "preservation of the political, economic and social values – respect for the rule of law, democracy, human rights, a market economy and the environment" (IWGNS, 2013).

Globally scholars have argued that secrecy in governments can be justified to protect authorized national security activities and prevent government's effectiveness being undermined by having the information it has collected, developed or used being exposed (Aftergood 2010; White, 2002). However there has been criticism that if too much information is classified and withheld from the public in the name of national security (Aftergood, 2010: 840), it can elicit criticism of the government as it attempts to control the agenda. South African academic, Jane Duncan (2018) for example, has argued that

operational secrets should remain issues of national security that are not released, but that policy documents should be made available to the public for the sake of transparency and public accountability as democratic controls. What this points to, is that issues of national security need to be weighed up against the right of access to information, particularly in the South African context.

South Africa, as a signatory to the Global Principles on National Security and the Right to Information (the Tshwane Principles) is fully aware of the tensions between secrecy on the grounds of national security and the public's right to access information held by a public authority. The country also has obligations to ensure that there is an appropriate balance between disclosure and withholding of information. According to the Tshwane Principles, legitimate national security interests can only be protected adequately when the public is well informed about the state's activities (Open Society Justice Initiative, 2013). The Tshwane Principles note that "concealment of information about human rights violations, any other violation of law, or the functioning of public institutions; strengthening or perpetuating a particular political interest, party, or ideology; or suppression of lawful protests", (Open Society Justice Initiative, 2013: 5) is not considered a legitimate national security interest. At the centre of the principles is the capability of the public to scrutinise state action, to safeguard against public officials abusing resources. Additionally there is the ability of the public to engage in the determination of the state's policies. The principles note that when there are barriers in oversight that are created by national security, it increases the risk of illegal, corrupt, and fraudulent conduct, which may not be uncovered. Privacy violations often occur under the cloak of national security secrecy.

In considering national security and access to information, the main consideration should be that of the public interest. It should be to establish whether maintaining the secrecy of information clearly outweighs the public interest in the access to information. The principles also define information that could legitimately be withheld. This includes "information about on-going defence plans, operations, and capabilities for the length of time that the

information is of operational utility. The third is information about specific measures to safeguard the territory of the state, critical infrastructure, or critical national institutions against threats or use of force or sabotage, the effectiveness of which depend upon secrecy" (Open Society Justice Initiative, 2013).

In the case of South Africa, Cawthra (2013) argues that the country's current approach to national security and access to information needs to be embedded in an historical context. It is important to note that South Africa has moved from being described as a police state in the 1950s, to one that was heavily militarized by the late 1970s, to one in the new South Africa where national security was no longer predominantly viewed as a military and police problem. He explains that through the Constitution, South Africa's democratic approach to national security has been one of safety and security for all citizens. In light of this, it can be argued the government – and the ruling party's – approach to the National Key Points Act is contradictory.

Let us momentarily extract the issue of national security from the National Key Points Act and conjure fictional scenarios that can be linked to national security to illustrate its importance. Take for example, a media report about the fact that South Africa currently only owns three fighter jets. The challenge for national security in this context is that the country stands the risk of exposing its vulnerability with regard to other states potentially understanding its capabilities in terms of fighting back in a hostile takeover. A similar scenario ensues if, for example, reports were made public of exactly how many members make up South Africa's National Defence Force. From the perspective of a national key point, there are also issues for example if a member of the public photographs a specific National Key Point and inadvertently exposes parts of the security blueprint to forces who would wish to invade or compromise the specific venue. On the part of the state, in these instances, it is critical to protect such information as it directly relates to the state's ability to secure this location. However, these considerations need to be subjected to mechanisms of oversight and weighed up carefully against the citizen's right to information that places them in a

position of making informed decisions about the choices they make as part of the electorate. In the case of the National Key Points Act, the provision that allows the minister discretionary power to declare a national key point without the input of the general public provides the minister with blanket power to make decisions that could impede on the populace's freedom of movement.

The National Key Points Act is, however, not the only apartheid law that provides a mechanism that the government can use to override the generous provisions of access to information with regard to national security. As noted earlier Cawthra (2013) has identified the General Intelligence Laws Amendment Act, as a piece of legislation that gives the state the power to get the intelligence services to gather information on people by "eavesdropping on electronic traffic over phones, e-mails and the internet, in line with the intelligence priorities of the Republic" (Cawthra, 2013: 10).

These are similar to provisions that were available to the apartheid state which were abused at that time. Due to the fact that the post-apartheid South African conception of national security is "both broad and human-centred" (Cawthra, 2013:14), a safeguard must be in place to ensure that there is a balance between national security and the right to information. The concern, however, according to Cawthra (2013) is that the state has currently placed a higher value on state security imperatives, moving away from that balance to the right to access information (Cawthra, 2013:14). The reason for this could be linked to widespread corruption within government that the state is attempting to cover up or as the result of the spread of disinformation for intra-party politics (Cawthra, 2013: 14).

In conducting an evaluation of the case study with regard to the issue of national security, it clearly illustrates the contradiction in the state's approach to national security and access to information. On the one hand, the government has built strong support for access to information by embedding the right to information in the country's Constitution along with the tenets of transparency and accountability. At the same time, South Africa has become a

signatory to the Global Principles on National Security and Access to Information, which shows that it is committed to understanding the relationship between the two concepts. As a signatory they would be fully aware of their limitations in using national security to deny information. In addition to this, these legal prescripts also have to be put in the context of the police's interaction with PAIA over the last 21 years as one of the state departments that have been most prolific in dealing with PAIA. The police are not only well versed with the implementation of the law but also familiar with how the exemptions can be used to deny information.

On the other hand, despite these legal parameters being drawn by the state, the state was willing to misuse national security as an exemption to refrain from handing over information to a requester. This is concerning for the implementation of PAIA.

5.5.3 Theme 3: The media

For the purposes of the case study, it is also important to look at media, civil society and the courts in the National Key Points matter to understand each of their roles.

With regard to the media, there are two points that need to be considered. The first is that the Mail and Guardian, as a well-established media house known for its investigative journalism capacities, had applied to be a friend of the court in the National Key Points matter. The argument presented by the Mail and Guardian in terms of why it wanted to be attached to the court case was that the outcome of the matter was of interest to the newspaper (Right2Know Campaign v Minister of Police, 2013[16]). In the course of the media house's work there had been "numerous incidents over the years in which reporters had been advised that a particular location could not be photographed or reported on because

[16] Right2Know Campaign and Another v Minister of Police and Another (2013/32512) [2014] ZAGPJHC 343, amicus curaie application founding affidavit

it was a National Key Point" (Right2Know Campaign v Minister of Police, 2013[17]). An understanding of what places were key points would therefore provide them with clarity and prevent their reporters from suffering unnecessary arrest when they were in the field reporting. The reasoning presented by the newspaper is fair but its decision to attach itself to a court case in which the outcome is in the public interest should also be seen as significant beyond the benefit that it brings the media house. This is because the media in this instance is stepping away from the passive role that it occupies normatively reporting on news: by joining the court case it has taken up a role as an active custodian of democratic good. In joining in the case, the media is behaving in a way that is supportive of the democratic principles of accountability and transparency and showcasing the need for these principles to be actively engaged within a democracy. This in turn once again underscores the important role of the media in encouraging democracy. The media, as has been outlined in previous chapters, is one of the bodies that actively utilizes PAIA in South Africa -- and the legislation is a critical cog in their attempts to access information in the possession of the state.

a) Media coverage and public interest

The second matter relates to media coverage of National Key Points. At the time that SAHA approached the high court to challenge the decision of the Police Minister not to release the list of National Key Points, the issue of National Key Points was not new, nor unknown. There were several other high-profile National Key Point issues that were being covered in the media at the time, which were closely associated with the National Key Point tension, some of which were subjected to their own PAIA applications in this regard. One of these was the PAIA application from the Mail and Guardian newspaper to the Department of Public Works on the security upgrades at the then President Jacob Zuma's homestead in Nkandla in South

[17] Right2Know Campaign and Another v Minister of Police and Another (2013/32512) [2014] ZAGPJHC 343, amicus curaie application founding affidavit, p4, para 10

Africa's KwaZulu-Natal province (M&G Centre For Investigative Journalism NPC v Minister of Public Works, 2014).

The initial request by the Mail and Guardian newspaper was specifically only seeking information relating to the "financial implications and not the technical detail of security-sensitive improvements" (M&G Centre For Investigative Journalism NPC v Minister of Public Works, 2014). However, the request was denied with the Public Works Department citing the estate as a "National Key Point" (M&G Centre For Investigative Journalism NPC v Minister of Public Works, 2014). The issue of the upgrades had created a massive media furore and this in turn created widespread public interest in the matter of National Key Points. The public interest in the matter resulted in mass public outrage and had several consequences. One of the most significant consequences was that a member of the public laid a complaint of corruption with the Chapter 9 institution of the Public Protector, which resulted into an investigation into the upgrades. In addition to the Chapter 9 institution launching an investigation, the public outrage also resulted in South Africa's parliamentarians taking an interest in the matter (IOL News, 2012). Eight of the ten opposition political parties in Parliament jointly proposed a motion of no confidence in then President Zuma, citing among other concerns the so-called Nkandlagate scandal and a rising tide of corruption in the public service (Davis & Ndenze, 2012). Several motions of no-confidence were tabled in Parliament and, in February 2018, Zuma stepped down as president (Burke, 2018; Winning, 2018). Although the resignation was a function of the ANC's internal factional contests and a practice that was established in 2008 when former President Thabo Mbeki was forced to resign after losing an elective conference, the events in Parliament, and the resignation of the president, are significant, because of the public interest that it generated. This reiterates the importance of the media in informing the public interest as well as setting the agenda, in line with McCombs, Shaw and Weaver's (1997) agenda setting theory.

The issue of public interest is critical because it highlights why the public interest clause is an important precedent in PAIA and how it benefits users of the law -- such as the media and

civil society organisations -- who seek information that could eventually assist members of the public effect their rights. It brings into sharp focus the values of openness, responsiveness and accountability that are articulated in section 1(d) of the Constitution (Republic of South Africa Constitution, 1996) as well as the freedom of the media that is linked to the provisions within PAIA.

The media coverage and the resultant public interest that it sparked, shows how the media also contribute to creating a more open and transparent society and how they have utilised PAIA for this purpose. In the same way, the case showcases how PAIA is able to aid the media in their purpose despite the fact that it, too, can place a limitation on their reportage. The underlying issue is that the media are only able to have a limited opportunity to adequately question decisions in government. Despite their application of laws such as PAIA, they are still potentially in the position of being denied the information they seek, which then requires them to take on a significant effort to access this information. This has cost as well as time implications. Even when issues are in the public interest, the concern is that by the time the information is revealed, it may no longer be relevant.

The media's role in helping to create (or at least inform) the public interest must be noted. All the cases used to cite public interest in the court case were based on media articles that had exposed how state officials invoked the National Key Points Act (Right2Know Campaign v Minister of Police, 2013).

b) Nkandla

The Mail and Guardian's PAIA application linked to the Nkandla homestead is, however, on its own accord, also significant for PAIA in that it has also successfully tested the way that the grounds of national security can be overthrown after a request for information has been denied. There are several similarities between the National Key Points matters and the Nkandla matter, particularly in the justifications that were used by SAHA in the one instance

and Mail and Guardian in the other. It is therefore worthwhile to look at the Nkandla case for the lessons that can be drawn from it with regards to PAIA. The Mail and Guardian had specifically made a request to retrieve documents relating to the motivations behind the upgrades at the then president's house. In addition, they sought documents detailing the available budget and the tender processes that were followed in the allocation of contracts for this work. This included a list of the contracts that were awarded along with the amount that each contractor was awarded for the work they would undertake.

The newspaper, in both the initial PAIA request documents as well as the papers filed in court to dispute this decision, had made it specifically clear that "no security sensitive information was required" (M&G Centre for Investigative Journalism v Minister of Public Works, 2014[18]) but rather the "financial implications of the procurements by the state" (M&G Centre for Investigative Journalism v Minister of Public Works, 2014[19]). In an affidavit filed to the North Gauteng High Court as part of the notice of motion, Vinayak Bhardwaj, who was the advocacy co-ordinator at the Mail and Guardian newspaper, justified the decision to seek the information. At the centre of his argument was the issue of public interest as well as the South African state's financial accountability obligations under the Public Finance Management Act (M&G Centre for Investigative Journalism v Minister of Public Works, 2014[20]), the finance law that guides procurement in government departments in line with the provisions noted in the Constitution. He argued that there was evidence that suggested fair, competitive, transparent and cost-effective procurement processes were not followed (M&G Centre For Investigative Journalism NPC v Minister of Public Works, 2014).

Similarly to the National Key Points case, Bhardwaj's justification for the release of the documents was centred on the profound public interest and importance of the information.

[18] MandG Centre For Investigative Journalism and Another v Minister of Public Works and Another (67574/12) (2014), founding affidavit of second applicant, P8 para 10
[19] Ibid.
[20] MandG Centre For Investigative Journalism and Another v Minister of Public Works and Another (67574/12), founding affidavit of second applicant, p26, para 55

It concerned what he termed in his application, the "propriety and priority of significant public spending in a country with limited funds to meet the considerable demands of a developing economy" (M&G Centre for Investigative Journalism v Minister of Public Works, 2014[21]). He termed the case a scandal that was "one of the most serious public spending scandals in the post-apartheid political era" (M&G Centre for Investigative Journalism v Minister of Public Works, 2012: 25) because of the continued state secrecy surrounding the expenditure despite news articles revealing that considerable sums of public funds were being paid to private contractors without the necessary tender procedures. It had "the potential to undermine national and indeed international confidence in the President and the public administration as a whole" (M&G Centre for Investigative Journalism v Minister of Public Works, 2012: 25[22]). Disclosing the records was therefore essential to "respect the founding constitutional values of government openness, responsiveness and accountability" (M&G Centre for Investigative Journalism v Minister of Public Works, 2014[23]), as well as to "vindicate the constitutional rights of freedom of expression and of access to information" (M&G Centre for Investigative Journalism v Minister of Public Works, 2014[24]).

The newspaper argued that the non-disclosure of the records had generated widespread speculation that the records would reveal impropriety. This harmed the public's confidence in the state and in the President himself. As evidence of the public interest in the matter, Bhardwaj cited several media articles by highly regarded newspapers in South Africa that had garnered significant attention from the public at the time and resulted in widespread public concern around the extent of public expenditure on the then president's estate (M&G Centre for Investigative Journalism v Minister of Public Works, 2014). These ranged from exposés that the Department of Public Works' expenditure had skyrocketed from R36 million

[21] M&G Centre For Investigative Journalism and Another v Minister of Public Works and Another (67574/12), founding affidavit of second applicant, p21, para 48
[22] Ibid, p25, para 53
[23] Ibid, p25, para 53
[24] M&G Centre For Investigative Journalism and Another v Minister of Public Works and Another (67574/12), founding affidavit of second applicant, p26, para 54

for security-related construction to approving over R230 million in security upgrade expenditure (M&G Centre For Investigative Journalism NPC v Minister of Public Works, 2014). Of this, about R194 million had been paid to contractors and R44 million to consultants in relation to this project (M&G Centre for Investigative Journalism v Minister of Public Works, 2014). There was also an announcement that the Public Protector would be investigating the irregular upgrades expenditure as well as calls from the leaders of the opposition parties in Parliament to cancel the upgrade and to spend the allocated funds on public services instead (M&G Centre for Investigative Journalism v Minister of Public Works, 2014). In addition to this, there were also articles that revealed that then President Zuma had been given more than the previous democratic government presidents for upgrades. The media had also published articles quoting experts who revealed that the costs of the controversial upgrades seemed to have been grossly inflated (M&G Centre for Investigative Journalism v Minister of Public Works, 2014).

Based on the court papers, the Department of Public Works contravened PAIA on several occasions, particularly in the early stages of the application (M&G Centre for Investigative Journalism v Minister of Public Works, 2014). Although the Department acknowledged the request, it failed to meet any of the remaining deadlines to respond to the request and the internal appeal, as is required by PAIA. It was only after the newspaper prodded the government body for an outcome to the response that they were denied access to the information. In addition, this government body also failed to cite a sufficient ground for refusal in terms of PAIA (M&G Centre for Investigative Journalism v Minister of Public Works, 2014).

Their refusal was on the grounds that all the information relating to the then President's residence was protected from disclosure in terms of the National Key Points Act, the Protection of Information Act and the Minimum Information Security Standards (M&G Centre for Investigative Journalism v Minister of Public Works, 2014). The Protection of Information Act no 84 of 1982 is a piece of legislation that was passed in the midst of apartheid to

supersede the Official Secrets Act. The Act prevents access to information related to "any prohibited place or anything in any prohibited space, or any armament, the defence of the Republic, any military matter, any security matter, or the prevention or combating of terrorism, and any other matter or article which might be of use to a foreign state or hostile organisation" (Protection of Information Act, 1982). It worked on the premise that "information published on security matters shall be deemed to be prejudicial to state security, unless it was received by someone acting under lawful authority" (Cited in Africa: 61). Additionally, the Minimum Information Security Standards are regulations that pertain to the classification of information (MISS, nd). They also cited sections 38 and 41 of PAIA arguing that the documents could not be disclosed because they contained security sensitive information (M&G Centre for Investigative Journalism v Minister of Public Works, 2014).

However, as the court case progressed, the Department was forced to concede that the documents that had been requested were not all of a security sensitive nature and the department was forced to release some of the information (M&G Centre for Investigative Journalism NPC v Minister of Public Works, 2014). In the end of the Nkandla matter, the court ruled that the department had an obligation to release all the documents related to the PAIA request (M&G Centre for Investigative Journalism NPC v Minister of Public Works, 2014).

Although the judgment in this matter was only made in 2014, and therefore had no impact on the outcome of the National Key Points matter, parts of the judgment are relevant for this thesis, in South Africa more broadly and as well as in relation to the contribution of PAIA to democracy. There are two reasons for this. The first relates to the deliberations around national security, which were clearly linked to the case. Although national security has been discussed at an earlier point in this chapter, in this instance it is worthwhile to mention the court's comments. This is particularly relevant because the court highlights how the state manages to utilise national security as a scapegoat for it not being willing to release information that could result in the citizenry identifying potential corruption, questioning it and ultimately holding them to account properly. The case directly shows why the populace

at large need accountability mechanisms to be able to voice their concerns in a democracy, even if it is through the media that take up the fight for the truth. However, it also effectively encapsulates the essence of the need for access to information mechanisms as an accountability tool to enhance the state of democracy in the country. Without active and efficient mechanisms for access to information, the likelihood of such types of information coming into the public domain is rare—and the ability of the public being able to use it to question the state is even more unlikely.

The second relates to the court's statements around the constitution and PAIA. These will be discussed in the next theme, relating to the role of the court. However, what this theme showcases – through both court cases – is the vital role of the media in the implementation of the access to information as an accountability mechanism. This is both through the reportage of information gained through access to information requests, creating awareness of access to information cases that have been launched as well as the active role they play in launching access to information requests and court cases that clarify and test and broaden the scope of the law.

5.5.4 Theme 4: The role of the courts

There are various insights into the role of the court in relation to PAIA that can be highlighted in the judgment of the case between the Mail and Guardian and the Department of Public Works.

However, before this is undertaken, it is important briefly to discuss the role of the court in relation to the main focus of this case study being the National Key Points matter. As has been outlined in the earlier part of this chapter, the judgment in the National Key Points case, delivered by Justice Sutherland, is significant on several fronts. It highlights the implementation challenges with regard to PAIA, particularly in the way that the state is able to hide behind elements of the Act to withhold information as well as the manner in which

state departments go against the tenets of accountability and transparency by keeping requested information out of the public domain.

