SUBMISSIONS ON ACCESS TO INFORMATION ON CLIMATE CHANGE AND HUMAN RIGHTS

To: The Special Rapporteur on Climate Change

Submissions in response to the call for submissions to inform the thematic report for the 79th session of the General Assembly.

From: Open Secrets and the Access to Information (in the energy sector) Coalition

Date: 7 June 2024

INTRODUCTION

1. The Access to Information Coalition for the energy sector (ATIC) is a group of South African civil society organisations seeking to ensure transparency and accountability within the South African energy sector. Open Secrets acts as the Secretariat for this coalition as well as its smaller working group.[1] Access to information, crucial to a just energy transition, is a shared concern amongst many organisations working within the climate and energy space. Where possible, we collaborate to ensure accountability on the part of government, state-owned entities and corporations that exert influence – and indeed profit from – the energy sector. We share a joint interest in ensuring that the right of access to information is realised in a substantive and efficient manner.

[1] The names of the organisations that support/endorse these submissions are listed on the final page.

2. The organisations represented in these submissions have engaged, or attempted to engage, the state or state-owned entities, on a number of issues pertaining to the just transition, sector transparency as well as the structures established to oversee the transition from an extractives-based economy to one which prioritises renewables and cleaner energy sources. It is safe to say that there has been a significant focus on procurement, pricing agreements for power supply, mining rights applications and tender processes on the part of civil society in relation to the energy sector.

3. We have structured these submissions as follows:

    3.1. A comment on the South African context;

    3.2. Brief description of the legislative framework;

    3.3. Challenges to accessing information; and

    3.4. Recommendations.

THE SOUTH AFRICAN CONTEXT

4. At the heart of our access to information work is the acknowledgment that the impact of climate change and climate events has been and will continue to be borne disproportionately by the poor and marginalised in South African society. Powerful monopolies established in the extractive industries flourished because a series of oppressive regimes ensured that labour could be exploited by a small, powerful minority, with government and corporations working hand in hand towards enrichment. Access to information matters in a democratic South Africa founded on Constitutional values. It matters that people are aware of the transactions that government are making ostensibly in the public interest that will ultimately have a bearing on the constitutional right to "an environment that is not harmful to their health or well-being."[2] For a right dependant on state power can only be realised if people are able to engage with decision makers.

[2] Section 24(1)(a) of the Constitution.

5. South Africa's Framework for a Just Transition,[3] approved by the President in September 2022, incorporates the Constitution's transformative vision when it says: "A just transition puts people at the centre of decision making, especially those most impacted, the poor, youth, women, people with disabilities, and the youth—empowering and equipping them for the opportunities of the future." There can be no doubt, then, in terms of legislation and policy, that the machinations of the state in shifting from one source of power to another must involve the people it seeks to serve.

THE LEGISLATIVE FRAMEWORK

6. South Africa's right to access information is grounded in section 32 of its Constitution which provides that everyone has the right to access information held by either the state or "another person". The constitutional legislation giving effect to this right is the Promotion of Access to Information Act 2 of 2000 ("the Act"). The Act sets out the processes through which a person or organisation requests information from a public or private entity. It also establishes guiding principles in respect of how information requests should be treated and the constitutional values that are to be prioritised.

7. When it comes to public bodies the Act's provisions are peremptory, granting the requester access to information held by the state unless the information is protected from disclosure by one of the Act's specific exemptions.[4] The requester need not motivate a request for access to the records of a public body. Rather, the public entity is required to justify a refusal to disclose.[5] As the Constitutional Court has stated: "the disclosure of information is the rule and exemption from disclosure is the exception".[6]

---

[3] This was compiled by the Presidential Climate Commission, an independent, statutory, multistakeholder body established by President Cyril Ramaphosa, with a view to overseeing and facilitating a just and equitable transition towards a low-emissions and climate-resilient economy.

[4] Section 11 of the Act. See Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA) para 43.