In line with Sutherland's statements, it is worthwhile to look at the judgment delivered by Justice Thlapi in the Mail and Guardian's case against the Department of Public Works, particularly with regard to her thoughts on national security and the courts. In her judgment, Thlapi ruled that the Constitution provided for accountability, transparency, openness and public administration and that all spheres of government as well as organs of state security and other security agencies needed to be subjected to these values and principles (M&G Centre for Investigative Journalism NPC v Minister of Public Works, 2014). She noted that "an open and transparent government and a free flow of information concerning the affairs of the state was the lifeblood of democracy", quoting another court case (M&G Centre for Investigative Journalism NPC v Minister of Public Works, 2014[25]). There were three points that showed that the denial of access to information was undermining constitutional safeguards. The first is the fact that the documents were disclosed after the revelations in the court case; the second is the fact that only a limited number of the documents were security related; and the third is the fact that the grounds relied upon were not justified (M&G Centre for Investigative Journalism NPC v Minister of Public Works, 2014). Moreover, in addition to the judges' comments on national security, what is even more compelling are her remarks about the role of the courts in access to information matters. Thlapi noted that the "courts are called upon to be vigilant in determining M&G Centre for Investigative Journalism NPC v Minister of Public Works, 2014"[26], and that they are "required to interpret security related legislation in a manner that will protect the right of access to information as provided for in the Constitution" (M&G Centre for Investigative Journalism NPC v Minister of Public Works, 2014[27]). She also made pronouncements on the processes linked to PAIA by providing stern remarks about issues of there being no record of documents in writing, or no records being

[25] M&G Centre For Investigative Journalism and Another v Minister of Public Works and Another (67574/12) (2014). ZAGPPHC 226, judgment, p19 para 26
[26] Ibid.
[27] Ibid.

kept pertaining to top management decisions (M&G Centre for Investigative Journalism NPC v Minister of Public Works, 2014). These challenges she labelled "a serious indictment against those in public office who deal with the business of government, which should not go unchallenged" (M&G Centre for Investigative Journalism NPC v Minister of Public Works, 2014[28]). Thlapi directly highlighted the state's "failure to keep records" as well as its "tendency" to "lose documents or hide them" or "deal with government business under a cloud of secrecy" constituted a dereliction of one of the most important obligations on a government, which is to keep proper records (M&G Centre for Investigative Journalism NPC v Minister of Public Works, 2014[29]). Thlapi expounds as follows:

> Such conduct on the part of government does not advance the values espoused in our Constitution that has a democratic transparent and accountable government. It is in the public interest to keep records in order to give credence to the business of government itself. And to those who govern, record is kept to monitor those vested in the duty to govern to ensure that taxpayers money is properly accounted for, record is kept to advance access to information as protected by the Constitution's records. So that such records are preserved for posterity in keeping with our national heritage (M&G Centre for Investigative Journalism NPC v Minister of Public Works, 2014[30]).

Both Sutherland and Thlapi's comments in these PAIA court cases are important for the pronouncements they make on PAIA itself as well conclusions that can be drawn from the role of the courts in the implementation of PAIA. Both justices firmly centre the importance of transparency and accountability on the part of the state as well the fact that if PAIA was not in place these would not effectively take place. They underscore the links that PAIA has to Constitution and how these cannot be undermined, if the state is eager to undo the injustices of the apartheid state. Their statements showcase how the court has been central to further defining the boundaries of the law in South Africa. In light of the challenges that have encompassed the processes of PAIA in South Africa, particularly with regard to the early stages of the requests for access to information, the precedent that is set stipulates how similar PAIA cases need to be dealt with in the future. It is also important in that it has

[28] M&G Centre For Investigative Journalism and Another v Minister of Public Works and Another (67574/12) (2014). ZAGPPHC 226, judgment, p26, para 35
[29] M&G Centre For Investigative Journalism and Another v Minister of Public Works and Another (67574/12) (2014). ZAGPPHC 226, judgment, p26, para 35
[30] Ibid.

managed to expose the implementation challenges through the judicial system, which is considered credible and independent and, as it inspires confidence in the ordinary citizen, that potential irregularities in their cases would not go unseen or not be dealt with.

At the same time, however, what is concerning in this regard is the fact that these cases needed to be adjudicated by the courts and that the internal appeals process was not sufficient to deal with these requests. Considering that the decisions were overturned shows that, potentially, the state was serving its own interests in denying the requested information. Equally concerning is the role that the court has had to play in delivering these pronouncements. Had the parties not had the financial means or resources to approach the court to appeal the dismissals of the information requests, these pronouncements would not have been made. What this means is that the ability of PAIA to act as an accountability mechanism can be limited, for an ordinary citizen.

Another significant point to highlight with regard to the role of the court is the way in which the court process also showcases how interlinked the media and civil society are in the implementation and correct interpretation of the law. This can be seen, for example by the way SAHA, who joined in as a friend of the court in the Mail and Guardian's matter against the Department of Public Works in late 2012, referenced above, was able to use their justifications to that court when they participated in the National Key Points matter. They were able to use their arguments as a basis to strengthen their case around the release of the National Key Point list. In its application to be an *amicus curiae* in the Mail and Guardian's case, SAHA argued that "there was a culture of secrecy pervading public bodies" (Kennedy, 2012). This, Kennedy argued, was "one of the primary limitations on the right of access to information" (Kennedy, 2012: 5). As a result of this culture of secrecy, "PAIA's security exemptions were often misapplied and there was a reliance by the state on apartheid era legislation such as the National Key Points Act as well as the Protection of Information Act to withhold information from the general public" (M&G Centre For Investigative Journalism and

Another v Minister of Public Works and Another, 2014[31]). This culture has had "a permeating effect and would continue to act as a wall between government and the general public" (M&G Centre For Investigative Journalism and Another v Minister of Public Works and Another, 2014[32]). The culture of secrecy manifested itself in responses to PAIA requests, in particular: that requests are often only considered once there is a threat of litigation or an appeal. As a result, requests were routinely met with an "initial knee-jerk unreflective refusal generally without adequate or any reasons as is required in terms of section 25 of PAIA" (M&G Centre For Investigative Journalism and Another v Minister of Public Works and Another, 2014[33]). Officials would refuse access to all requested records without considering the obligation to serve materials that may be disclosed in terms of section 28 of PAIA, nor considering whether the public interest override in section 46 of PAIA may require disclosure even where a valid ground to refuse disclosure is present (M&G Centre For Investigative Journalism and Another v Minister of Public Works and Another, 2014[34]). The end result, according to Kennedy, was that the refusal would eventually be withdrawn when litigation was instituted (M&G Centre For Investigative Journalism and Another v Minister of Public Works and Another, 2014[35]). This culture frustrated the legislative scheme envisaged by PAIA. Kennedy's findings are in line with the statements made by Judge Thlapi in the Nkandla matter and showcases the sentiments of users of PAIA across the board, based on the challenges they encounter.

5.5.5 Theme 5: Civil society's contribution

Beyond the media coverage, the National Key Points case underscores the importance of organisations such as the Right2Know Campaign and SAHA and others and the role that they play in taking up the PAIA battles on behalf of citizens. The case shows the critical role of civil society groups along with the media in the ongoing efforts to make the use of PAIA more

[31] M&G Centre For Investigative Journalism and Another v Minister of Public Works and Another (67574/12) (2014), founding affidavit in application for amicus curaie, p5-6, para 14.2
[32] Ibid, p8, para 24
[33] Ibid, p8, para 25.3
[34] Ibid, p8, para 25.3
[35] Ibid, p8, para 25.3

widespread and to create awareness about the law among the general public. SAHA and the R2K Campaign were a critical part of the National Key Point case victory, however, they have also consistently been at the forefront of championing PAIA awareness among the general public in South Africa, as can be seen by the high-profile cases mentioned in this thesis in which both parties have been intricately involved. In addition to SAHA's dedicated efforts to create awareness of PAIA through training, the case is one of thousands that SAHA has undertaken. The organisation has been one of the significant driving forces in relation to PAIA in South Africa, and it's involvement showcases how, without civil societies' efforts to utilise PAIA by ensuring that the law is applied in the spirit and manner envisioned by the Constitution, taking the state to court when their applications for information are dismissed and as well as their efforts to get the general public to utilise and understand the law, the law may continue to fall flat.

SAHA's role must be seen in the context of the role that civil society is able to play to aid the proliferation or sustainability of PAIA in South Africa. However, civil society organisations present both a benefit and a disadvantage in the implementation of PAIA and more largely in the democratic process.

On the one hand, there is a benefit of a dedicated organisation representing the voice of the populace, backed by the necessary resources in order for it to be able to tackle the state apparatus as well as the formalised process of the PAIA law and the requisite legal prescripts of the South African legal space more broadly. In terms of the benefits posed by the involvement of civil society organisations in the PAIA process, there is the palpable benefit of information being provided by the public body, as has been shown in the multitude of SAHA's cases where information and documents have been released. The organization has had numerous successes in the requests that they have filed, which exceeds 2000 requests sent to government departments as well as numerous appeal applications to high courts (M&G Centre For Investigative Journalism and Another v Minister of Public Works and Another, 2014).

As one of the leading organisations utilising PAIA, SAHA has made it their prerogative to ensure that they take on and get involved in cases that are both of a high-profile nature as has been shown in the cases of the national key points act and the Nkandla homestead upgrades relating to the then president as well as those cases that involve ordinary residents. The latter cases which would not necessarily result in attention from the media to expose the matter. This mandate to take on the cases of local communities who need information to benefit their local residents directly, is important. One such case that the archive has taken on, is that of a middle-aged woman from Small Farm in Gauteng who had requested a copy of the budget and expenditure for the Evaton Urban Renewal Project. Initially the woman was advised by a municipal officer that this information was confidential and meant "for senior management only" (PAIA Civil Society Network, 2009: 6). However, when the archive took up the matter in 2017, and requested copies of any and all records relating to public participation in the Evaton development programme within the Emfuleni Local Municipality, various documents were forthcoming (SAHA, 2017). The documents released include a status report on the Evaton Renewal Project as well as meeting minutes of the Evaton Renewal Project follow up meeting and an attendance register of the meeting. The documents are an important part of the community's interest in the matter as it provides them with details about the upgrades, which have been promised since 2004 but have still not taken place. The ability to access the documents allows interested residents in that community to peruse the documents in order to question the political decisions that have been made at a municipal level, which would ultimately affect them. For residents to be able to have access to these documents, the democratic tenets of openness, accountability and transparency are at play and therefore encourage participation in the process, control of the agenda and an enlightened understanding. The success of retrieving these documents also engages with the power balance between citizens and officials within the municipal and local government arena and shows how PAIA can be used successfully to navigate those power balances in favour of communities. In this instance, therefore, the involvement of civil society organisations such as SAHA helps to showcase the strong democratic character of the PAIA legislation and process.

However, at the same time there are negative repercussions linked to civil society organisations such as SAHA managing the PAIA application process. They illustrate what is required to successfully navigate the process, clearly highlighting the inaccessibility of the law for individuals. Ordinary residents that do not have the backing of civil society resources, expertise, capabilities, and capacities are likely to be unable to take up and manage a PAIA process on their own, in order for them to get access to the information they require. In addition to the formalistic nature of the law, which residents may not have the capacity to access nor understand, there are also the challenges that arise with the need to approach the judiciary to dispute a decision to deny access to information. Various scholars such as Adeleke (2019, pers. comm.), Calland (2003) and Peekhaus (2011) have lamented the formalization of the law – and these challenges on the part of citizens speak directly to that.

It must be noted, however, that SAHA has made it a priority to educate citizens on PAIA and its import, hosting a variety of workshops with community workers and organisations that have limited resources as well as producing toolkits and guides on how to utilize the law in the most effective way. Despite this, as a former official at the SAHA (2019, pers. comm.) reflects in a personal interview: there is still a disparity, particularly with community members who approach SAHA in an attempt to utilise PAIA to solve community-based problems. According to the official (2019, pers. comm.) citizens are often still lost in terms of the processes they need to follow to use the information that they have managed to access, in a manner that would result in their problems being resolved. In most instances, citizens that have successfully managed to acquire information in terms of PAIA are ill-equipped to understand how this information can be utilised to bolster their battles and they are unable to utilise this information to their advantage (interviewee, 2019, pers. comm.). Many do not realise that the process of getting access to information is only the first step in a broader process that needs to be followed in order for them to get what they require from the government (interviewee, 2019). This reality is not an unlikely scenario in a state such as South Africa which has significant socio-economic challenges and close to 60% of the population have not completed high school, according to the 2015 General Household

Survey (Statistics South Africa, 2016). SAHA has not been the only organization to experience this challenge.

Murray Hunter, former spokesperson for the Right2Know Campaign, who was a critical driving force in the National Key Points matter, has termed the ability to utilise information to one's advantage as "social power" (Hunter, 2019, pers. comm.). Hunter (2019, pers. comm.), in a personal interview, argues that people hold social power on various levels, based on their upbringing, the levels of education and the network that they are able to collect and connect to. Collectively these can often constitute a firm enabling force in giving one an advantage. He uses the example of someone who is able to speak English well and understands the legal terminology that engulfs a PAIA request. Government officials may potentially mistake a well-spoken person for an attorney and this would result in them getting their request more easily than someone who is not as fluent. Hunter (2019, pers. comm.) found that in many of the PAIA requests that his organization handled, ordinary residents were looking for an answer to resolve a problem. In these instances, the documents were helpful but in many cases, people were in fact requiring an official to explain what the problem was and how it could be resolved.

While PAIA applications do not result in the delivery of services on the part of government, they have the ability to result in a process that could eventually lead to service delivery[36]. However, this often takes longer than the community expects it to take. In most cases, however, Hunter found that it was the service delivery that people wanted rather than the information (Hunter, 2019, pers. comm.). There were instances where a simple document request was all that was needed to end a dispute or prove an allegation (Hunter, 2019, pers. comm.). In these instances, the information was the service but in most cases people needed the government official who managed the document to sit down with them and answer their questions. They wanted access to the process instead of getting a stack of documents. In this

[36] Service delivery includes the provision of services such as water, electricity, waste removal, which are considered services delivered at a municipal level in South Africa.

instance, civil society organisations have managed to navigate the power relationship between the citizen and the state relating to access to information, to ensure that their interests are met and ultimately to the benefit of the communities they serve and work with, to enable access to information.

The reflections of an interviewee and Hunter illustrate a significant problem with PAIA in terms of citizens being unable to utilize this piece of legislation in their individual capacities in order to improve their autonomy and their prospects for enjoying the democratic privileges of being empowered. These reflections do, however, bring to the fore the issue of power, which should also be discussed in the context of PAIA, and specifically the National Key Points case.

5.5.6 Theme 6: Power

In addition to analysing the National Key Points case in relation to the law itself, the media and the role of civil society, it is also important to evaluate the case in terms of power, as there are various scenarios within the case that reflect the nuances of the power relations in the application of PAIA.

There are various elements of the case that should be evaluated from a perspective of power. For one, the National Key Points Act itself can be considered through a lens of power. The power relations are evident in the enforcement of the law as well as the manner in which the law has been utilised in a post-apartheid setting. In terms of its composition, the fact that a law gives a political appointee the discretion to determine a National Key Point without any interrogation or announcement to the populace demonstrates how the power imbalances are skewed in favour of the state. The concern in terms of this scenario links directly to Matolino's sentiments of "representatives not fully representing their constituencies" as they are manipulated by their parties (Matolino, 2018: 108).

Another case in point is the fact that the act allows the apparatus of the state the power to make decisions that would affect the populace, without any consultation with them. When a decision to declare a National Key Point takes place, it is important for citizens to be in a position where they are able to question the Minister's decision and understand the basis of the decision. They also need to be able to question the financial aspects around this decision. However, they are only able to do this with the necessary information that a National Key Point has been declared and they are in a position to raise red flags and ultimately hold the state to account. The sole discretionary power – as envisioned in the National Key Points Act -- invested in a Minister is therefore problematic as it suggests that citizens are not able to be privy to this decision. This power asymmetry is therefore blatantly in conflict with the principles of democracy as it fails to provide any autonomy to the general populace to have any input in this decision-making process.

It follows then that because the democratic ANC government would have been fully aware of the power asymmetries that exist in the design of this law and its application, as a party it has been willing to skew the power dynamics to its benefit and despite it detracting from the democratic ideals it envisions in the Constitution. It is concerning that the state is willing to invoke a piece of apartheid-era legislation, rooted in autocratic principles and one that limits citizens' freedom of movement, during a democratic period, despite the Constitution guaranteeing freedom of movement.

The power relations surrounding the law also need to be evaluated from the perspective of national security. National security is an important priority and cannot be undermined in the context of any state setting. However, the issues of national security and the impact that they have on power relations in the PAIA arena, as seen in the National Key Point Act case study, cannot be understated. As Cawthra (2013) argues, there is an important balance that needs to be struck between power and national security. Information cannot expose the state and its citizens and make it vulnerable to any external forces. However, the Tshwane Declaration notes that national security trumps information only in the face of on-going defence planning

and operations (Tshwane Principles on National Security and the Right to Access to Information, 2013) (Open Society Justice Initiative, 2013). South Africa, as a signatory to this declaration, should therefore be aware of the provisions that it can cite in denying information. The fact that the state incorrectly cited national security provisions in the case of the National Key Points PAIA application means that it was utilising the power asymmetry to its advantage by withholding information, which they knew could inflame the populace. If there is no oversight mechanism, it provides a gap for abuse in some form, where national security can be used as an excuse to withhold information that covers up corruption. There is a clear conflict with principles of transparency and accountability.

At the same time, the case study also showcases the fluidity of the power dynamics surrounding PAIA. Fundamentally, the fact that the PAIA application resulted in a court case, which in turn resulted in the apartheid-era law being repealed in favour of the Critical Infrastructure Bill, showcases how the populace were able to navigate the power relations and invoke the principles of accountability and transparency in order to get the information that they required. This eventually led to the public being enlightened on an issue that affected them and then having the ability to be able to speak out against it. It therefore also illustrates the overarching importance of the public interest within a democracy, which is important in the navigation of the power relations. This public interest in the matter resulted in the exposure of the abuse of power along with the challenges around transparency and accountability within the state apparatus, despite the values espoused by the Constitution. This can be considered an outright victory for democracy.

It must be noted that the enactment of the PAIA law itself within South Africa's young democracy signifies the government's transformation in their approach to national security and signals the tendency of a government that is attempting to be accountable. It is also a recognition of the government's intention to introduce a different culture of transparency in the new South Africa. However, the implementation of this law showcases the power

balances that need to be navigated in terms of national security versus access to information.

In line with this, the case study however also highlights the challenges with regard to power balances in the implementation of the law. There are several instances where this takes place. The fact that the case needed to be heard in a court creates a problem for the equal use of the law without resources as this is a costly mechanism to undertake. This highlights the flawed internal appeal process and is an example of how the populace at this juncture have limited (and unequal) power to challenge the decision-makers within the state who decide to deny the information.

Secondly, delays on the part of government officials in responding to requests and their flagrant disregard of the law, as highlighted by SAHA, also leaves the populace powerless and not in position to navigate this power imbalance unless they have access to civil society organisations that can take up their cause or sufficient financial backing to argue the matter in court. The trend over the last 18 years, based on reports by the PAIA network, of PAIA requests being routinely ignored, speaks to the power relations in certain aspects remaining skewed in favour of the state. There have been various occasions in which the Chapter 9 institutions, as the former champions of the law, have approached Parliament to have elements of the law amended, to ensure that the populace can enjoy a more balanced power relation in the implementation of the law. However, these requests have gone unanswered. In terms of the state's democratic mandate of being accountable to the populace, this is problematic as it implies that the state is failing in its democratic obligation but also undermining the Constitutional obligations of access to information, accountability and transparency.

The fact that critical questions about the department's decisions around National Key Points were only raised during an appeal in the court, three years after the allegations were first exposed, is also problematic in terms of the principles of accountability and transparency

that need to be effected within a democracy. Ideally the populace's ability to question decisions by the state should be attended to more speedily without a three year wait. Ultimately, the fact that government officials are able to invoke provisions in the National Key Points Act in their attempts to deny information, without being held accountable, is problematic for democracy.

5.6 Discussion

The National Key Points PAIA matter is an important one for the evaluation of PAIA and democracy for several reasons. The case study provides insights into PAIA in South Africa and how it interacts with various democratic principles in the course of democracy in the country.

For one, it showcases how PAIA can be utilised to invoke transparency and accountability from the state. However, it also highlights how this can be a long and bureaucratically cumbersome process that requires financial backing to be able to question dismissals through the courts. The case study shows that the public are able to utilise the Act to exercise their public power by eventually holding the government to account. But as has been flagged by Hunter (2019, pers. comm.) and the interviewee (2019, pers. comm.), it must be noted in most cases the populace needs to be aware that their applications for information are only one part of a longer process that would eventually lead them to be able to effect accountability. Ultimately, however, what the case study shows is that full and successful engagement with PAIA is significantly linked to access to resources, money and ability to understand the law and navigate these power relations. The challenge that this creates is that in a society such as South Africa, one of the most unequal on earth, the more affluent citizens are more likely to be in a position to utilise the law for their democratic benefit while the working class and unemployed citizens are likely to be unaware that the law exists and that these processes exist to get the information they seek for their democratic benefit. This

then reflects the unequal access to power on economic grounds. This is noted as a democratic deficit in both the design and implementation of the access to information law in South Africa.

However, at the same time, it must be acknowledged that the case study does reveal that parts of the PAIA law work well. For example, the manner in which the public interest clause was successfully cited in both the National Key Points cases as well as the Nkandla matter, proves the value of the clause and its benefit for the populace.

In discussing the merits of the case study, it is important to reflect on the two main research questions of this thesis. With regard to the first question, relating to the interplay between access to information and accountability in South Africa and how it contributes to an improvement in democracy, the case of the National Key Points shows that there is a clear link between access to information and accountability and that the relationship between the two elements is tested on a regular basis through the implementation of the law but also in the manner in which the law has been questioned through the judicial system. It is evident that accountability mechanisms can be effectively triggered through access to information and that the media and civil society organisations that specialise in assisting people to invoke their right to access to information, have been most successful in triggering this mechanism.

In addressing the second part of this question, however, evaluating how this interplay contributes to an improvement in democracy, the case study provides several insights. If one evaluates the contribution to democracy in terms of Dahl's understanding of democracy – that is, that citizens develop an enlightened understanding, control the agenda and effectively participate – the case study clearly shows that citizens are able to develop an enlightened understanding of issues that are pertinent to them by utilising the access to information laws and invoking the accountability mechanism. Similarly, the case study also highlights that citizens, to a certain extent, are able to control the agenda in this regard. As was shown in the case study, the exposure of information eventually led to the apartheid

created National Key Points Act being repealed and a democratic piece of legislation being introduced in its place in the form of the Critical Infrastructure Bill, which was eventually assented as the Critical Infrastructure Protection Act. This should be considered a clear victory for the public's control of the agenda. However, if the case study is considered in terms of Dahl's third criteria of effective participation, a democratic deficit arises in that it shows how the populace is not able to engage with the access to information law in South Africa on their own without help or support from various organisations who are able to navigate the power relations in the system.

With regard to the second question, which is an evaluation of the trends around access to information requests in South Africa, and how this affects the accountability mechanisms in democracy, the case study shows that there are still major challenges in terms of the implementation of the law. This has a negative impact on the ability to utilise the accountability mechanisms created by the access to information laws. One trend is linked to implementation, which shows that there are still various procedural misnomers committed by government officials that slip through the cracks of the law and result in access to information being denied and accountability effectively being hampered. This, for example, occurs when officials fail to respond to PAIA requests within the stipulated period. Another trend that is evident from the case study is that the courts have had an important role to play in setting the parameters of the PAIA law, its application and its relevance with regard to the Constitution. The third trend is that the media also play a critical role in engineering public interest in issues, which has an important role to play in terms of affecting accountability in society. Along with civil society more generally, the media are also critical in ensuring that the law is being utilized. In terms of its contribution to democracy, these trends show that there is still a democratic deficit in place in terms of the law and it being fully operational in the way in which it was designed to be. Linked to this, the involvement of the media and civil society must be seen as a positive contribution towards democracy as civil society's involvement allows citizens to participate more effectively in democracy. The

media's ability to inform and create public interest also speaks directly to citizens becoming more enlightened and controlling the agenda.

The courts have a role in democracy to interpret the intention of the law to the benefit of the citizen. However, a challenge arises when the court misinterprets a prescript of the law to the detriment of the ordinary citizen.

5.7 Conclusion

In conclusion, what categorically underscores this chapter and the case study, is the issue of power. The case study ultimately highlights the challenges that the citizen has to undergo to navigate the power balances in the processes of access to information. There are several insights.

For one, the government's ability to curtail the process of access to information at any point by not responding to information requests, delaying responses to information requests and flat-out denying requests from citizens needs to be flagged as an assertion of power that has the potential to be problematic. Secondly, the fact that the state is able to deny requests without applying the necessary exemptions or considering the necessary laws and invoking the incorrect and irrelevant reasons linked to national security is also evidence of the power tensions that exist between the state and the citizens with regard to the access to information. It highlights how ultimately the power balance around access to information rests with the state and their will to release information and that citizens in this instance have the challenge of navigating this power balance in order to be successful. The state is aware of this power imbalance in their favour and is content with the status quo which gives them the ability to withhold information they don't feel should come into the possession of the general public, which flagrantly ignores the purpose of the democratic state.

This is, however, countered by the citizen's ability to dispute a response through the internal appeal process as well as their ability to approach the court for further recourse. Both processes show how the power relations are able to potentially shift and afford the populace with the opportunity to be the power drivers. The caveat, however, is that the internal appeal process is handled by the political head of the department who has the power to determine whether or not information should be released. In these instances, the power is once again taken away from the citizen. Similarly in the matter of the court, the financial resources needed to approach the court also once again shows how the power relations can be to the disadvantage of the citizen. For the vast majority of citizens in South Africa this lack of financial means is a stark reality.

6

6. CASE STUDY: THE BALANCE OF POWER

6.1 Introduction

The aim of this chapter is to provide an analysis of the PAIA law in South Africa by evaluating a second case study. The chapter will discuss the processes, decision and actions that stemmed from a PAIA request from the South African History Archive (SAHA) to the South African Reserve Bank (SARB), asking for records relating to a series of financial crimes and corruption that took place during the last decade of Apartheid in South Africa. The request for access to information was initially denied and resulted in a six-year long court battle across three South African courts. What is unique about this case is that the initial judgment, which went in favour of the Reserve Bank, threatened the livelihood of the SAHA Trust by instituting a massive cost order against it. The cost order is concerning as it should be seen as an attempt to essentially silence those who utilise the concept of access to information.

What the case study will show is how the state is able to use its power to withhold access to information and how this decision can be reinforced by the judicial system to the detriment of the general populace. Although SAHA was forced to take the matter to the Supreme Court of Appeal, where the matter was won, the evaluation of the case study will also show how easily access to information stands to be threatened. In stark contrast to the successful usage of PAIA in the National Key Points case, the South African Reserve Bank case study showcases the limitations on PAIA in attempting to provide the populace with information that assist them in holding the government accountable and engaging in transparency.

This chapter begins by outlining the parties involved in the case study. It then unpacks the processes of the initial request for information, followed by the court case that ensued, before evaluating the case study according to six central themes.

6.2 Context

The basis of SAHA's PAIA application was to get concrete evidence of the corruption and economic crimes that took place during a time in South Africa which was characterised by secrecy and censorship. In the last two decades since apartheid rule ended, several scholars (see Van Vuuren, 2006; Lodge 1997; Hamilton, 2013; Bruce, 2014) have tried to discuss the issue of corruption and maladministration during the authoritarian regime. In many cases economic crimes were closely associated with corruption, maladministration and fiscal mismanagement. Lodge (1997), for example, discusses the 1978 Information Department scandal where senior officials used public funds to pay for family holidays, tax free supplementary allowances, and properties registered in their own names. Bruce (2014: 56), notes that "during apartheid, corruption manifested in a multiplicity of ways, facilitated by strict official secrecy provisions". And Hamilton (2013: 107), in his book *Are South Africans free?* talks about how the ANC government "inherited an economy in complete disarray", explaining that the levels of "fiscal mismanagement of the apartheid regime from 1980 until 1994 were staggering". He notes:

> Between 1989 and 1994, the government deficit increased from R91.2 billion to R237 billion (in current prices), which Sampie Terreblanche regards as nothing more than 'reckless white "plundering" in the final years of white supremacy and, therefore, as another example of Afrikaner/white corruption (Hamilton, 2013: 107).

However, one of the findings revealed as part of South Africa's Truth and Reconciliation Commission proceedings revealed that the former government deliberately and systematically destroyed a significant body of state records and documentation to eliminate the incriminating evidence (TRC Report, 1998).

SAHA made the application to the Reserve Bank on behalf of a group of researchers known as Open Secrets, who were, at the time, writing a book on these economic crimes in an attempt to enlighten the citizenry and expose the veil of secrecy encouraged by Apartheid. Their argument is that the citizenry has a right to know about the Apartheid atrocities in their entirety. Considering that such a significant portion of history has been lost, efforts to expose information that could contribute towards the nationwide healing from Apartheid is of critical national importance. Additionally, ensuring these economic crimes are brought into the open and that democratic controls can be put in place at these institutions to ensure that networks of state capture are reduced.

It must also be noted that the Reserve Bank, as a state institution, has an obligation to uphold Constitutional obligations such as transparency and accountability.

6.3 The parties involved in the case study

There are two main parties involved in this case study: The South African History Archive (SAHA) and the South African Reserve Bank (SARB). However, there are two parties who are important to mention in this case: Open Secrets, on the side of the SAHA, as the applicants and the governor of the Reserve Bank, Lesetja Kganyago, on the side of SARB as the respondents. It is necessary to unpack the roles of each of these parties briefly in order to understand their contribution to the case study.

6.3.1 The South African History Archive Trust

As discussed in the previous chapter, the SAHA is an independent NGO dedicated to providing access to archives that they have been created to document struggles for justice in South Africa (SAHA, 2021). The trust facilitates access to these materials for the general public. Established in the late 1980's by anti-apartheid activists, its aim is to promote South Africa's history and to record history as it unfolds (SAHA, 2021). SAHA therefore uses access

to information to expand the boundaries of freedom of information in South Africa and to create awareness of, compliance with and use of PAIA.

One of the ways in which it does this is by making requests to the government, challenging denied access to information requests in court and joining court cases as *amicus curiae*. This court case against the SARB is one of many applications for information that the trust has instituted.

The second party that is relevant in this case study is the Open Secrets Project. SAHA made the application for access to information to the Reserve Bank on the Open Secrets Project's behalf. It approached SAHA to make the application for information because the records were similar to those that had fallen within the scope of information that SAHA had been routinely archiving and making available to the public. Open Secrets did not join in the court case as an *amicus curiae* but is central to the case: the organisation was collecting and analysing apartheid era archival material to write a book that will focus on procurement practices and public accountability during apartheid (The South African History Archive Trust v The South African Reserve Bank, 2020). Since the application and subsequent court case, Open Secrets has registered as an NGO with the mandate of "promoting the right to truth, and contributing towards social justice by holding powerful private actors to account through research that leads to legal accountability and advocacy for change" (Open Secrets, 2021). This is important because it showcases the need for organisations that solely work on the exposure of such economic crimes.

6.3.2 The South African Reserve Bank

Another important party in this case study is the South African Reserve Bank. The Reserve Bank is the central bank of South Africa, established in terms of section 223 of the Constitution and is governed by the South African Reserve Bank Act 90 of 1989. The Reserve Bank is:

> responsible for the protection of the value of the currency of the Republic in the interest of balanced and sustainable economic growth; assisting the South African government in the formulation and implementation of macro-economic policy, and informing the South African public about South African monetary policy and the South African economic situation" (SARB Act, 1989).

As the Governor of The Reserve Bank, Lesetja Kganyago, is also another important party in the case, particularly because he is the political head who would sign off on decisions at the bank. Kganyago, who is also a respondent in the court case, is cited in his official capacity as the Information Officer of the Reserve Bank, in terms of the Promotion of Access to Information Act 2 of 2000. As the Information Officer of the SARB he is responsible for the records that were the subject of SAHA's request for information under PAIA.

6.4 The process of the court case

6.4.1 The initial PAIA request

On 1 August 2014, the SAHA Trust filed a PAIA request with the SARB, asking for access to records that detailed the findings of an investigation it conducted into corruption and fraud that took place between 1980 and 1995 under the apartheid regime (South African History Archive Trust v South African Reserve Bank, 2018). At the centre of their request were documents relating the manipulation of the South African rand and the dual currency, which is used to speculate how the exchange rate moves and performs. There were also allegations that Eskom bonds were forged, and that gold and other precious metals were being smuggled. In addition, there were documents related to loans and permissions that were granted to transfer funds outside the country (The South African History Archive Trust v The South African Reserve Bank, 2018).

The request included "any and all the records, or parts of the records, of any evidence that was obtained by the bank at any time as part of the investigations into any substantial

contravention of or failure to comply with the law in terms of significant fraud" (The South African History Archive Trust v The South African Reserve Bank, 2018[37]).

In terms of the Reserve Bank's investigation, which centred on eight people that were state officials, police and businessmen. Some of these people are considered architects of the apartheid regime, and included:

- Giovanni Giuseppe Mario Ricci,
- Stephanus Petrus (Fanie) Botha,
- Brigadier Johann Philip Derk (Jan) Blaauw,
- Paul Ekon,
- Robert Oliver Hill,
- Vito Roberto Palazzolo,
- Craig Michael Wiliamson, and
- Dr Wouter Basson

Botha was the former Minister of Labour and Manpower in the apartheid state (Van Vuuren, 2017). Blaauw, a former brigadier in the South African Defence Force who was implicated in arms dealing to circumvent a ban by the UN (Dolley, 2017). Hill was a South African businessman who allegedly fled the country in 1988 after he was implicated in the forgery of Eskom bonds (Dolley, 2017). Palazzolo is a Sicilian banker who also goes by the name of Robert von Palace Kolbatschenko and has been linked to the Italian Mafia. He was extradited from South Africa to serve a jail term in Italy (Dolley, 2019). Basson, the biological warfare expert who headed the apartheid government's biological and chemical weapons programme and was acquitted of forty-six charges of murdering apartheid opponents, conspiracy, drug possession and fraud (Pillay, 2013). Ricci, Botha and Blaauw have died and Palazzolo was recently released from prison in Sicily where he served time for Mafia-related crimes.

[37] The South African History Archive Trust v The South African Reserve Bank and Another (Case no 05598/16) [2018] ZAGPJHC (19/03/2018), Applicant's heads of argument, p19, para 44

The current request for information under discussion was deemed refused in terms of section 27 of PAIA, as the information officer failed to respond to the request within the designated 30-day period. Following this, on 28 October 2015, the Reserve Bank refused access to the records. In the current application, the Reserve Bank argued that it had done a search of its records and was unable to find any records of the sort requested in relation to Ricci, Botha, Ekon, Williamson and Basson and could only find information for Blaauw, Hill and Palazzolo.

6.4.2 The court case

The refusal by the Reserve Bank prompted SAHA to approach the High Court. SAHA was forced to seek this remedy as the Reserve Bank has no internal appeal mechanism (SA Reserve Bank PAIA Manual, 2002), and in accordance with section 78 of PAIA, a party can only approach the high court when it has exhausted all internal appeal mechanisms (PAIA, 2000).

In its application to the High Court, SAHA asked the court to review and set aside the decision by the Reserve Bank to refuse access to the records. In addition it wanted the court to force the respondents to provide the requested records for Blaauw, Ricci, Botha and Hill within 15 days of the order being granted and for the Reserve Bank to notify Ekon, Palazzolo, Williamson and Dr Basson of the request within five days of the date of the order, in line with section 47 of PAIA. Section 47 deals with the manner in which third parties should be notified when their information has been requested (PAIA, 2000). According to the section, an information officer has 21 days from the date in which they receive a request to notify the third party of the request (PAIA, 2000). Lastly, the trust asked the court to order the Reserve Bank to pay the costs of the application.

An affidavit filed by Catherine Kennedy, then Executive Director of SAHA, formed an integral part of the application to the High Court. In disputing the Reserve Bank's response, Kennedy's

application relied on three main arguments: a) that SABR's arguments were in conflict with the PAIA legislation and therefore also in conflict with the Constitution; b) that they were using a piece of apartheid legislation to deny a request and that their dismissal spoke to the culture of secrecy in the country and within the Reserve Bank, which the PAIA legislation was created to remove; and c) that the information was in the public domain. The next section details the three arguments.

a) PAIA and the Constitution

In the main, the application to the court centred on the Reserve Bank's non-compliance with PAIA. There were various ways in which the Reserve Bank contravened or partially contravened PAIA procedurally, according to Kennedy (The South African History Archive Trust v The South African Reserve Bank, 2018). For one, the Reserve Bank initially failed to make a decision on the request within the time periods prescribed in PAIA. According to the Act, the bank has 30 days in which to respond to the request. However, the request was only denied in October 2014, close to 60 days after the initial request. The bank also asked for reasons why the information was being sought, despite the law clearly outlining that parties who request information do not need to submit a reason for the information they seek (PAIA, 2000). In addition to this, the bank also failed to notify three parties of the request for information, alleging that the parties were either dead or incarcerated outside of the country. They then used the fact that they had not notified the parties as one of the reasons behind the dismissal of the request. According to PAIA, reasonable steps must be taken to notify a third party, failing which a decision must be made by the entity (PAIA, 2000). The fourth example of a procedural contravention is that the information officer who deliberated over the matter, filed an affidavit noting that he could locate any records that were requested relating to five of the individuals listed in the application. The affidavit was made in terms of section 23 of PAIA, which states that the affidavit must give a full account of all steps taken to find the record in question or to determine whether the record exists. This needs to include all communication with every person who conducted the search on behalf of the

information officer. This did not take place (The South African History Archive Trust v The South African Reserve Bank, 2018).

Kennedy argued that PAIA was also misinterpreted at several points and that the exemptions that the bank relied on to allow it to circumvent releasing information were therefore incorrect. The Reserve Bank used three specific exemptions in section 34, 37 and 39. Section 34 (PAIA, 2000) deals with the unreasonable disclosure of personal information about a third party who is a natural person while section 37 outlines an information officer's duty to refuse a disclosure that has breached the confidence of a third-party agreement. Under section 39 of PAIA, a request for information may be refused if the record contains

> methods, techniques, procedures or guidelines for the prevention, detection, curtailment or investigation of a contravention or possible contravention of the law; or and the disclosure of those methods, techniques, procedures or guidelines could reasonably be expected to prejudice the effectiveness of those methods, techniques, procedures or guidelines or lead to the circumvention of the law or facilitate the commission of an offence" (PAIA, 2000, 28-9).

The bank argued that the disclosure of the information could prejudice their receiving similar information in the future.

At the centre of Kennedy's dispute was the fact that the Reserve Bank's arguments relating to client confidentiality were fundamentally misconceived. The bank was the regulatory authority with regard to the financial rand. Any duties that the bank carried out, whether it was receiving application, considering approvals or monitoring the financial rand system, it was doing so on behalf of the South African state and not at the behest of the applicants for authorisation. Functions were carried out in its capacity as the regulatory authority. It therefore follows, according to Kennedy, that the records that the Reserve Bank received were not received on behalf of 'clients', and no question of client confidentiality could arise. In the same manner, Kennedy argued, the investigations into abuses of the financial rand, the collection of evidence of such abuses, which was carried out by the Reserve Bank, was not being done at the behest of a client but at the Reserve Bank as the regulatory body in South Africa. In that regard, her argument was that the records that it obtained in the course

of those investigations could not be the subject of client confidentiality but were the privy of citizens of the state (The South African History Archive Trust v The South African Reserve Bank, 2018).

Kennedy's argument was that the Reserve Bank had engaged in a blanket and generalized reliance on the exemptions instead of identifying the requested records that could not be disclosed for fear that it would prejudice the future supply of information. Those documents could have been withheld, if they were able to explain the consequence that the disclosure of those particular records would have. She said it was inconceivable that every part of every one of the records is excluded by PAIA from disclosure (The South African History Archive Trust v The South African Reserve Bank, 2018).

By misinterpreting the exemptions in the application for access to information, Kennedy's argument was that the Reserve Bank had gone against the spirit of the Constitution. Said Kennedy (The South African History Archive Trust v The South African Reserve Bank, 2018):

> The Constitutional Court has made clear that the right of access to information is fundamental to the realisation of the other rights guaranteed by the Bill of Rights. The Reserve Bank is a public body … established by the Constitution; it exercises its powers and performs its duties in terms of the Constitution; and it is governed by the South African Reserve Bank Act, in terms of which it exercises public power and performs a public function. [The] primary objective of the Bank (according to the act it was established under) is to protect the value of the currency of the Republic in the interest of balanced and sustainable economic growth in the Republic (The South African History Archive Trust v The South African Reserve Bank, 2018[38]).

b) Apartheid legislation and the culture of secrecy

Another central argument presented by the Reserve Bank was that section 33 of the Reserve Bank Act precluded it from disclosing information. Section 33 of the Act prohibits a director, officer or employee of the Reserve Bank from disclosing any information acquired about the bank while exercising their duties or functions. This included the bank, their shareholders and clients (The South African History Archive Trust v The South African Reserve Bank, 2018).

[38] The South African History Archive Trust v The South African Reserve Bank and Another (Case no 05598/16) [2018] ZAGPJHC (19/03/2018), Applicant's founding affidavit P18, para 37 and p19, para 39

However, Kennedy's counter argument was that section 33 of the Reserve Bank Act was aimed at ensuring that the Reserve Bank directors, officers and employees maintained confidentiality in carrying out their duties but that it did not prevent the bank from engaging in PAIA provisions (The South African History Archive Trust v The South African Reserve Bank, 2018).

In addition to this argument, Kennedy highlighted that the provision was enacted in 1989 – and was therefore a piece of Apartheid legislation that did not have the capacity to override PAIA, as legislation introduced during democracy, which gives effect to a constitutional right and governs the circumstances in which access to information, must or may be granted to a requester. It is noted in the preamble of PAIA that the system of government in South Africa before 27 April 1994 "resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations" (PAIA, 2000). It states that PAIA has been enacted to "foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information" (PAIA, 2000: 1). In line with this, section 9 of PAIA outlines the objective of the act as to the promotion of "transparency, accountability and effective governance of all public and private bodies by including, but not limited to, empowering and educating everyone" (PAIA, 2000: 11). This made the provision by the Reserve Bank materially inconsistent with the objects and provisions of PAIA.

c) Public interest

The Reserve Bank also argued that SAHA's argument that the disclosure of the information being in the public interest, as outlined in section 46 of PAIA, did not apply to the request. According to the Reserve Bank, the disclosure of the information did not clearly outweigh the harm contemplated by the provision of the information (The South African History Archive Trust v The South African Reserve Bank, 2018).

However, Kennedy argued that the contents of the records were of profound public interest and importance as they were relevant to past and contemporary struggles for justice in South Africa. Aside from the fact that very little detail was publicly known about the economic crimes that took place in the final decades of apartheid, which happened as a result of the pervasive culture of state secrecy at the time, there was a strong public interest in not perpetuating the results of that culture. She said that the Reserve Bank was the only institution that held most of the documents requested and the silence on economic crime during apartheid was a major stumbling block to the right to truth. In this regard, the right to truth was fundamental to challenging impunity and was recognised in international law. It was essential to ensure that all human rights violations, including economic crimes, were not repeated. She referred to the United Nations Commission on Human Rights (UNCHR) which "recognises the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights" (The South African History Archive Trust v The South African Reserve Bank, 2018[39]). The reality, according to Kennedy in her founding affidavit, is the information dealt with events of great importance in the country's history and that serious allegations were already in the public domain. However, the evidence and the detail that the requested documents were likely to contain were still missing (The South African History Archive Trust v The South African Reserve Bank, 2018[40]).

SAHA's request for information into the investigations that the bank conducted was aimed at retrieving the records of eight individuals who were senior officials in the apartheid state or had close ties to it. Their illicit activities included alleged fraud, smuggling and manipulation of foreign exchange and the financial rand, which were carried out to support the apartheid state, whose policies were a crime against humanity. It was therefore in the

[39] The South African History Archive Trust v The South African Reserve Bank and Another (Case no 05598/16) [2018] ZAGPJHC (19/03/2018), Applicants founding affidavit, P36 para 108
[40] Ibid.

public interest for the truth be established and made known. The South African public had a right to know information that shed light on how and by whom this state and system were supported.

Kennedy said the point of the release of the information was that researchers and the public would be allowed to gain a better understanding of the corruption that took place under apartheid. This would also demonstrate the Reserve Bank's constitutionally required commitment to transparency and accountability (The South African History Archive Trust v The South African Reserve Bank, 2018).

In justifying the need for the information, Kennedy unpacked some of the allegations and facts that were in the public domain. According to Kennedy, until the mid-1990s, the movement of large sums of money abroad was illegal in the absence of approval from the Reserve Bank. The estimate of the assets that were taken out of the country ran into tens of billions of dollars. This capital fight was done through the manipulation of the financial rand mechanism where different exchange rates applied to different types of transactions. In order to incentivise foreign investment, favourable financial rand rates were used and to protect the rand from volatility, transfers of goods and services had to be done at the less favourable commercial rand rate. But according to Kennedy's affidavit, this system was exploited through fraudulent 'round tripping' of money, generating massive illicit profits. One estimate of the total value of the financial rand market had it as between R141 billion and R204 billion at year-end 1993, or between about R450 billion and R650 billion at modern rand values. The state was willing to make foreign exchange available where large and possibly strategic businesses were concerned to overlook a certain margin of tax avoidance, and to facilitate international expansion, all in conditions of utmost secrecy. The sanctions and boycotts that were imposed on South Africa at the time produced a sense of siege, which encouraged secrecy. In addition to this, the marked lack of transparency in corporate governance at the time meant that share ownership arrangements, private transactions, indirect holdings, possible conflicts of interest, and even director remuneration were virtually

untraceable (The South African History Archive Trust v The South African Reserve Bank, 2018).

Kennedy argued that Hill was implicated in a handful of known cases of high-profile fraud related to the financial rand or other aspects of foreign exchange regulations. In addition, the Reserve Bank was suspected of irregular conduct in a number of dealings. Its institutional culture of secrecy made it impossible to subject it to meaningful scrutiny (The South African History Archive Trust v The South African Reserve Bank, 2018).

6.4.3 The judgments

The court case which SAHA instituted was heard 18 months after papers were filed in the Johannesburg High Court. In ruling on the matter, Judge Elias Matojane dismissed SAHA's application (The South African History Archive Trust v The South African Reserve Bank, 2018). In what was potentially a crippling blow, Matojane also made a cost order totalling R2.7-million against SAHA. Matojane found that SAHA's request was too vague and broad and ruled that the three people implicated in the documents sought by SAHA should have been added as parties to the application. The court also agreed with the exception used by the Reserve Bank that gathering the information would substantially and unreasonably divert the resources of the public body, as records for just one of the individuals cited filled 43 boxes. The court found that it would take the SARB between 86 and 129 days to do so and this was too onerous (The South African History Archive Trust v The South African Reserve Bank, 2018).

He found that the Reserve Bank had complied with its duties in dealing with the request and that the exclusion grounds that they used related to the respective categories of documents. Matojane argued that the Reserve Bank did not rely on blanket assertions as it had made it clear which documents were contained in the investigation files that were analysed by the bank. In addition, it had shown that the documents could not be found and therefore

producing documents where parts of the information were redacted, did not apply. Matojane argued that the Reserve Bank could not be faulted for considering factors other than those that the archive had produced to establish that there was public interest in the information being disclosed. For example, the fact that the archive was producing a book was not a pressing issue and the fact that records were being sought rather than reports and memoranda, meant that the documents could be used out of context and could result in speculative and unsubstantiated commentary (The South African History Archive Trust v The South African Reserve Bank, 2018[41]).

However, SAHA challenged the ruling, filing an appeal in the Supreme Court of Appeal in Bloemfontein. The archive maintained the arguments presented before the Gauteng High Court, arguing that the Reserve Bank's decision to withhold the information requested was procedurally incorrect (The South African History Archive Trust v The South African Reserve Bank, 2020).

The archive insisted that the right of access to information was one of the fundamental parts of a state which had founding values that included the pursuit of accountability, responsiveness and openness. The application relied heavily on the Constitution, positing that the supreme law of the country reflected the need for a decisive break with the apartheid state's obsession with secrecy. In addressing the court during the proceedings, Advocate Geoff Budlender, who was representing the archive, argued: "the purpose of the right of access to information is to subordinate the organs of state… to a new regimen of openness and fair dealing with the public". He said while financial information from 20 or more years ago was highly unlikely to cause any material financial or commercial harm, the alleged economic crimes were of great importance in South Africa's history. This was inconsistent with the requirements of the Constitution, which should be adversely marked by the court. The approach by the Reserve Bank was unworthy and inconsistent with the

[41] The South African History Archive Trust v The South African Reserve Bank and Another (Case no 05598/16) [2018] ZAGPJHC (19/03/2018), judgement, p13, para 54

requirements of the Constitution (The South African History Archive Trust v The South African Reserve Bank, 2020).

In the appeal to the SCA, SAHA only pursued the documents relating to Blaauw, Palazzo and Hill, which the Reserve Bank was able to identify in its possession during investigations. Blaauw had, however, died and neither Palazzolo nor Hill indicated that they wished to take part in the proceedings. The importance of these findings will be discussed at a later stage of the chapter.

However, it is important to note that the Supreme Court of Appeal overturned the decision by the Gauteng High Court. The court ruled that the dismissal of information requested by SAHA was unlawful and in conflict with the provisions of PAIA. The decision to reduce access to records of Blaauw, Palazzolo and Hill were reviewed and set aside. The Reserve Bank was to provide SAHA with the requested records in respect of the late Brigadier Blaauw and notify Palazzolo and Hill of the request concerning records relating to them in accordance with section 47 of PAIA within 10 calendar days after service of this order on them, and thereafter to comply with the time periods and provisions in Chapter 5 of PAIA (The South African History Archive Trust v The South African Reserve Bank and Another, 2020).

Equally as important as the judgment against the Reserve Bank was the fact that the Supreme Court of Appeal reversed the cost order imposed by the Gauteng High Court, and in favour of SAHA, ordered the Reserve Bank to pay the costs of the application, including the costs of two counsel (The South African History Archive Trust v The South African Reserve Bank and Another, 2020). This will also be discussed further at a later stage in the chapter.

In addition to overturning the hefty cost order, the court also delivered a scathing attack on the bank, noting that the affirmation by the Reserve Bank fell woefully short on fact, detail or proper application of the provisions of PAIA. It's actions "constituted a cynical disregard of its obligations under PAIA" (The South African History Archive Trust v The South African

Reserve Bank and Another, 2020[42]). It posited that their response bordered on the obstructive and was not in keeping with the purpose of PAIA in working with the provisions of the Constitution to promote openness and transparency. It noted that the approach was "redolent of the dark days of apartheid, where secrecy was routinely weaponised against a defenceless population" (The South African History Archive Trust v The South African Reserve Bank and Another, 2020[43]). It found that the bank had not applied its "mind" to the documents being requested and instead relied on stock answers, which demonstrated that its refusal simply arose from speculation without enjoying any factual basis. The court highlighted how the Reserve Bank failed to follow the correct process in applying PAIA and highlighted how the Reserve Bank had not taken any steps at all to fulfil the information request (The South African History Archive Trust v The South African Reserve Bank and Another, 2020[44]). The Reserve Bank's decision to reduce access to the documents relating to Hill and Palazzolo lacked valid legal basics. Lastly, what should be noted from the judgment is that the Supreme Court of Appeal also questioned the Gauteng High Court, positing that the decisions relating to Hill and Palazzolo should have been reviewed and set aside by the court of first instance (The South African History Archive Trust v The South African Reserve Bank and Another, 2020[45]).

For the purposes of this research, it is important to evaluate the developments, judgments and findings of the courts in relation to its significance for access to information in general, PAIA specifically, and democracy and accountability. The next section will consider the case study through the lens of the six themes identified in the previous chapter, in order to unpack its links between access to information, democracy and accountability.

[42] T*he South African History Archive Trust v The South African Reserve Bank and Another* (Case no 17/19) [2020] ZASCA **Coram:** 56 (29 May 2020), p15, para 26
[43] Ibid, p24, para 48
[44] Ibid, p15, para 22
[45] Ibid.

6.5 Evaluation based on themes

In line with the case study considered in chapter five, in the next section, six themes will be discussed in relation to the case study at hand to understand the tensions between the populace and the state in relation to access to information within a democracy. These themes are the legal framework, national security, the media, the role of the courts, civil society and power. The evaluation will aid in establishing the similarities and differences between the two case studies. What this means for the research topic under investigation will then be discussed in the next section.

6.5.1 Theme 1: The legal framework

One of the issues that needs to be evaluated is the legal frameworks at the centre of the case study. In order to understand the legal framework that is relevant to the case study, it is importasnt to step back and understand the legal parameters of the Reserve Bank. There are four pieces of legislation that deal with the Reserve Bank. The first is the Currency and Exchange Act of 1933, the second is the Reserve Bank Act of 1989, the third is the National Payments Systems Act of 1998 and the fourth is the South African Banks Act of 1990. The first two acts relate to the bank's establishment and the last two to its operations. The Reserve Bank performs its functions in terms of the Constitution of the Republic of South Africa (1996) and the South African Reserve Bank Act, 1989 (Act No. 90 of 1989 – SARB Act). The regulations promulgated under the SARB Act provide the enabling framework for the SARB's operations. The primary objective of the bank is "to protect the value of the currency in the interest of balanced and sustainable economic growth in the country and it has the task of promoting and enhancing financial stability" (SARB Act, 1989).

The Reserve Bank Act is, however, central to the legal framework that was used in this case study. One of the central arguments presented by the Reserve Bank was a clause within the Reserve Bank Act relating to secrecy. According to section 33 of the Reserve Bank Act, "no

director, officer or employee of the bank, and no officer in the Department of Finance, shall disclose any information relating to the affairs of the Bank; a shareholder of the Bank; or a client of the Bank" (SARB Act, 1989: 35). The only exception is that the Minister or Director General of Finance can be given such information or if an officer is requested information for the purpose of performing their duties or functions or when required to do so before a court of law or under any law (SARB Act, 1989: 35).

As has been argued by Kennedy in her affidavit to the court, the law essentially qualifies as a piece of apartheid legislation as it was enacted in 1989, towards the tail-end of apartheid (The South African History Archive Trust v The South African Reserve Bank and Another, 2020). The law, and the particular clause must be seen in the spirit of the apartheid regime and its central tenets of secrecy that needed to be upheld. Considering the political landscape at the time, and this veil of secrecy that the country was under at the time, along with the precise nature of the criminal allegations, there is the potential that the clause was crafted precisely to cover atrocities such as these. As argued by Kennedy, it follows from this, therefore, that a piece of Apartheid legislation is able to be superseded by a democratically created one such as PAIA and the Constitution which endorses legislation to affect access to information (The South African History Archive Trust v The South African Reserve Bank and Another, 2020).

Beyond the argument of the Apartheid law, there is also significance in the use of the clause within the context of banking law. The clause falls within a class of laws known as bank secrecy. Bank secrecy has been a global concern since the early 1990s (Mujuzi, 2016), and has been contentious in the sense that it has been invoked as a ground to cover corruption and bribery in the banking sector. The extent of the concern with regard to bank secrecy is shown in the fact that it has been discussed by the United Nations in its development of the UN Convention on Corruption (Mujuzi, 2016). Mujuzi (2016) engages with the concept of bank secrecy in discussing how South Africa has fared in the implementation of the United Nations' Convention against Corruption. He notes that bank secrecy has been recognised in

South Africa since the turn of the century, defining it as a bank's duty to keep its clients' information confidential. In terms of bank secrecy, the Reserve Bank Act makes provisions for the Reserve Bank to provide information to the authorities for the purposes of criminal investigations and corruption. Additionally, in line with the provisions of PAIA, the bank has established a PAIA manual. However, beyond the manual the Act provides no directive on dealing with requests for access to information from the general public. The Reserve Bank Act also bears no reference to the PAIA laws or the PAIA manual.

Mujuzi (2016) argues that in the case of there being public policy that requires the information to be disclosed, the bank has a duty to disclose it. In his explanation, Mujuzi (2016: 133) notes the lack of reference to both the Constitution and PAIA but argues that while the act does not specifically refer to these laws, "it cannot be argued successfully that it is not subject to those two pieces of legislation". Therefore, if the Constitution or PAIA requires that information should be disclosed, it has to be disclosed under the general exception of "under any law" (Mujuzi, 2016: 133). Additionally, Mujuzi posits that the law notes that, while confidentiality is an essential aspect of a relationship of trust between a banker and a client, there must be circumstances where the needs of privacy must give way to the needs of the administration of justice.

There are other pieces of banking legislation in South Africa that do make provision for the disclosure of information. Bank secrecy is noted in section 43 of the Land and Agriculture Development Bank Act, which notes that information submitted to the bank by any person who applies for agricultural finance is to be confidential (Land and Agriculture Development Bank Act, 2002). However, the significant difference in this instance is that the Land and Agriculture Development Bank Act does recognise both the Constitution as well as PAIA, and has noted that the provisions of bank secrecy are subject to both these laws. It notes that if the disclosure is required in terms of PAIA, or if a court of law orders that such information should be disclosed, or if the person who submitted that information consents to its disclosure, the disclosure should take place (Land and Agriculture Development Bank Act,

2002). There is also the Banks Act (1990), which does not include a provision imposing a duty on all banks to keep their clients' information confidential.

In addition to this, there is another example in the National Payments Act of South Africa (1998) where there are four exceptions which allow for the disclosure of information. Under section 10 of the Act, the Reserve Bank is required to disclose confidential information related to a payment system for the purpose of legal proceedings or when required to do so by a court or, if in the opinion of the Reserve Bank, disclosure is in the public interest or if it is already publicly available.

In terms of the legal framework, there are two concerns that relate to access to information and democracy that has shown up in the case study of SAHA and the Reserve Bank. The first relates to the fact that neither the Reserve Bank Act nor the Coins and Exchange Act makes reference to the provisions of PAIA and the importance of access to information. The central tenets of PAIA are transparency and accountability and these are in line with the demands of the Constitution in South Africa, in an attempt to create a society that is not shrouded in secrecy and that gives the people the power to access information that could improve their lives in a democracy. Both these acts were established prior to the onset of democracy and therefore while their objectives do not rest in promoting the segregation that came with apartheid, they emphasise an element of secrecy on the part of the state, which has the potential to be dangerous.

The second concern relates to the fact that the Reserve Bank invoked Article 33 of the act to deny information to SAHA should be seen as an attempt of the bank to utilize bank secrecy as a ground to override its responsibilities in relation to PAIA and access to information more broadly. In line with Mujuzi's (2016) explanation that the exception for disclosure would be in circumstances of public policy, the decision by the Reserve Bank to evoke a bank secrecy code that effectively undermines legal prescripts of PAIA as well as the Constitution, is alarming and potentially dangerous for democracy.

6.5.2 Theme 2: National Security

As has been highlighted in the previous chapter, national security was a central argument in the refusal to release the information. However, in its attempt to refuse access to information to SAHA, the Reserve Bank did not raise any issues regarding national security. Instead, it argued that the disclosure of the records would materially jeopardise the economic interests or financial welfare of the state or affect the ability of the government to manage the economy of the republic effectively. This is an exemption under section 42 of the PAIA act (The South African History Archive Trust v The South African Reserve Bank, 2020). The Reserve Bank argued that investigators conducting investigations on behalf of the Reserve Bank relied predominantly on statutory powers within the South African Reserve Bank Act, the Inspection of Financial Institutions Act, Exchange Control Regulations and the Currency and Exchanges Act to enable them to gather relevant information. They argued that the sanctity of these investigations needed to be guarded and that a member of the public should not be allowed to misuse the information gathering powers statutorily entrusted to a regulator. Citing various clauses of PAIA, the Reserve Bank argued that they are essentially duty bound to treat the information as secret and confidential and that the flow of information is protected in this instance by PAIA. They argued that there was potential harm in the general public knowing that information may be readily disclosed by the Reserve Bank, following a request under PAIA. The challenge was that the bank would encounter difficulties obtaining co-operation from institutions and third parties in the future (The South African History Archive Trust v The South African Reserve Bank, 2020).

Theoretically, it may have been possible for the Reserve Bank to have used the argument of national security in their refusal to send information as there is potentially a link between the economic interest argument and the issue of national security. The definition of national security, as has been outlined in the previous chapter, is that the most important obligation of government involves the safety and security of the country and its citizens as well as the guarding of the national values and interests from both internal and external dangers.

Alguliyev, Imamverdiyev, Mahmudov and Aliguliyev (2020) argue for linking economic interest and national security. They argue that national security is a complex and multi-level system that covers various fields of activity, including economic security, financial security, information security and socio-political security as linked central elements of national security. Their broad definition of the concept of national security is that it must ensure that the interests of the individual, society and the state are all covered. The individual's interests include "the realization of constitutional rights and freedoms, the provision of personal security, the improvement of living standards, and the physical, spiritual and intellectual development" (Alguliyev et al., 2020: 2) while society's interests include issues such as "ensuring democracy, establishing a legal and social state, achieving and supporting the public solidarity, and improving the moral environment" (Alguliyev et al., 2020: 14). Lastly, the state's interests include "the inviolability of the constitutional system, the sovereignty and territorial integrity, the provision of social and political, economic and social stability, legislation and legal order, and the development of mutually beneficial international cooperation with equal rights" (Alguliyev et al., 2020: 2).

However, as they argue, one of the most important components of national security linked to economic security and others, is socio-political security, which is an indicator of government activities (Alguliyev et al., 2020). When social and political security has been violated, it results in a paralyzed government and chaos, which in turn has an impact on the status of other components of national security:

> Security in the military, economic, social and other areas cannot be achieved without the social and political security and stability in any country. From the point of view of local (national) conditions, the socio-political security means the stability of the social and political system in the society and country, the basic interests of all social groups, the basic human rights and freedoms, and the lack of socio-political conflicts (Alguliyev et al., 2020: 5).

This explanation is important because it speaks to the importance of the links between economic security and national security and further amplifies the issue highlighted in the case study. While the Reserve Bank argues that it is unable to release information because it may jeopardise the economic interests or financial welfare of the state, the Reserve Bank's

decision to withhold information from the public in fact results in a scenario of socio-political instability, created by the fact that the interests of all social groups are not being met.

Further to this, in discussing economic security as an element of national security, Alguliyev et al. (2020) argue that economic security is reached when an the economy and the various sectors of the economy such as finance, banking, investment and tax is able to exist independently of state because national production is being reached for the development of the country to take place. In addition to this the strategic economic resources of the country are protected from the influence and control of adversarial and criminal forces, therefore protecting basic economic rights and freedoms (Alguliyev & Mahmudov, 2013a). Alguliyev et al. (2020) note that ensuring economic security is one of the main conditions for the successful provision of the country's sovereignty, stability and normal functioning of society, based on the fact that the economy is one of the most important activities of the state, society and individuals. National security, therefore, cannot be ensured if economic security is absent. Based on the explanation by Alguliyev et al. (2020) in relation to the interlinking elements with national security, there is an obligation on the state to expose what is alleged to have been criminal and adversarial sources attempting to influence the state from a financial perspective.

At the same time, if they had used the argument of national security, there would have been a counter in terms of the Tshwane Principles on National Security and the Right to Information. As the previous chapter outlined, the Tshwane Principles on National Security and the Right to Information were ratified in 2013 and South Africa is a signatory to it. Accordingly, there are three Tshwane principles that are relevant in this regard.

The first relevant principle links the public's right of access to government information, including information from private entities that perform public functions or receive public funds. The second is that while the governments may legitimately withhold information in narrowly defined areas such as defence plans, weapons development, and the operations

and sources used by intelligence services, according to principle 10A, it should not withhold information concerning violations of international human rights and humanitarian law. This includes information about the circumstances and perpetrators of torture and crimes against humanity, information about past abuses under previous regimes, and any information they hold regarding violations committed by their own agents or by others. The third principle that is relevant is principle 30 which states that governments should not be permitted to keep state secrets or other information confidential that prevents victims of human rights violations from seeking or obtaining a remedy for their violation in line with the Tshwane Principles (Open Society Justice Initiative, 2013).

While the information being sought relates to economic crimes that took place during the Apartheid regime in South Africa, the Apartheid regime has been recognised as one that encouraged crimes against humanity. In this instance, the Reserve Bank had a duty to expose this information. In addition to this, the fact that the Reserve Bank is subject to the Constitution of South Africa as an integral state player means that in line with principle one, it has a responsibility to ensure that the public is able to scrutinise the actions of the bank.

6.5.3 Theme 3: The media

d) Media coverage and public interest

The third theme that needs in depth analysis in the case study is the media, and particularly media coverage, public interest and how these two issues link to access to information. The issues that must be discussed relates to the role of the media in reporting cases and how this contributes to public interest in the matter; and the broader role of the media in terms of its use of PAIA.

One of the arguments presented by the Reserve Bank, as highlighted in the previous section of this chapter is that, if the requested information was released via a PAIA application, it

would likely open a floodgate of similar requests for access to information requests to the bank (The South African History Archive Trust v The South African Reserve Bank, 2020). Essentially the statement implies that there was no public interest in the matter.

There are, however, several inconsistencies in this thinking. For one, it fails to acknowledge that the issue of Apartheid economic crimes had been in the public interest long before the application was made to the Reserve Bank.

In fact, one of the criticisms of the Truth and Reconciliation Commission is that it failed to address economic crimes during Apartheid. The TRC was established in 1995 for victims and perpetrators to engage over the gross human rights violations that had taken place in the country while promoting a culture of reconciliation (TRC Report, 1998). At the end of 1998, the final report of the commission's findings was presented to government detailing the apartheid structure along with the roles played by key state functionaries in implementing the policies of the apartheid regime. The report captured a selection of heinous human rights violations committed under apartheid, emphasising that apartheid was a crime against humanity (Mabunda, 2015). However, as Gumede (2017) highlights, the TRC failed to systematically look at the apartheid-era business model in both the public and private sector.

> The TRC did not thoroughly investigate the different sectors of the economy – and their role in perpetuating the evil system. Apartheid discrimination was deeply entrenched in housing, banking, schools, sport, universities, sports, arts, farming, education, churches, the media, and so on. The hearings that did deal with sectors, such as the media, were limited (Gumede, 2017: 67).

Prior to the TRC, limited detail of the apartheid based economic crimes had been revealed in the Harms Commission of Inquiry. The Harms Commission, set up in 1990 and led by Justice Louis Harms, was intended to investigate the activities of the South African Defence Force Army and South African Police counter insurgency units. It had been established as a response to the outcries by South African and international human rights groups over allegations by three former police officers in October and November 1989 that they had been

members of an officially authorized and funded police death squad. However, the commission faced several challenges, including the fact that the investigation was limited to acts committed within the borders of South Africa, even though many anti-apartheid activists had been assassinated on foreign soil (Wits University Historical Papers Research Archive, 1990). The commission's report was released in November 1990 but failed to name any special units of the army or police, let alone any individual officers, as participants in the death squads. The report was denounced by opposition groups as a whitewash (Wits University Historical Papers Research Archive, 1990).

What is important to note is that the commission received a significant amount of media coverage at the time and the evidence of the commission remained in the public domain for close to a decade. This is evidenced in an article published in the Mail and Guardian newspaper in 1999 which mentions the commission in the report which outlines the involvement of Palazzolo with the National Party and the machinery that had been set up to help the apartheid state. (Mail and Guardian Staff Reporter, 1999).

It must also be noted that the Reserve Bank's reluctance to release information into the public domain came after a seven-year court battle and came despite a significant collection of work compiled by the Open Secrets research group, which has been published in the media outlets and promoted in the public domain. For one, based on reports in the media, Open Secrets has collected approximately 40,000 archival documents from 25 archives in seven countries as part of their investigations to uncover the damning details of the individuals and corporations that propped up apartheid and profited in return (Frieslaar & Van Vuuren, 2020).

In addition to a series of media articles that have been written to map apartheid South Africa's international network, Open Secrets has also published book called *Apartheid Guns and Money: A Tale of Profit.* The book details some of the economic crimes that propped up apartheid and links heads of state, arms dealers, bankers who were all enriched by flouting

arms sanctions and laundering the money that paid for weapons. The book was written by researcher Hennie van Vuuren and a team of researchers who have argued that it is vital to allow the public to scrutinise the primary evidence. The book reveals how close to half a trillion rand in today's value was moved offshore between 1977 and 1994 to procure weapons for the apartheid state. And showcases how the South African apartheid regime was not self-sufficient and isolated as it has been purported. It reveals that the regime beat sanctions by state secrecy and security; a secret war economy in which corporations were accomplices; laundering of money by banks; and powerful allies and their proxies. The book implicates at least 47 countries that collaborated to break arms, oil and trade sanctions against South Africa (Van Vuuren, 2017). Van Vuuren says:

> [it is] fundamental to understand both the nature of power in South Africa and the nature of elite criminality – the way in which corruption has become ingrained in the practice of our politics and business. From the mid-1970s to the mid-1990s, a mix of factors gave rise to a perfect storm that left an indelible impact on our history and society. It was a time of unparalleled abuse of power. … [when] economic crime not only festered, but became state policy. The apartheid-era pattern and many of the actors rapidly ingratiated themselves into the new order (H. Van Vuuren, 2017).

What this shows is that in terms of public interest, the information requested by SAHA must be seen in the context of the broader project that it is part of. The media has been critical in creating this public interest. The issue had generated significant public interest for several years prior to the requests and that the attempts therefore by SAHA, on behalf of the Open Secrets researchers, as highlighted in their court papers, should be considered an attempt to detail those economic crimes from apartheid that had not been captured sufficiently in archival materials (SAHA v SARB, 2016).

e) Role of the media

The issues relating to public interest explained above can also be linked to the second issue relating to the media – its involvement in the advancement of PAIA and access to information broadly in South Africa.

The role of the media in the Reserve Bank matter can be considered another difference between the current case study and the previous case study. In the previous case study, the media approached the high court in the initial appeal, asking to be part of the court case and to be able to provide evidence that could strengthen the case of SAHA in requesting a list of national key points in the country. In joining in the case, the media has essentially showcased its support of the democratic principles of accountability and transparency that underpin PAIA and supported the need for these laws within a democracy. This underscores the important role of the media in encouraging democracy. In the current matter, the media did not join in as an *amicus curiae* but rather took the responsibility of performing a watchdog role and reporting on the developments in the court case, consistently informing the public of an issue that they should be aware of. In this instance, the media have used their agenda setting role to perform this task, which based on McCombs, Shaw and Weaver's (1974) agenda setting theory, influences the public thinking. At the centre of this theory is the role of the media to dictate how people should think about topics based on what they decide to focus on and how they frame it (McCombs et al., 1974). In the Reserve Bank matter, the media have crucially helped the public to understand the significance of the court case in the way that they have framed it. The media's role was purely of reporting on the matter and creating a public interest, which is arguably equally as critical in that it is thereby performing its role of informing the general public. This, in turn, is linked to creating an informed citizenry, who is able to make decisions that are based on their interests.

Access to information expert and academic Adeleke (2019, pers. comm.) reiterates the role of the media. While there have been cases that show how members of the public are able directly to use information to exercise their rights themselves, the evidence that Adeleke has seen in more than two decades of PAIA's implementation in South Africa is that it is often not the case that people are able to utilise the information on their own (Adeleke, 2019, pers. comm.).

Adeleke (2019, pers. comm.) notes that one of the critical assumptions of those who conceptualised and designed the law was that people would be able to use the law on their own. However, in Adeleke's experience, the biggest users of PAIA and biggest instigators of PAIA have been journalists and civil society organisations. The reason for this is simple, according to Adeleke (2019, pers. comm.) and rests in the fact that access to information rights in South Africa particularly is extremely bureaucratic. As a result, people who wish to utilise the law need significant financial backing to be able to realise their rights, particularly if a case needs to go to court to be appealed.

Adeleke (2019, pers. comm.) notes that often in these instances, media houses and journalists have the "know-how" and the sophistication to be able to engage the space that can potentially use access to information requests, laws and rights. The challenge that this scenario creates, posits Adeleke (2019, pers. comm.), is that journalists and civil society organisations effectively have to act on behalf of members of the public. In these instances, the exercise of the right to access to information is no longer something that people can directly rely on, but one in which they need a gatekeeper (or representative) to assist them.

6.5.4 Theme 4: The role of the courts

Another element that needs to be considered in the evaluation of this case study is the role of the courts in terms of the implementation of PAIA and what effect it has on democracy more broadly in line with the research question. In this case the role of the courts is particularly important, based on the fact that the court of the first instance, being the Gauteng High Court, dismissed the trust's appeal, issued a significant cost order against the trust. Judge Matojane ordered SAHA to pay the legal fees of the legal counsel of both the South African Reserve Bank, and their own, amounting to more than R2.7million. In terms of the court's role in the application of PAIA and the relation to democracy, there are three issues that will be discussed in this section. The first relates to the lack of alternative

remedies and how the court dealt with that. The second relates to the PAIA procedures and the third relates to the cost order issued by the Gauteng High Court.

In terms of the appeal process, Matojane's dismissal of the request for access to information (discussed under section 6.4.3) is concerning considering that the high court was the only recourse available to the trust in appealing the decision of the Reserve Bank. Unlike many other entities the Reserve Bank does not have a process for an internal appeal, as is outlined in its PAIA manual. The trust was, therefore forced to approach the court as there was no other recourse available to it within the Reserve Bank. Matojane's decision as the court of the first instance is therefore particularly concerning given the limited scope of the PAIA appeal procedures at the Reserve Bank. In cases of this nature, where the court is the only mechanism that can be utilized to achieve the administration of justice it is important for the court to provide guidance on the implementation and importance of PAIA, linked to the Constitution.

Linked to this are the procedural faults in Matojane's application of PAIA. For one, in his judgment, Matojane noted that the Reserve Bank could not be faulted for considering other factors when establishing the public interest in the disclosure of information. He noted that the bank was of the view that the trust sought the disclosure of the investigation files for the purposes of documenting SAHA in a book, which was not a pressing issue. He said that the bank also took into account that the trust was not seeking a report or memorandum, but whose documents which may, out of context, result in the speculative and unsubstantiated commentary (The South African History Archive Trust v The South African Reserve Bank, 2018).

One challenge with Matojane's decision to side with the Reserve Bank in this instance is that it contravenes the PAIA Act. Chapter one of the act, in subsection 11(3) points a and b, note that a requesters' right of access cannot be affected by any reason that the requested gives

for requesting access not can it be affected by the information officer's belief as to what the requester's reasons are for requesting access (PAIA, 2000).

Lastly, the issue of Matojane's crippling cost order needs to be evaluated for the impact that it has on access to information and democracy more broadly. It is relevant to note that the involvement of the judiciary in PAIA appeals is an issue that has plagued the implementation of PAIA since it was first promulgated (Klaaren, 2005; Peekhaus, 2011), with PAIA proponents positing that the significant costs attached to legal appeals was not financially inclusive and limited the ability of ordinary individuals from being in a position to appeal refusals of their requests for information. Access to the justice system has been considered a luxury of the elite, particularly because of the high illiteracy, low education, and widespread poverty in the country.

In the current case, the challenge was that in his judgment, Matojane's decision was not clearly justified with an explanation. This suggests that his decision was motivated by the intention to maintain secrecy on behalf of the Reserve Bank. In terms of PAIA and its contribution to the enhancement of democracy, this should be seen as a debilitating factor, exposing the power imbalance that needs to be navigated through the courts to engage in transparency, accountability and the right to freedom of access to information. The cost order issued by Matojane would inevitably act as a deterrent, limiting other non-governmental organisations, civil society organisations, media organisations and even individuals from attempting to appeal their denials of requests for information.

Moreover, Matojane's cost order is concerning due to the fact that his decision is in conflict with case law relating to cost orders in public interest litigation, which dates to 2008. It is necessary to briefly outline the 2008 case to understand the similarities.

At the centre of the 2008 case is Biowatch, a non-profit trust which was set up to advance conservation and protect biodiversity, who went up against a decision in the courts where

two crippling cost orders were issued against it. In 2002 Biowatch approached the Department of Agriculture for access to information about the permitting system for genetically modified organisms. Their requests were denied, and they then petitioned the South Gauteng High Court. The court granted the non-profit access to the documentation, acknowledging that they were acting in the public interest and with no alternative remedy. In a strange twist, however, the court issued a cost order against Biowatch, contrary to a well-established rule that costs follow the result. More worryingly, despite its non-profit status and the constitutional rights (environmental protection and access to information) which it asserted genuinely and in the public interest, Biowatch was ordered to pay the costs of an intervening respondent, Monsanto. The two cost orders against Biowatch, despite their success in acquiring the information they requested, threatened the existence of the non-governmental organisation. However, Biowatch appealed the cost order to a Full Bench of the High Court and the Supreme Court of Appeal before approaching the Constitutional Court. (Biowatch, 2021)

In the Constitutional Court case, three non-governmental organisations specialising in public interest law joined in as *amici curiae*. They argued that the approach of the High Court could jeopardise public interest litigation by the severe financial costs imposed. The cost order would therefore have a deleterious effect on the capacity of public interest law bodies to initiate litigation in defence of constitutional rights. They also contended that the effect would be particularly severe on bodies that were dependent on support from international donors. They noted that many civil society groups that were seeking constitutional justice were dependent on funds from donors, and these donors would then be reluctant to provide financial support for litigation if they feared that the money would be swallowed up in satisfying adverse costs orders (Peekhaus, 2011).

The Constitutional Court overturned two cost orders. What makes the judgment significant is that it implies that an appellate court will always have grounds to interfere if the court of first instance failed to consider adequately the constitutional justice implications when

making a costs order. It is certainly a resounding slap on the wrist for the lower courts that dismissed the appeal before it reached the Constitutional Court. Judge Sachs, in delivering the Constitutional Court judgment said that the Biowatch case presented a matter of special constitutional concern. He acknowledged that vulnerable sectors of society were particularly dependent on the support they got from public interest groups and said that a perusal of the law reports showed how vital the participation of public interest groups has been to the development of the Constitutional Court's jurisprudence. The interventions have led to important decisions on the rights of homeless people, refugees, prisoners, landless people, gender equality, children, gay and lesbian rights as well as freedom of expression. It was therefore critical that litigants were considered equally, and therefore not based on their commercial interests and financial capability nor because they are fighting for the poor and lack funds themselves. However, what was more important, said Sachs, was that the costs issue was driven by whether or not the litigants were asserting rights protected by the Constitution. Sachs referred to a general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs to the state. The general rule in constitutional litigation, said Sachs, is that the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. The rationale for the rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule (Biowatch Trust v Registrar Genetic Resources, 2009).

In the Biowatch case Sachs said that it was shown that the state had failed to fulfil its constitutional and statutory obligations. The high court had misdirected itself in respect of the factors it was obliged to consider when it held that the applicants should pay costs in favour of Monsanto. Labelling the high court judgment as a curt appraisal of costs, Sachs said that the High Court did not take appropriate account of the fact that the litigation was essentially constitutional in nature. It also failed to adequately deal with the fact that it was the state's conduct that had provoked the litigation in the first place. And it did not take account of the fact that its order afforded Biowatch crucial information whose release

Monsanto had resolutely opposed. He said the court could have shown its disapproval of the form of the application, which it was unhappy with, in less drastic ways (Biowatch Trust v Registrar Genetic Resources, 2009).

There are differences between the Biowatch and Reserve Bank cases. For one, despite Biowatch's request for information being successful, they were still ordered to pay costs. In terms of the case of the SAHA trust against the Reserve Bank, their initial request for information was unsuccessful and they were then ordered to pay the legal costs. In line with the general rule, espoused by Sachs in the Biowatch judgment, even if the court determined not to allow the trust to access the documents requested, there should not have been a cost order initiated against the trust. This is particularly relevant if one evaluates the information that is sought. In the first instance there was no commercial gain that the trust would have benefited from by receiving the information. Additionally, if one uses the general rule referred to by Sachs, it is evident that the request for information is based on the constitutional justice element of transparency, accountability and access to information, underscored by the government's clear intention of transforming from a secretive state to one that espoused and conducted itself in accordance with values of openness in South Africa's democracy. Transparency also forms one of the guiding principles in the governance of public administration. This is in line with the Constitution, which posits that transparency must be fostered by providing the public with timely, accessible and accurate information. In addition to this access to information is fundamental to the realisation of the rights guaranteed in The Constitution.

What the Biowatch case shows is not only that a precedent was set in terms of how to handle costs in relation to constitutional matters and that this general rule on costs could have been applicable to the SAHA matter. Even if the application for information was unsuccessful, a cost order should not have been placed on SAHA. Given that the particular case law exists, Matojane's order is therefore in contravention of a well-established legal practice. This is particularly concerning. In the context of access to information and advancing an agenda of

transparency and accountability, Matojane's crippling cost order against a non-governmental organisation that has been a central part of testing, advancing and engaging with the PAIA legislation for close to two decades, is potentially an attempt to dissuade future cases that could be deemed frivolous. At the same time, it is potentially an attempt to silence PAIA activism and in so doing to essentially entrench secrecy on the part of the state.

However, it must be noted that despite Matojane's adverse ruling against PAIA, there are several court rulings over the last two decades that have assisted in the strengthening of PAIA. In one of the most recent cases, the Constitution Court has ruled that parts of the act needed to be reformulated as it was unconstitutional because it failed to regulate how private funding received by political parties was recorded and disclosed. The South African non-profit organisation My Vote Counts had initially approached the Western Cape High Court for an order declaring PAIA unconstitutional because it felt that the act did not provide for political parties and independent candidates to disclose their private funding. The body argued that the information was needed for voters to be able to exercise an informed right to vote. The court ruled in the NGO's favour and gave Parliament 18 months to fix this defect (My Vote counts v minister of Justice and Constitutional Development, 2017). The NGO's main aim is to improve the accountability, transparency and inclusiveness of elections and politics in South Africa. In a statement released following the case, the NGO argued that the judgment was important to uphold and promote the right to access to information and to vote from an informed position (MyVoteCounts, 2018). Peekhaus (2014) notes that the Constitutional Court, as the highest court in the land has underlined the foundational import of the right to access to information on several occasions. He refers, for example, to the case *Brümmer v Minister for Social Development and Others*, where Judge Ngcobo stressed the importance of the right to access to information "in a country which is founded on values of accountability, responsiveness and openness. To give effect to these founding values, the public must have access to information held by the state" (Peekhaus, 2014: 571).

6.5.5 Theme 5: Civil society's contribution

Another theme that has emerged in this case study which requires exploration is the role that civil society has played in the unfolding of the case study. Similarly to the case study evaluated in the previous chapter, SAHA was heavily supported by civil society groups in both the request for access to information and the ensuing court cases that followed in an attempt to get the requested information released.

There are two points of relevance with regard to civil society organisations and PAIA. The first is that the request for access to information was submitted by a non-profit organisation on behalf of a civil society, social justice grouping. This once again emphasises the significant role of civil society groupings in PAIA, both from the perspective of the utilisation of the legislation as well as its advancement. Various scholars and access to information protagonists such as Tilley (2019) and Razzano (2019) have highlighted the fact that the legislation is seldom used by the vast majority of society and that it generally falls into the purview of a small section of society, mainly being the media and civil society groupings. These sentiments are echoed in a report published by South African government's National Planning Commission (2012) which notes that usage of the legislation by South Africans remains low and limited mainly to civil society organisations (National Planning Commission, 2012).

The second point relates to the support that civil society lends to PAIA. In the current case, a number of civil society organisations pledged their support for SAHA. These included organisations that have a vested interest in access to information such as the Right2Know Campaign and My Vote Counts, constitutional justice groupings such as the Council for the Advancement of the South African Constitution, public service accountability organisations such as the Public Affairs Research Initiative (PARI) and the Public Service Accountability Monitor (PSAM). The groupings were quite vocal about their support and issued several joint statements about the importance of the request at different stages of the process. In a

statement released on the eve of the case being brought before the Supreme Court of Appeal, the organisations said the matter was “fundamentally important to the work of civil society in South Africa” and involves central questions related to the notions of transparency in relation to apartheid era economic crimes (ATI Network, 2020).

The organisations highlighted that the appeal was vital to understand the past of the country and that it was part of the continued efforts for social justice. They posited that by denying access to records of its own investigations into alleged economic crimes, the Reserve Bank was protecting the interests of a small group of men, some of whom had been implicated in serious economic crimes and human rights abuses (ATI Network, 2020). One of the most important issues raised by the organisations was that the actions of the Reserve Bank gave the impression that laws such PAIA did not apply to it. Its refusal was without a reasoned basis, particularly because the free flow of information is the lifeblood of the country’s hard-won democracy (ATI Network, 2020).

The civil society groups highlighted their concerns about the cost order, saying that the judgment reversed a long-standing principle and adding that it would not only potentially bankrupt SAHA but send a chilling effect to all civil society organisations which are unlikely to take the state to court in future to gain access to records that are in the public interest. They noted that one of the most important elements to the court case was that it was challenging the impunity of the bank that appeared to be protecting the eight men (ATI Network, 2020).

SAHA’s role must be seen in the context of the role that civil society is able to play to aid the proliferation or sustainability of PAIA in South Africa. However, it also speaks to the fragility of the civil society sector.

6.5.6 Theme 6: Power

The final theme that requires discussion in relation to the case study is the issue of power and how power relations have played out in terms of the PAIA matter between the trust and the Reserve Bank. A discussion of the power relations that exist between the two bodies in the application of the PAIA law is critical in the attempt to answer the research question of how the interplay between access to information and accountability contributes to the improvement of democracy in South Africa.

In line with conception of power discussed at an earlier stage in this thesis, there are two elements of these theories on power that are relevant. First is the conception of power as a set of mechanisms that can be used to set the agenda. This includes securing compliance by controlling the thoughts of the populace by socializing them in a particular way and controlling the information they have or through political inaction and suppressing knowledge through censorship and disinformation. The second relates to power as a procedural arrangement, set up within the state in an attempt to aid citizens in identifying, expressing and evaluating their needs and in so doing having the potential to minimise domination.

In evaluating the power relations, it is important to consider, on its own merit, the information that has been requested from the Reserve Bank. A request for the details of the economic crimes that took place during apartheid is a critical part of recapturing South Africa's tumultuous history, a lot of which has already been destroyed and lost. Gumede (2017: 1) argues that acts of "seeking truth, acknowledging the injustice, retributive justice to bring perpetrators to book, restorative justice, providing reparations to victims, and fashioning a new post-abuse 'reconstruction' of society based on 'mastering of the past'" are procedures that many countries have undertaken after they endured long period of human rights abuses. In the case of South Africa, the Truth and Reconciliation Commission was established as a mechanism to deal with the widespread human rights abuses that took

place during Apartheid (van Zyl, 1999). It is often labelled as "a novel experiment of restorative justice and nation-building through reconciliation" (Adam & Adam, 2000: 33). However, various scholars have berated the approach of the commission, arguing that the Truth and Reconciliation Commission had failed to adequately expose atrocities from the repressive regime. Jeffery (1999), for example, calls it a "truth that is far from truthful" and Gumede (2017) also argues that the TRC processes did not include economic redress. In this vein, attempts to gather information linked to the last vestiges of Apartheid's atrocities and expose them to the general populace should be seen as an effort to encourage transparency, make the Reserve Bank adhere to principles of accountability and in so doing, empower the populace through knowledge.

In line with this argument, it follows that the PAIA legislation in and of itself must also be seen in the context of the latter conception of power in that it is a procedural arrangement within the state that aids citizens in identifying, expressing and evaluating their needs and in so doing having the potential to minimise domination.

Beyond the legislation, in terms of how the conceptions of power relate to the current case study, there are various issues that show how the power relations between SAHA and the Reserve Bank play out. There are various junctures during the process of the application for information and the subsequent court case where the nuances of these power relations have come to the fore. For example, SAHA's use of the access to information law needs to be seen in the context of utilizing mechanisms available to them to set the agenda. However, the Reserve Bank's decision to deny access to the requested information shows how the power relations are skewed to favour the state in this instance. Their ability to withhold the information should be seen as a way in which they are securing compliance by controlling the information that is placed in the public domain.

This skewed relationship is, however, reiterated by the fact that the Reserve Bank has no internal mechanism for requesters to appeal decisions of applications that the bank has

chosen to deny (SA Reserve Bank PAIA Manual, 2002: 14). What this means is that requesters have no avenue for recourse within the institution itself and have no option but to approach the courts for further recourse. The challenge here lies in the fact that requesters who do not have sufficient financial backing – or know how – to shield them from the costly court battle that comes with an appeal, will be limited in their endeavours to access the information that they need.

In terms of the court case that ensued in this case study, power relations have been clearly evident. The Gauteng High Court's ruling to uphold the Reserve Bank's decision to deny access to the information as well as the court's decision to institute a punitive cost order against SAHA highlight the problematic power relations at play here. Although the court is the only instance of appeal that the trust has available to it, the fact that the court has decided to uphold the decision, alters the power imbalance within this procedure. In this instance the SAHA trust is left as the powerless actor with no further option for recourse aside from further court challenges which could prove to be costly. The fact that the court reiterated the stance of the bank highlights its ability to tilt the power balance in favour of the state, to the detriment of the citizen, contrary to the prescripts of the Constitution.

Additionally, the nuances in these power relations also show up in the Reserve Bank's implementation and interpretation of the law. The case study shows how, for example, there is still a failure on the part of the state to adhere to the prescripts of the act and implement PAIA in the manner that it is intended to be implemented. This is shown in the way that the Reserve Bank failed to respond to the initial PAIA request within the prescribed time frame of 30 days, as stipulated in the Act (PAIA, 2000). As has been shown in this chapter, the Reserve Bank has developed a PAIA manual, and it would therefore be well aware of the timeframes that a body has to respond to a requestee. The request submitted by the trust was also not the first of its kind and followed a similar submission one year earlier. The failure of the bank to respond in time is evidence of its flagrant disregard of the law and should be seen as attempts by the Reserve Bank to control the agenda and withhold information. This

disregard has been noted by various scholars such as Peekhaus (2011), Adeleke (2019, pers. comm.), to note only a couple, as well as the PAIA Civil Society Network in each of their annual shadow reports since their inception and in the South African Government's National Planning Commission Report on PAIA (NPC, 2012). Moreover, It must be noted that the Reserve Bank is not the first state entity to disregard the procedures of the PAIA Act. Over the last two decades, scholars and PAIA advocacy groups have laid out in great detail how state institutions blatantly fail to adhere to the timeframes stipulated in the law (Peekhaus, 2014; Adeleke, 2019, pers. comm.; Calland, 2003; Razzano, 2015; Abdullah, 2017; Zulu 2018).

The power relations around the interpretation of the PAIA law also briefly need to be discussed, particularly due to the way in which the Reserve Bank has handled the request for information. There were several occasions in the process of the request where the bank contravened sections of the Act. For example, it insisted on asking SAHA for reasons for the request, despite the act specifically stating that this is not needed.

What this section shows is that the power relations in this case study are significantly skewed in favour of the Reserve Bank. Although SAHA managed to overturn the ruling in its favour, this was the outcome of a lengthy court battle with costs that ran into millions of rands. The case study is potentially a microcosm of the way that the Reserve Bank tackles access to information cases. If this is the case, what is concerning is that these skewed power relations are still prevalent more than twenty years into democracy, and that they are to the disadvantage of the general populace who effectively are unable to exercise their right to access to information.

6.6 Discussion

There are several valuable observations that can be drawn from the case study. In conducting this evaluation, there are both similarities that this case study shares with the previous case study as well as differences that set it apart. These similarities and differences

can be discussed in terms of the six themes that were originally used to engage with the case studies.

The first similarity that should be noted is in terms of the legal frameworks that were used to deny the access to information requests. Both case studies relied on Apartheid era legislation to justify their denials. The first case study used the National Key Points Act while the second case study used the Reserve Bank Act. The variation between the two cases is that in the National Key Points matter, the ANC government's use of the legislation went against its earlier – and very public – stance, in which it told the TRC that the law was used for the benefit of the Apartheid security forces. Although the National Key Points Act was created to protect buildings from sabotage during the apartheid era, the spirit of the Act was a fundamental part of the information-controlled regime that was the order of the day. As a result of the case and the exposure around it, the legislation was later repealed and replaced by a democratic version called the Critical Infrastructure Protection Act (2019).

In terms of the SAHA-Reserve Bank case, the legislation – and the specific clause that was used – has been used to entrench a culture of secrecy. The ingrained culture of secrecy has been highlighted as a challenge in the implementation of access to information in South Africa. Access to Information specialist, lawyer Gabriella Razzano, who has worked for several access to information NGOS in South Africa, notes (in an interview) that the culture of secrecy has been a persistent trend in the denial of access to information requests.

> The culture of secrecy is a very real thing and I wouldn't underplay it. It's literally a knee-jerk reaction to keep things under wraps. I think some of the reasons are just a knee-jerk reaction, some of it are lost records and there is a vested interest in keeping a lot of the pre 1994 stuff private, even from the perspective of our current democracy (G. Razzano, 2019, pers. comm.).

In terms of the legal framework what the case studies show is that the state under the leadership of the ruling party has been willing to rely on apartheid laws to withhold information on two separate occasions. This raises a concern for the ability of citizens to effectively use access to information as a mechanism for accountability. In the case of the Reserve Bank, it shows that they have not fully considered the elements of access to

information; nor have they fully integrated it into the legal landscape of their bank. In the case of the Department of Police, the repealing of the apartheid law was a clear victory for access information and for the populace to be able to hold state accountable.

The second similarity between the two case studies is in terms of the role of civil society. It is clear that civil society groups were at the centre of both case studies and were an integral part of ensuring that the initial requests for information which were denied were overturned successfully. However, it is evident that civil society groups do not only play an important part in ensuring that access to information laws are utilised in South Africa, but they also contribute to the advancement of the law. In terms of the National Key Point case, civil society organisations were critical in driving the court case and ensuring that the general populace were considered in terms of how the legislation would affect them. The elements of both accountability and transparency were fully engaged with as a result of the actions of the civil society groups.

Similarly, in terms of the Reserve Bank case, the involvement of civil society was important because the civil society group was able to consistently challenge the judgment. In the end the cost order was overturned, resulting in a significant victory for the group. The magnitude of the overruling is that it set a new precedent for cost orders not to be issued against civil society groups that aim to advance the cause of access to information matters. This clears the way for other civil society organisations to be able to approach the court for further recourse without the fear of a pending cost order that could be held against them.

However, what the SAHA-Reserve Bank matter also shows is that significant financial backing is needed to pursue access to information cases in courts. This is concerning as it raises the issue of whether grassroots organisations are likely to have these resources available to them and whether they would therefore be in a position to pursue similar judicial recourse that could eventually lead to them getting the information that they need to make informed decisions. It is evident that these types of organisations are disadvantaged in this instance.

Equally as concerning is the fact that the involvement of civil society groups also highlights the reality that most individuals would be largely unlikely to be in a position to utilise the law on their own accord, by themselves. This once again links to the issue of access and the ability to navigate the system.

The critical role of civil society organisations in the implementation of PAIA has been highlighted by several interviewees in this research. Adeleke (2019, pers. comm.) engages on the involvement of civil society based on his experiences as part of the SA Human Rights Commission where access to information clinics were established in conjunction with The Universities of the Witwatersrand and Western Cape to try to give the public more interest in using access to information requests before they resorted to confrontations with the state. Razzano's (2019) experiences are in line with Adeleke. She found that once people started using the legislation, they resorted to it on a regular basis. She posits that PAIA has a "powerful role to play in a civic engagement environment because once people have learnt the process of it, it empowers them to engage with government in a whole lot of other spheres" (Razzano, 2019). She links the importance of the use of PAIA to South Africa's social political history, arguing that the populace are generally reluctant to engage with government, based on their past experiences of the state as an authoritarian force.

Linked to the points raised under the civil society section are the similarities in terms of power. Both case studies have showcased how skewed power relations are between the state and the populace. It is evident that the state mainly holds the power, particularly in the way that the law has been created and established. The Constitution has endeavoured to limit the power imbalance, based on its prescript in section 32 of the Constitution, which prescribes that national legislation should be enacted to give effect to access to information. In reality, as has been shown in the case of the Reserve Bank, PAIA is not inculcated in its legislation, meaning that the culture of access to information is not completely incorporated into the landscape of many government departments.

On a more positive note, the case studies both show that the populace are able to navigate the power relations by using the access to information law. The success of both cases through appeals to the courts which resulted in information being released is evidence that the populace is able to essentially hold the government accountable in some form. The fact that both cases took such a significant amount of time to reach a conclusion, along with the fact that both were subjected to substantial legal bills is concerning for democracy as it infers that the average person on the street is unlikely to be able to follow this course of events and therefore potentially unable to utilise the legislation successfully.

Lawyer Allison Tilley (2019) who has also worked in the access to information space for more than two decades, uses the example of Thandi (in an interview), a working-class single mother in South Africa and how she should be able to utilise the law. She notes:

> We should know that Thandi on the street, there's a lot going on in her life. Including whether the buses are running and whether she can get food on the table. She needs to be able to, on her way to her house, or passing the local school see pasted up on the notice board outside the school, information on the last budget. Don't make her work for her information, she is working for quite enough as it is, she needs to get the information she needs delivered to her in the best way possible, in a way where she can use it and when she can use it. That's the challenge of information, not how can we make it so that people can access it easily (A. Tilley, 2019, pers. comm.).

Tilley posits that the ideal scenario is that real people in real places will ask for information which will eventually make a difference in their lives. The reality, however, is that access to information laws are tools used by the wealthy. While various case studies show how real people have used the law, according to Tilley (2019). However, as Tilley notes, most PAIA requests have been people who have financial resources and want information. This includes companies that want information on tender processes, and non-governmental organisations that require information on policy processes.

Razzano (2019) believes that the challenge with PAIA is partially linked to bureaucracy and partially as a result of power and interests. She argues that what the right of access to information is trying to do is to equalise power in civic engagement by "putting people on a

footing with the people that they've given a mandate to" (Razzano, 2019). Razzano (2019) notes that the state of access to information is directly correlated to the political situation in the country. This constantly shifts, seemingly not for the better, and inevitably results in access information not being facilitated. This, says Razzano (2019), should be seen as a political power play along with economic power and social power. She argues that access to information has the potential to continue to be an elitist mechanism.

In evaluating the differences between the two case studies, the first difference is in relation to the use of national security to justify the denial of information. While the National Key Points case study centred on the use of national security to deny information, in the Reserve Bank case study, the denial of information was linked to an infringement on the economic interest of the bank.

Both case studies in their own right engage with the issue of transparency and how the state uses mechanisms at its own avail to refrain from engaging in transparency. In this regard each of the case studies carry important lessons in terms of the implementation of access to information in South Africa. The use of the national security exemption in the National Key Points case showcases how the state is able to use the law to its advantage to withhold information, avoid transparency and accountability and maintain a culture of secrecy. There are two main flaws with the state's approach in the National Key Points case.

The first is the fact that the state used the justification of national security incorrectly and second is the fact that it failed to adhere to an international treaty on access to information and national security to which the country is signatory. This shows disregard for the law and once again illustrates how the prescripts of access to information have not been fully incorporated into South Africa's legal framework nor been normalized to ensure that these prescripts are fully considered. The incorrect use of national security is concerning as it raises doubts about the state's commitment to transparency and the effectiveness of legislation

such as access to information to encourage accountability as envisioned in the preamble of the Constitution.

In terms of the Reserve Bank case, the focus is on the protracted lengths that what might be called an arm of the state went through to avoid providing the requested information. Although the state did not use the issue of national security, it used an economic interest argument coupled with the fact that the public interest did not outweigh the harm that the release of the information would cause as well as the fact that the information release would open a floodgate of similar requests in the future. Evaluating these justifications from an access to information perspective, the importance of the requested information in light of South Africa's past and the public interest in relation to these issues must be acknowledged. This raises an alarm bell for the willingness of the state to engage in discourse as well as institutional and procedural political and legal arrangements that encourage transparency.

The next difference is in terms of the role of the media. In the National Key Points case study, the media had two roles. They formed a part of the application to the court, signalling how an integral part access to information is in their everyday work. However, their secondary role was also an informative one, where they also ensured that the issue received consistent attention, reporting on it at various stages of the proceedings. In the Reserve Bank case, by contrast, the media had a role to play in reporting on the issue but did not participate in the court case itself.

The media have been supportive of access to information, and various scholars have pointed out how critical mechanisms such as access to information are in helping them to place information into the public domain to effect transparency and accountability, However, in the first case study, the media actively defended the access to information mechanism. This is important for the role of access to information in enhancing democracy as the media have a central role in entrenching democracy. It’s ability to entrench democracy takes place as a

result of its role in providing space for free access to information, for free speech and through its capacity to scrutinise and challenge power.

The third difference is in terms of the role of the courts. Although both case studies were subjected to court cases, the role of the courts in the two case studies were vastly different and, upon evaluation, showcase the different roles of the courts in relation to access to information. In the case of the National Key Points case, the court was firmly in support of access to information and made several stern remarks against the Ministry of Police as the state entity that refused to release the information. Not only was the decision declared unlawful and unconstitutional but the court noted that the decision to deny information and effectively engage in blanket secrecy could be considered flagrant disregard of a principle of freedom enshrined in the Constitution.

In the Reserve Bank case, the court of first instance being the Gauteng South High Court sided with the Reserve Bank and supported its justifications for not releasing the information. Its decision is concerning, particularly because this was the only recourse available to the Trust to question the Reserve Bank's decision. What was, however, more concerning was the court's decision to issue a hefty cost order against the trust. Evaluating this decision from an access to information perspective, the deliberations of the Supreme Court of Appeal implies that the Gauteng High Court did not fully and properly defend the values of transparency or accountability, effectively undermining constitutional safeguards that had been put in place in order to navigate South Africa's chequered history and the veil of secrecy that came with it.

However, the additional value that the SAHA-Reserve Bank PAIA court case provides is the successful reversal of the crippling cost order that was placed on the trust. In their successful petition of the Supreme Court of Appeal and the subsequent overturning of the cost order, the trust played a critical role in setting a precedent with regard to the ruling of cost orders in similar cases, ensuring that other non-governmental organisations who are denied

information and decide to approach the courts for reprieve are not deterred by the prospect of punitive cost orders that could result in them suffering significant financial loses and even having to cease operations.

6.7 Conclusion

What is evident from the evaluation of the case studies is how PAIA can be utilised to invoke transparency and accountability from the state. The case study shows that the public are able to utilise the Act to exercise their public power by eventually holding the government to account. However, it also highlights how access to information is not straightforward and that the tool cannot always be relied on as the first resort to help the public access information, and effect transparency and eventually accountability. The mechanism does, however, prove to be a valuable one.

The case study also shows that the power relations that need to navigated across the institutions that uphold the principles of the Constitution are often skewed in favour of the state; and for the general populace to navigate these relations, they need significant support.

In this regard, the chapter has also highlighted the value of both civil society and the media in making access to information a reality. It is a cumbersome process that requires financial backing to be able to question dismissals through the courts. However, it also reflects on the ability of the state ultimately to hold the power to make access to information an easy to attain reality or a long drawn out battle.

7

7. CONCLUSION AND FINDINGS

7.1 Introduction

In an idyllic setting, the vision of access to information could be aptly summarised in the words of South African Public Law Professor Richard Calland, who was referenced at an earlier stage in this thesis:

> Access to information laws create a unique opportunity to profoundly alter the relationship between the governed and the government, to build a new covenant of trust and to change the rules of the game (Calland, 2003: 2).

This thesis has, however, shown that while access to information does exist in a developing world setting such as South Africa, and can be applied to deliver the desired outcomes, the implementation of this concept is not straightforward and often entails an extended campaign to get the information sought. Often it also involves a series of power struggles that need to be navigated in order to alter the relationship between the governed and the government, to use Calland's terminology. In most instances, it is the populace that have to navigate these power relations in order to achieve their desired outcomes. Additionally, there are various structural impediments – that exist beyond the reach of the populace, that often make the quest of access to information an unachievable reality.

This chapter is an overview of themes and topics discussed in this thesis. It will be divided into three sections. The first will take into consideration the key concepts that have formed the basis of this research and engage with each in relation to the research question of this thesis on a theoretical level. The second is an overview of the case studies in relation to the

concepts engaged, the theoretical framework and finally the research question. The third section will bring together matters discussed in the thesis in order to answer the research question and draw the concluding remarks.

7.2 Overview of theoretical concepts

The research question centres on the interplay between accountability and access to information and how this enhances democracy in South Africa. In answering this question there are various concepts that have been utilised. These include access to information, accountability, power and democracy. This section provides a brief overview of the most salient points related to each of these concepts.

7.2.1 Access to information

For the purpose of this thesis, access to information has been defined by Darch and Underwood (2010: 8) as "the individual's right of access to recorded information in the possession of the state". In a global context access to information remains a concept that is mainly utilised by the media and by civil society organisations in their quest to enhance transparency and accountability in a particular society. In the vast majority of countries, the concept is legalised through access to information or freedom of information legislation, which allows the populace to retrieve information in the possession of the state. In terms of measuring the effectiveness of access to information, there are four components that need to be considered. These relate to coverage, exemption, enforcement and ease of access, which effectively evaluates how much of the information in the possession of the state can be accessed, how easily governments can withhold information, how effectively governments are able to enforce compliance and how easy it is for the public to access to information in the possession of the state.

7.2.2 Access to information in South Africa

In the South African context, access to information is a concept that was legally introduced to the state in 1996 through prescripts in the South African Constitution's Bill of Rights that provides the right to access information. Globally, this is not a common phenomenon. The right has been operationalised through PAIA, an act that was promulgated in 2000. The law allows the populace to access information in the purview of the state as well as the private sector, which is not common in access to information legislation elsewhere in the world.

As this thesis has shown, the law provides extensive guidelines on the legal procedures that need to be followed for people to be given access to the information they seek. It also outlines the extensive responsibilities on the part of each government department to provide assistance to the populace in effecting their rights to access to information as well as their ongoing obligations in monitoring of the utilisation of the law. However, as illustrated in studies by Peekhaus (2011 and 2014), Diallo and Calland (2012) and Adeleke (2016 and 2019), there are still significant implementation challenges despite the law being in existence for more than two decades.

In assessing the effectiveness of the South African legislation, these challenges have been categorised into the four components mentioned above. Structurally, the law in its current form has severe limitations on making access to information a reality. For example, while South Africa has done well to ensure that the law covers both the public and private sectors, exemptions that can be used to prevent the release of information, enforcement of the law and the ease of access that people have in being able to get information, have been hampered by the manner in which the law has been structured.

The exemptions allow the state to utilise national security as a way of not releasing information to the public, despite South Africa being a signatory to a set of international principles which prevents national security from being used as an exemption. Enforcement

has also been a difficult component to manage as the law does not have any criminal sanctions attached to it. The SAHRC, as the Chapter 9 institution that was tasked with managing the implementation of access to information laws in the country, has not been empowered to ensure compliance by using the threats of criminal sanctions. Various changes have since been brought in, which are borne out of the recognition that the law is flawed. These include the introduction of an Information Regulator, who is charged with managing PAIA and will be able to enforce the law criminally. This office has, however, faced a significant delay in its set up. There are also pending changes to the law. Lastly, in terms of ease of access, the law has specificities in relation to records versus documents limiting the access to various documents along with an extensive legalistic process that needs to be engaged to be able to access the particular record sought. In the event of the request for access to information being denied, the law does create a platform for appeal and instructs all government departments to ensure that this appeal mechanism is functional.

Access to information proponents see access to information as an enabling right that redefines power relations between social and government actors and has the ability to unlock and realise other socio-economic rights for citizens. Scholars such as Calland and Bentley (2012), Diallo and Calland (2012) and Adeleke (2019) argue that while it does not deliver socio economic rights such as healthcare, education or housing, it empowers the right holder to demand information from the state to question the delivery of these socio-economics rights. Ideally it should give the less powerful actors the opportunity to engage meaningfully with the more powerful actors over their political choices that will have an impact on their interests.

7.2.3 Accountability

For the purposes of this thesis, the focus on accountability has been framed in terms of societal accountability, as an off-shoot of public accountability. Munzhedzi (2016) proports that for public accountability to thrive mechanisms must exist to ensure that public sector

officials are held accountable for the manner in which they use government resources for service delivery to be ethical, transparent and in line with good governance ideals. Furthermore Goetz and Jenkins (2001) highlight that the shortcoming of conventional accountability systems is that the citizen is not entirely privy to all proceedings, allowing officials to be insulated from the checks and balances that the citizenry would require if they were part of the process.

There are two questions that are central to the discussion about accountability. The first is who effects the accountability and the second is why, or to what end. In line with this, Joshi and Houtzager (2012: 149) have argued that public accountability mechanisms must be expanded to "introduce the right to information and transparency legislation to give the media, civil society organisations and individual citizens greater oversight capacity". Similarly, Hyden (2010: 3) has posited that when societal accountability is effected, citizens are able to "check the use of government power via the media, civil society organisations and popular protests". This has placed the responsibility of effecting accountability on the doorstep of the citizenry, represented by the media and civil society organisations and through individuals in their private capacity to use of right to information legislation.

In recognition of these facts, the concept of accountability has been enshrined in South Africa's Constitution, underscoring its importance in the government's efforts to build a new democratic country. This is in stark contrast to the previous dispensation where state affairs were shrouded in secrecy and the general populace was subjected to censorship.

In terms of accountability there are three points of importance in terms of the role of the media. As Sen (2009) intimates, the first is the fact that the media has been established as the institution within a democracy that plays the important watchdog function. In the media exposing the wrongdoing of the state, it is able to question the state's intentions, particularly with regard to the public purse and the delivery of services. In this manner, it's able to hold the state to account on behalf of the populace. However, it must be noted that the ability to

have access to information is critical to it being in a position to effect this role. Second is the media's role as the body that facilitates access to information to the populace. The information that is provided to the populace helps the citizenry to identify their interests and then to make informed decisions about those interests.

Thirdly, there is the agenda setting role that the media play, as posited by McCombs, Shaw and Weaver (1997). The media has the power to set the agenda and determine what is important in the eyes of the general populace. What is critical here is the fact that the media have the power to put the information in the public domain and drive the agenda by framing the information within a broader discussion about accountability and transparency. The media's ability to set the agenda must be acknowledged alongside the role that it has within the responsibility that it has in effecting societal accountability. Collectively these roles create the scenario where the media are able to help the populace realise the value of the information and why they need to hold their government to account.

As the case studies illustrate, in South Africa the media have had an important role to play in the use of access to information legislation and has been one of the most prominent users of the tool.

Fox (2000) has argued that civil society organisations play a critical role in encouraging accountable governance and that they have a particular role in helping individuals to realise their rights for access to information. In terms of civil society in the South African context, there are various organisations that have taken up the fight for access to information on behalf of the populace. What is interesting to note is that In South Africa the media and civil society has worked very closely together to further the applicability of access to information in South Africa to effect accountability within the democracy.

7.2.4 Democracy

The definition of democracy for this thesis was grounded in Dahl's democratic ideals. This is based on the concept that various democratic procedures need to exist for political equality to obtain. There are five democratic procedures but the three that are relevant for this thesis is an enlightened understanding, control of the agenda and effective participation. All three are closely correlated to access to information and accountability. In fact, the three democratic criteria must be seen as the link between access to information and accountability. In terms of access to information, the three democratic criteria can be considered as the outcomes of being able to access information and at the same time, these three democratic criteria form the basis of what the populace is able to use to hold their governments to account, across service delivery scenarios. By having an enlightened understanding, participating effectively and being in control of the agenda, the populace is able to ask the state the hard questions about whose interest they are really acting in.

The challenge with these three criteria in the context of democracy is that the populace's ability to get control of the agenda, to develop an enlightened understanding and to participate effectively are all subjected to pre-existing power relations that the state, more than any other agent, pre-determines.

7.2.5 Power

In the significant discourse around power, there are two conceptions of power – one as "power over" and the other as "power to". Both conceptions are important because they speak to one actor having power over another but also about power as a concept to empower an actor.

For the purposes of the research, a combined conception of power that is grounded in the theories espoused by Lukes (2005), Hamilton (2013) and Foucault (2000) was developed.

Collectively these accounts argue that the best and capacious, workable conception of power has four main elements. The first is as a relation between actors that needs to be navigated to limit the scope of domination. The second is as a set of mechanisms that can be used to set the agenda. This includes securing compliance by controlling the thoughts of the populace by socializing them in a particular way. It could also be conceived as controlling the information the populace has or through political inaction or suppressing the knowledge they have through censorship and disinformation. In the third conception, power is the ability of citizens to gain agency that can be linked to their autonomy, while the fourth conceives of power as procedural arrangements that are set up within the state to aide citizens in identifying, expressing and evaluating their needs. These would help to minimise domination.

This combined conception is critical to evaluate the power relations linked to the implementation of access to information mechanisms in South Africa and how these contribute to the enhancement of democracy in the country.

On a theoretical level, it is evident that there are strong links between access to information, accountability, power and democracy. Practically, in South Africa, these links can be seen in the access to information law that was enacted. Theoretically when a citizen is able to successfully access information, the information helps them to have a more enlightened understanding about the issues that affect them. In so doing, they are able to participate more effectively in the democracy and it places them in a better position to be able to control their interests within the agenda. Thus, on a theoretical level, these linkages can be utilised to answer the research question. As a start, it is evident that access to information leads to accountability and that this helps the citizen have a better prospect of engaging with the issues that affect them. However, even in this theoretical equation, power still plays an important role as it affects how access to information is enacted, and to what extent accountability can be effected. All the conceptions of power are relevant in a theoretical and practical sense.

In and of itself, the PAIA law should be seen as a conception of power as the law empowers the citizenry, giving them agency in stark contrast to the authoritarian regime during Apartheid in which censorship was central. By accessing information, the citizenry is placed in a position where they develop autonomy. The ability to access information helps citizens to engage with the needs that are central to their lives and to make critical decisions about how this can affect them. This exercise is helpful for democracy as it reduces the risk of citizens being dominated and their needs being overlooked.

However, in accessing information there is still a power relation that has to be navigated between the governed and the government. This is a natural consequence of the manner in which the law is set up, in that the requester (the governed) has to ask for information but the state (or rather the government of the day) can decide whether or not to provide or deny access to this information. In some instances, the power is navigated in favour of the requester, empowering them with the information that they sought. The requested information, once received, can be used as a mechanism to set the agenda for the requester. In some instances, the power is skewed in favour of the state, allowing them to deny access to information. The state's decision to withhold information should also be seen in the context of it utilising power to secure compliance by controlling the populace and controlling the information they have at their disposal. Furthermore, a decision by an information officer to ignore a PAIA request received from the governed can be seen as an exercise of power, which is the result of the broader mechanics of power and hence results in political inaction. This is a way to prevent the populace from being able to navigate this power relation in their favour. In terms of the links this draws to accountability and democracy, the withholding of information limits the ability of the citizen to hold the state to account more effectively and also limits their ability to then engage in the democracy in terms of Dahl's three criteria. Therefore, it must be noted that power has the ability to undermine efforts to enhance democracy in terms of access to information.

7.3 Case studies evaluation

The two case studies presented in this thesis look at how access to information has played out in the South African context. There are various inferences that can be drawn from the case studies evaluated in this thesis in relation to the research question. The two case studies have highlighted the practical challenges in linking access to information to accountability and democracy and underscores that it is a complex and necessary exercise.

On the face of it, while both case studies managed to secure access to information successfully, there were significant challenges in realising this. This provides various lessons for the practical application of access to information and how this links to accountability and democracy. These find expression in the role of the judiciary, conflicting legislative interests and the realisation of accountability.

7.3.1 The role of the judiciary

As a start, in both case studies the judicial system formed an integral part of the access to information requests. All other mechanisms that allow the requester access to information were denied and therefore, in both cases the court ultimately had to make the decision. However, the roles of the courts in each of the case studies were markedly different.

In the National Key Point case study, the court of the first instance granted the request for access to information. In the judgment, Justice Roland Sutherland said the decision was unconstitutional and noted that "transparency about all the facts is necessary to either repair the rot [in government], if any exists, or dispel the lack of confidence which the citizenry will continue to nurse if the facts are concealed" (Right2Know Campaign v Minister of Police, 2013[46]). This was important for accountability and democracy as a whole as it underscored

[46] Right2Know Campaign and Another v Minister of Police and Another (2013/32512) [2014] ZAGPJHC 343, Judgment, p26, para 45

the importance of the citizenry's ability to question the state and the need for it to respond. The court's support of the access to information landscape reinforces the importance of access to information as a Constitutionally guaranteed right.

In the Reserve Bank case study, technical aspects of the access to information law were cited as a justification for denying access to information. The court went one step further issuing a crippling cost order against the NGO that had made the application. The severity of the cost order would in effect muzzle an organisation that has been at the heart of access to information requests for more than two decades. This could have the effect of limiting other access to information processes of continuing. The organisations at the centre of the request were forced to engage in a lengthy and expensive court battle which took six years to overturn. In overturning the judgment, the Supreme Court of Appeal condemned the court of the first instance for denying access to information sought, further noting that bank's denial of the request "constituted a cynical disregard of its obligations under PAIA" (The South African History Archive Trust v The South African Reserve Bank, 2020[47]).

There are two concerns that need to be stressed. The first is the fact that in both case studies the organisations were forced to approach the court for a reprieve. Although the legislation allows for the court to intervene in denials of requests, the involvement of the courts has been identified as a lengthy and costly exercise, which is only at the disposal of those who have the necessary financial means to seek this avenue for recourse. Secondly, the cases show the failure of the internal appeals mechanism.

The challenge with the appeal mechanism is that it is, in most cases, administered by the political head of a particular government department. This means that politically sensitive matters can still be denied. When this happens, in order for requests for access to

[47]The South African History Archive Trust v The South African Reserve Bank and Another (17/19) [2020] ZASCA 56; [2020] judgment, p15, para26

information to be fulfilled, it often requires the requesters to approach the judicial system. In the case of the Reserve Bank, there is no internal appeals mechanism.

What these case studies show is that the courts have a significant role to play in terms of navigating access to information and the implementation of existing access to information laws in South Africa. However, it is alarming that the court of the first instance in the Reserve Bank case did not uphold the PAIA legislation correctly, failed to recognise the importance of the request and blocked the passage of access to information. In this case, there is a potential democratic deficit in that the judiciary as an institution falls short of fulfilling the principles of democracy envisioned in the Constitution. The fact that accountability has become heavily reliant on the decisions being made in the country's courts is potentially problematic as it showcases exactly how systems created for the electorate to be able to hold their political representatives to account are not able to work adequately. This amounts to a deep democratic deficit or lack of accountability. Although this thesis does not delve into this aspect of judicial accountability, it is important to note the role of the judiciary in democratic accountability. Under general circumstances, the judiciary has a role to play in adjudicating between the state and the citizenry -- or the governed and the government. What is important in terms of links between access to information, accountability and democracy, is that the judiciary does have an important role to play. The challenge is that that avenue is only open to those who have the economic resources to access this. This, thus limits the ability of the populace to be empowered through the courts access to information.

7.3.2 Conflicting legislative interests

In both cases, the state utilised legislation that had been promulgated during apartheid as a justification for the requested information not to be released. Most apartheid laws were centred on censorship and information not being leaked to the public. While the majority of these apartheid era laws have been repealed and replaced, some notable exceptions exist. This includes the National Key Points Act as well as the Riotous Assemblies Act and The Public

Gatherings Act (The Citizen, 2018). The National Key Points Act aimed to protect various buildings and locations from apparent threats of sabotage in the height of apartheid, establishing National Key Points and safeguarding of these points, "any occurrence arising out of or relating to terroristic activities, sabotage, espionage or subversion" (NKPA, 1980: 3).

The challenge with state entities in democratic South Africa utilising laws that were meant to oppress the majority of the population goes against constitutionally mandated rights to transparency, accountability and access to information. The use of these laws must be seen as an attempt by the state to maintain the power imbalance in their favour. One of the fundamental tensions in a democratic state is between secrecy and transparency. The state has an obligation to maintain national security secrecy in relation to the security of the state, which protects the citizens against outside threats. However, maintaining the balance is tenuous as it needs to accommodate the citizens right of access to information. The state's decision to use apartheid laws which had the intention of maintaining censorship, clearly skews the power balance in favour of secrecy rather than transparency, and the spirit of the new democracy.

Linked to this is the concerning issue of the state using national security as an exemption for not providing the necessary information, particularly when the use of the national security exemption has been justified incorrectly. The incorrect use of national security was more prominent in the National Key Points case then in the matter of the Reserve Bank. However, this use of national security displays a deliberate attempt by the state to utilise any mechanisms necessary to withhold information. While the issue of national security cannot be ignored on the part of the state and is a valid concern there are very specific scenarios in which national security can be used and the state has various obligations that need to be fulfilled in this regard.

7.3.3 Access to information and accountability

In drawing the links between access to information and accountability, the National Key Points case study provided a more definitive result than the Reserve Bank case. The organisations at the centre of the National Key Points request were able to use the information that they received to their benefit, holding the government to account and effecting change. The outcome of this in terms of accountability was a change in the law, where the apartheid law was repealed and a new law, the Critical Infrastructure Protection Act (2019), has been assented into law. The new law is more relevant for the Democratic South Africa: It identifies and declares infrastructure as critical and provides guidelines and factors to be considered to ensure that this identification is transparent (Critical Infrastructure Protection Act, 2019). The fact that an apartheid law that was being misused was repealed and the principles of transparency were upheld, is a feat for access to information, accountability and for democracy. In terms of the Reserve Bank case study, the access to information-accountability relationship is not as yet fully clear. The Supreme Court of Appeal decision was only delivered in May 2020 and accountability stemming from the case has not as yet been forthcoming.

What the researchers in this instance would need to understand is how they could utilise the information to effect accountability, particularly because several of the people linked to the request have died. If accountability can only be effected by holding someone to account, the question remains: how will the researchers hold people who have died to account? What is significant in this instance is that access to information is less about accountability and more significantly linked to transparency. It is important to note that the links between access to information and accountability cannot always be drawn. It is also relevant to recognise that there are instances where accessing the information is not sufficient to result in accountability and that the information needs to be translated or interpreted in order for people to understand how the information they have, can be used to effect accountability. This is in line with Calland and Bentley's (2012) idea around access to information being an

enabling right. In this sense, access to information enables the citizenry to exercise better accountability in the longer term by having the ability to make more informed decisions.

There are other cases that have reflected the ability of access to information to affect accountability as is evidenced in the Nkandla access to information case briefly discussed earlier in this thesis. What the Nkandla case showed is that the request for access to information – which was eventually granted – kicked into motion a chain of events that eventually resulted in the then President of the Republic Jacob Zuma stepping down from office. It must be noted that there are various factors that came into play that eventually resulted in Zuma's resignation, including pressure from the ruling party's leadership as well as the public pressure on the then president. However, the access-to-information request and the publicity that the matter had received through the media did have a contribution towards the eventual public outcry against the then president.

In addition to these three key areas, the implementation challenges linked to access to information that scholars have repeatedly noted, needs to be considered within the context of the case studies. The case studies showcase how these challenges still exist two decades after the law came into effect. The implementation challenges, which are not new and have existed since the onset of the law, should be seen in the context of existing social, economic and political power relations.

What is evident, is that the state and some officials who administer PAIA requests are still implementing the act incorrectly and are still unfamiliar with the correct processes that need to be followed. Some interviewees have alluded to the interference from political offices, such as the minister's, on occasion. The manner in which the administrative process of PAIA is structured allows the political office to influence decisions about access to information shows how access to information is still not fully implementable without power relations hampering or impeding the process.

7.4 Concluding remarks

While the discussion has set out how, on a theoretical basis, access to information is an uncomplicated exercise, the reality is that on a practical level, the implementation of access to information is complex and skewed by power relations. This does not make it any less necessary and important, however.

The research question looked at the interplay between access to information and accountability and how this enhances democracy in South Africa. In answering this question, the following conclusions can be made.

- Access to information remains a useful and valuable tool for the enhancement of democracy in South Africa. It has the ability to help the populace develop an enlightened understanding, control of the agenda and participate more meaningfully in democracy. Where power relations can be overcome or mitigated, particularly through internal procedures and the judiciary, transparency and access to information allows the populace to understand their needs and interests better and then to make the necessary decisions links to these needs and interests. There is definite evidence that the populace is able to utilize access to information to be able to effect accountability. These have resulted in massive feats for the populace and have encouraged the presence of transparency more frequently. Evidence of this can be found in the National Key Points case which resulted in an outdated piece of legislation being repealed and replaced by a modern and more democratically sound piece of legislation. This must be seen as a marker for democracy as it has resulted in citizens being able to participate effectively, develop an enlightened understanding and control the agenda.

- At the same time, access to information remains a right that is not in the purview of the vast majority of the citizenry in South Africa, who are still unaware that access to

information legislation exists and that it can be utilised at their will to contribute to an improvement in their lives. This in itself is concerning as it insinuates that they are oblivious of a mechanism that exists to help them hold their government to account. Should the populace be more aware and utilise this mechanism more actively, it is likely to have a more long-lasting ability to alter the power dynamics between the governed and the government. Having said this, it is, however, a fairly standard practice across the world that access to information tools are mainly used by the media as part of their mandate to hold the state to account on behalf of the populace. This has been highlighted in this thesis, along with the integral role that the media and civil society organisations play in this process by using the legislation to encourage transparency and accountability.

- Although not directly related to the research question is the issue of access to information and power, which has consistently featured through this thesis. Power remains a site of tension within the access to information landscape itself and also more broadly in terms of the ability of citizens to effect accountability. At one level power still rests primarily with the state by virtue of the way that legislation has been designed and can be effected for them to utilize it for their own benefit. However, it must be noted that power is, however, fluid to a certain extent in the sense that citizens are able to navigate it in their favour. There are mechanisms that exist that allow them to challenge power.

- On a theoretical level, having access to information is a sufficient condition to enable an enlightened understanding, control of the agenda and effective participation. However, at times, particularly in the practical sense, the links between access to information and accountability can be fragile or weak. An example of this has been brought up by several interviewees, who have noted that often people did not know how to use the information that they received via successful information requests to achieve accountability from the state. They therefore required additional support

from civil society organisations on how to use the information as an enabling right that could help them realise the next step towards accountability. What is significant to highlight is that the success that civil society organisations have had is linked to the manner in which they have been able to organise themselves to navigate the social power that is needed in order to access information. Social power is largely the financial resources, networks and levels of education to be able to navigate the organs and arms of the state. In this vein, this thesis also shows that the links between access to information and accountability can only be drawn once the citizen understands the value of the process to access information, the information itself and how it has the potential to improve their lives and circumstances.

- Access to information as a tool in SA remains riddled with various implementation challenges, which pose a significant risk to the enhancement of democracy in South Africa. These implementation challenges have become the sites of power relations that need to be navigated. In most instances the populace as the less powerful actors falls short. These implementation challenges manifest in information officers being unfamiliar with the procedures of the law, and therefore failing to abide by the timeframes instituted in the law to respond to requests. Sometimes these officers have not been trained in terms of their obligations. It also manifests in the internal appeal process being unduly influenced by the political office within government. While the law allows an internal appeals process to be set up, political offices therefore have the ability to intervene and on occasion prevent the realisation of politically sensitive information requests. At times, the incorrect justifications are used to deny requests. These are particularly challenging in terms of national security, where it appears that nationally, the state is fully aware of their obligations in terms of national security and the right of access to information in some quarters, but these obligations do not filter down to information officers who should be aware of them.

- Access to information can be a costly exercise, particularly if one needs to approach the court to appeal a decision that has been denied. The challenge is that only a select number of people have the economic resources to take these matters to the court for further reprieve. Those who have been able to take these cases forward include media houses, civil society organisations as well as individuals with the financial resources. However, for many grassroots civil society organisations and individuals this option does not exist – limiting their ability to question decisions and interests that are not in their favour. In terms of democracy, this limits the ability of PAIA to be used widely as a tool that enhances democratic values in the country.

Given these issues, it must be acknowledged that South Africa has established an Office of the Information Regulator with a mandate of managing access to information in the country. The office is mandated to manage both the public as well as the information officers.

On the part of the public, the office will consider a complaint after an internal appeal procedure has been exhausted, as well receive and investigate complaints about how PAIA was handled. These matters will be referred to the Enforcement Committee and once the committee makes a recommendation, it will also issue the notice. The information regulator will also be responsible for developing and conducting educational programmes in disadvantaged communities and help people requesting information.

In terms of information officers, the Information Regulator will monitor implementation of PAIA, train information officers, make recommendations to public and private bodies on changes they can institute in relation to the administration of PAIA and engage with the public and private sectors about problems they have encountered complying with PAIA. The office will also assess how public and private bodies comply with PAIA and to recommend how they can make information available electronically.

Many of the implementational challenges that have already been identified may be tackled by this office. The office of the Information Regulator, which is in the process of being fully functional is a critical cog in the successful implementation of access to information in South Africa. However, in order to circumvent some of the implementation challenges that have shown up over the last two decades, various steps must be taken.

More resources must be given to the Office of the Information Regulator. The South African Human Rights Council, as the custodians of PAIA, has, on several occasions, complained to Parliament about the lack of resources that had been afforded to it. The limited resources have impeded it from doing its work in relation to PAIA, and particularly around awareness of the law. Already in its strategic plan of 2020/2021- 2024/2025, the office has noted budgetary constraints.

The reality is that more widespread awareness is needed of access to information in the country. In order to truly empower the average citizen in terms of access to information the state has a responsibility to educate and provide citizens with support that helps them to understand the processes around access to information as well as how they are able to effectively utilise the information they have gained to hold the state effectively to account.

Another potential challenge within the current set up of the Information Regulator is that the management of PAIA has been amalgamated with the management of the Protection of Personal Information Act. There is a chance that the act would be overlooked or side-lined in the attempt to get South Africa POPIA compliant. The importance of the POPIA is clearly stated In the Information Regulator's Strategic Plan, which notes the urgent need to bring POPIA into full effect, as the absence of a fully functional and effective personal information regulatory authority is beginning to have an adverse effect on the country, seen by various data and information breaches.

The office would also need to operate more optimally to reduce the number of court appeals that take place. As court procedures are only privy to those in a good economic position, the ability of the law to act as a widespread accountability mechanism for the populace is limited.

It remains to be seen if the Office of the Information Regulator would be able to fulfil this task. It would also be important for the office to ensure that it operates free of political influence and that the ongoing appointment of the Information Regulator is seen as a fair and untainted process.

However, access to information in South Africa does require political will. Overall, the state has failed to address the structural problems of the access to information law. There appears to be no political will to tackle the implementation challenges raised by the South African Human Rights Council over the last two decades. This, in turn, has the ability to limit the way that this law is effected and to limit the ability of the populace to engage in accountability. Unless there is a recognition of the value that access to information imparts on society, in line with the constitutional provisions, it is unlikely to become a more widespread tool for the populace to use to hold the state accountable.

Ultimately, access to information is a necessary step for accountability to take place but this is not a symbiotic relationship and therefore access to information does not automatically result in accountability and neither does accountability result in access to information. In instances where access to information is used as a basis for accountability, it has the potential to garner substantial results in favour of the populace and this has the ability to strengthen democracy. There is evidence that it can result in a populace that participates more meaningfully, that have an improved control of the agenda and that has an enlightened understanding. In this way one can argue that in South Africa, access to information mechanisms have enhanced democracy.

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APPENDICES

Approval of Proposal for the Doctoral Degree

UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

FACULTY OF HUMANITIES
POSTGRADUATE OFFICE

Student Number: 1297705

Miss Candice Bronwyn Bailey
35th Avenue
Westdene
Johannesburg
2092
Gauteng
South Africa

30 January 2019

Dear Miss Candice Bronwyn Bailey

APPROVAL OF PROPOSAL FOR PhD IN POLITICAL STUDIES

I am pleased to be able to advise you that the readers of the Graduate Studies Committee have approved your proposal entitled "***Democracy and Access to Information in South Africa."*** However you should take note of warnings and recommendations. I confirm that ***Prof Lawrence Hamilton*** has been appointed as your supervisor.

The research report is normally submitted to the Faculty Office by 15 February, if you have started the beginning of the year, and for mid-year the deadline is 31 July. All students are required to RE-REGISTER at the beginning of each year.

You are required to submit 2 bound copies and one unbound copy plus 1 CD in pdf (Adobe) format of your research report to the Faculty Office. The 2 bound copies go to the examiners and are retained by them and the unbound copy is retained by the Faculty Office as back up.

Please note that should you miss the deadline of 15 February or 31 July you will be required to submit an application for extension of time and register for the research report extension. Any candidate who misses the deadline of 15 February will be charged fees for the research report extension.

Kindly keep us informed of any changes of address during the year.

Note: All MA and PhD candidates who intend graduating shortly must meet your ETD requirements at least 6 weeks after your supervisor has received the examiners reports. **A student must remain registered at the Faculty Office until graduation.**

Yours Sincerely

A Mahomed
Asiya Mahomed (Ms)
Faculty Officer
Faculty of Humanities

Ethics Certificate

UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

Research Office

HUMAN RESEARCH ETHICS COMMITTEE (NON-MEDICAL)
R14/49 Bailey

CLEARANCE CERTIFICATE	**PROTOCOL NUMBER: H19/02/02**
PROJECT TITLE	Democracy and access to information in South Africa
INVESTIGATOR(S)	Miss C Bailey
SCHOOL/DEPARTMENT	Social Sciences/
DATE CONSIDERED	15 February 2019
DECISION OF THE COMMITTEE	Approved
EXPIRY DATE	20 June 2022

DATE 21 June 2019 **CHAIRPERSON** _____ (Professor J Knight)

cc: Supervisor : Professor L Hamilton

DECLARATION OF INVESTIGATOR(S)

To be completed in duplicate and **ONE COPY** returned to the Secretary at Room 10004, 10th Floor, Senate House, University. Unreported changes to the application may invalidate the clearance given by the HREC (Non-Medical)

I/We fully understand the conditions under which I am/we are authorized to carry out the abovementioned research and I/we guarantee to ensure compliance with these conditions. Should any departure to be contemplated from the research procedure as approved I/we undertake to resubmit the protocol to the Committee. **I agree to completion of a yearly progress report.**

Signature _____ Date 22, 06, 2019

PLEASE QUOTE THE PROTOCOL NUMBER ON ALL ENQUIRIES

Participant Information Sheet – Experts



Dear Sir/Madam

I am a PhD student in the Political Studies Department at the University of the Witwatersrand in Johannesburg, under the NRF British Academy SARChi Chair in Political Theory. As part of my studies I have to undertake a research project. I am looking into access to information laws in South Africa and how they intersect with democracy in a study titled "Democracy and Access to Information in South Africa". The crux of the research is to evaluate how the access to information laws that were promulgated in South Africa shortly after the new government was installed have contributed to the state of democracy in the country 25 years later.

Based on the significant references to your office that have been found in both the media as well as academic literature on this field of study, I have identified you as one of South Africa's critical stakeholders regarding this legislation. Therefore, as part of the project I would like to invite you to take part in an interview. This activity will involve a face-to-face interview and will take around one hour of your time at a place of your convenience. During this interview, I will engage with you on a series of questions that could help me understand both the broader benefits of this piece of legislation as well as some of challenges that hinder it. With your permission, I would also like to record the interview using a digital device.

You will not receive any direct benefits from participating in the study and there are no disadvantages of not participating. You may withdraw at any time or not answer any question if you do not want to. I also need to state upfront that although the interview will be completely confidential and I will not be asking for your name or any identifying information, the nature of the interview and the references to your official position may make you identifiable. However, please rest assured that the information you give me will be held securely and will not be disclosed to anyone.

If you have any questions after about this research feel free to contact me on the details below. The study will be written up as a PhD thesis, will be available online through the Wiredspace digital platform of the University of Witwatersrand. If you have any queries, concerns or complaints regarding the ethical procedures of the setting, you're welcome to contact the University human diesel if extremity for non-medical purposes on 0117171484 or email Shaun.Schoeman@wits.ac.za

Yours sincerely

Candice Bailey

Tel: +27 83 318 8613 candice.bailey@gmail.com

Participant Information Sheet – Managers

Dear Sir/Madam

I am a PhD student in the Political Studies Department at the University of the Witwatersrand in Johannesburg, under the NRF British Academy SARChi Chair in Political Theory. As part of my studies I have to undertake a research project. I am looking into access to information laws in South Africa and how they intersect with democracy in a study titled "Democracy and Access to Information in South Africa". The crux of the research is to evaluate how the access to information laws that were promulgated in South Africa shortly after the new government was installed have contributed to the state of democracy in the country 25 years later.

As one of the government departments that have significantly engaged with the Promotion of Access to Information Act, and fielded thousands of requests over the last 25 years, I have identified you as one of South Africa's critical stakeholders regarding this legislation. Therefore, as part of the project I would like to invite you to take part in an interview. This activity will involve a face-to-face interview and will take around one hour of your time at a place of your convenience. During this interview, I will engage with you on a series of questions that could help me understand both the broader benefits of this piece of legislation as well as some of challenges that hinder it. With your permission, I would also like to record the interview using a digital device.

You will not receive any direct benefits from participating in the study and there are no disadvantages of not participating. You may withdraw at any time or not answer any question if you do not want to. I also need to state upfront that although the interview will be completely confidential and I will not be asking for your name or any identifying information, the nature of the interview and the references to your official position may make you identifiable. However, please rest assured that the information you give me will be held securely and will not be disclosed to anyone.

If you have any questions after about this research feel free to contact me on the details below. The study will be written up as a PhD thesis, will be available online through the Wiredspace digital platform of the University of Witwatersrand. If you have any queries, concerns or complaints regarding the ethical procedures of the setting, you're welcome to contact the University human diesel if extremity for non-medical purposes on 0117171484 or email Shaun.Schoeman@wits.ac.za

Yours sincerely

Candice Bailey

Tel: +27 83 318 8613 candice.bailey@gmail.com

Participant Information Sheet – Participants



Dear Sir/Madam

I am a PhD student in the Political Studies Department at the University of the Witwatersrand in Johannesburg, under the NRF British Academy SARChi Chair in Political Theory. As part of my studies I have to undertake a research project. I am looking into access to information laws in South Africa and how they intersect with democracy in a study titled "Democracy and Access to Information in South Africa". The crux of the research is to evaluate how the access to information laws that were promulgated in South Africa shortly after the new government was installed have contributed to the state of democracy in the country 25 years later.

The PAIA Civil Society Network has significantly “used” this legislation by interacting with several different government departments around it and requesting a range of information through it.

Based on this I have identified the network among South Africa's critical stakeholders regarding this legislation. Therefore, as part of the network, for my PhD project I would like to invite you to take part in an interview. This activity will involve a face-to-face interview and will take around one hour of your time at a place of your convenience. During this interview, I will engage with you on a series of questions that could help me understand both the broader benefits of this piece of legislation as well as some of challenges that hinder it. With your permission, I would also like to record the interview using a digital device.

You will not receive any direct benefits from participating in the study and there are no disadvantages of not participating. You may withdraw at any time or not answer any question if you do not want to. I also need to state upfront that although the interview will be completely confidential and I will not be asking for your name or any identifying information, the nature of the interview and the references to your official position may make you identifiable. However, please rest assured that the information you give me will be held securely and will not be disclosed to anyone.

If you have any questions after about this research feel free to contact me on the details listed below.

The study will be written up as a PhD thesis, will be available online through the Wiredspace digital platform of the University of Witwatersrand. If you wish receive a summary of either your comments

that you made to me I will be happy to send to you, upon request. If you have any queries, concerns or complaints regarding the ethical procedures of the setting, you're welcome to contact the University human diesel if extremity for non-medical purposes on 0117171484 or email Shaun.Schoeman@wits.ac.za

Yours sincerely

Candice Bailey

Tel: +27 83 318 8613 candice.bailey@gmail.com

Interview Consent

UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

Democracy and Access to Information in South Africa

By Candice Bailey (student number 1297705)

I _____ in my capacity as _____ agree to participate in this research project. The research has been explained to me and I understand what my participation will involve.

I agree that my participation will be noted in the research YES NO

I understand that my name will not be used but that my anonymity cannot be guaranteed due to the nature of the research collating information that I will provide in my official capacity, emanating from my professional office YES NO

I agree that the researcher may use my quotes in her research report YES NO

I agree that the interview may be audio recorded. YES NO

I would like to review direct quotes that have been included in the research YES NO

Name _____

Signature _____

Date _____

Questionnaire - Experts

Interview protocol (semi-structured interviews with experts of the legislation)

1.The Promotion of Access to Information Act was promulgated in South Africa shortly after the inception of democracy. What do you think the point is of this piece of legislation?

2. Do you believe it is critical for democratising states to implement mechanisms of this sort? Why or why not?

3. How effectively has this piece of legislation been able to achieve the goals that the original legislators intended?

4. What is the mandate that you were given in terms of working in the office where Promotion of Access to Information Acts are dealt with? Why do you believe this mandate is sufficient?

5. The legislation was first managed by the South African Human Rights Commission, under the auspice of the Department of Justice and Constitutional Development. What is your review of the management of the legislation during that period?

6. What effect do you believe moving the legislation to the purview of the Office of the Information Regulator will have on the effectiveness of the legislation and the management of the Promotion of Access to Information Act legislation in its day to day applications?

7. What in your opinion are the chief structural and systemic barriers that prevent this legislation from achieving its full potential? What do you think these challenges are a result of?

8. Are there specific cases that highlight issues around PAIA that show how the legislation is being used? Why do you think you encounter these challenges? And do you think these challenges are unique to your entity? If so, why? If not, why?

9. In terms if rectifying the challenges that are presented by the legislation, what are among the most significant provisions that can be introduced to improve its implementation and effectiveness?

10. In evaluating the benefits of this piece of legislation, what would you note as some of the highlights or positive experiences that you have encountered in working with PAIA? Are there specific cases that highlight the positive experiences around PAIA that show how the legislation is being used?

11. Are there cohorts of people that benefit from the legislation more than others? In which way do they benefit and in which way do other lose out?

12. Can you recount your experiences on a specific case – or a series of cases -- that show how PAIA is being used? Why is this case important for South Africa?

Questionnaire – Managers

Interview protocol (semi-structured interviews with day to day managers of the legislation)

1. The Promotion of Access to Information Act was promulgated in South Africa shortly after the inception of democracy. How do you think the South African Police Service has handled the Promotion of Access to Information legislation generally since the promulgation of the law and since it started getting requests for information?

2. What do you think the point is of this piece of legislation? And what has been the mandate that you were given within the South African Police Service in terms of working in the office where Promotion of Access to Information Acts applications are received?

3. Do you believe the approach – or response from -- the South African Police Service towards the law has changed since the inception of the law? If so, how and why? If not, why?

4. Within the South African Police Services, how, in your opinion, do you believe promotion of access to information legislation could be beneficial for citizens?

5. What in your opinion are the chief structural and systemic barriers within the police service specifically but also more broadly across other government departments that could prevent this legislation from achieving its full potential?

6. When applications are denied information, are there instances when you disagree with the decision to deny? Why did you disagree?

7. When applications are denied information, are there instances when you agree with the decision to deny? Why did you agree?

8. In 2014/2015 year, the South African Police Service received 21 580 PAIA requests. Close to 90% of these requests were granted fully or partially but there were 189 cases that were denied. What was the reason behind these cases being denied? Who were these requests from? How is a decision to deny information taken? What is it based on? What are the circumstances that mostly surround denials of requests? And how is the denial recorded?

9. In terms if rectifying the challenges that are presented by the legislation, what are among the most significant provisions that can be introduced to improve its implementation and effectiveness?

10. In evaluating the benefits of this piece of legislation, what would you note as some of the highlights or positive experiences that you have encountered in working with PAIA? Are there specific cases that highlight the positive experiences around PAIA that show how the legislation is being used?

11. Can you recount your experiences on a specific case – or a series of cases -- that show how PAIA is being used? Why is this case important for South Africa?

12. Are there cohorts of people that benefit from the legislation more than others? In which way do they benefit and in which way do other lose out?

Questionnaire – Sample

Interview protocol (semi-structured interviews with [sample] of users of the legislation)

1.The Promotion of Access to Information Act was promulgated in South Africa shortly after the inception of democracy in an attempt to encourage an increase in citizens' political knowledge and ultimately to positively influence their ability to engage in democratic decision-making. Do you agree or disagree with this statement? Why?

2. Do you believe it is critical for democratising states to implement mechanisms of this sort? Why or why not?

3. How effectively has this piece of legislation been able to achieve the goals that its original legislators intended?

4. What in your opinion are the chief structural and systemic barriers that prevent this legislation from achieving its full potential?

5. Within your organisation, what are some of the main challenges that you encounter with the PAIA legislation? What do you think these challenges are a result of?

6. Are there specific cases that highlight issues around PAIA that show how the legislation is being used? Why do you think you encounter these challenges? And do you think these challenges are unique to your organisation? If so, why? If not, why?

7. In terms if rectifying the challenges that are presented by the legislation, what are among the most significant provisions that can be introduced to improve its implementation and effectiveness?

8. In evaluating the benefits of this piece of legislation, what would you note as some of the highlights or positive experiences that you have encountered in working with PAIA? Are there specific cases that highlight the positive experiences around PAIA that show how the legislation is being used?

9. Can you recount your experiences on a specific case – or a series of cases -- that show how PAIA is being used? Why is this case important for South Africa?

10. Are there cohorts of people that benefit from the legislation more than others? In which way do they benefit and in which way do other lose out?