[5] South African History Archive Trust v South African Reserve Bank and Another 2020 (6) SA 127 (SCA).

[6] Section 81(3) of the Act. President of the Republic of South Africa and Others v M & G Media Ltd 2012 (2) SA 50 (CC) at para 9.

8. The Act's provisions exempting a public body from disclosure are either mandatory, as is the case with the confidential information of a third party, or require an information officer to exercise discretion in determining whether to grant access. Both categories must be interpreted restrictively. Courts have been critical of public entities that offer only vague justification for refusal and have insisted, repeatedly, that a "proper evidential basis" be established in respect of each document refused. This would necessitate that an information officer itemise each document refused and the reasons for non-disclosure.[7]

9. The Act does include a 'public interest override' provision, whereby a record that would ordinary fall within an exemption be disclosed if "the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law, an imminent and serious public safety or environmental risk….and the public interest in the disclosure clearly outweighs the harm contemplated in the provision in question."[8] Courts have noted the concern that "a requester of information invariably has no, or very little, information at his or her disposal concerning the information requested… [and that] it may very well be impossible to prove that disclosure 'would' reveal legal contraventions."[9] Accordingly, requesters generally treat this provision with a measure of caution, citing it as an alternative ground favouring disclosure.

10. While PAIA is a crucial tool in accessing information, it should not be the only way through which the public can access information. Apart from the fact that the time-frames embedded in the process lock parties into a lengthy and adversarial process, it is also a backward looking exercise. For the requester is asking for records pertaining to something that, for the most part, has already happened. Were the public bodies responsible for sourcing power to actively engage the public on their proposed procurement plans, for example, the cumbersome exercise of having to argue in favour

[7] President of the Republic of South Africa and Others v M & G Media Ltd 2011 (2) SA 1 (SCA) at para 11. See also Leuvennik v South African Civil Aviation Authority and Others 2023 JDR 2894 (GP).

[8] Section 46.

[9] Centre for Social Accountability v Secretary of Parliament and Others 2011 (5) SA 279 (ECG) at para 90.

of disclosure need not play out. Importantly, the notion of transparent contracting should not be considered controversial. Section 217(1) of the Constitution states that "when an organ of state in the national, provincial or local sphere of government contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."[10]

11. In addition, when it comes to certain environmental information, the National Environmental Management Act[11] (NEMA) states that this information must be disclosed as a fundamental component of meaningful public participation. According to NEMA, every person is entitled to access information held by the State which relates to the implementation of any law affecting the environment and to the state of the environment and actual/future threats to the environment.[12] There are grounds for refusal (which are similar to those under PAIA), but like under PAIA, these must be narrowly construed.

12. When the state insists that information be disseminated through a PAIA process in circumstances where, like the procurement of goods and services, such information could simply be dispersed in real time, it amounts to an abuse of process. It becomes increasingly difficult for the public to hold its government to account when damning information is brought to light years after the fact.[13]

CHALLENGES TO ACCESSING INFORMATION

13. Some of the coalition organisations have sought, over the last year, to access a range of documentation from state or state-owned entities, namely Eskom Holdings SOC Ltd, the Department of Mineral Resources (DMRE), PetroSA (a wholly state-owned

[10] These principles are expanded in the Public Finance Management Act 1 of 1999.

[11] Act 107 of 1998.

[12] Part 2, section 31 of NEMA.

[13] It is helpful to note that the case of *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* [2020] 4 All SA 374 (GP). The applicants, dwellers on land upon which minerals were discovered and in respect of which a mining license was sought by the company Transworld Energy and Mineral, applied to the Department of Mineral Resources to view the mining right application. The respondents, which included the DMRE, directed them to file an information request in terms of PAIA. The High Court found that the applicants were entitled to the mining right application in terms of legislation deeming them to be an affected party and, accordingly, entitled to have been notified of the application for the purposes of consultation. PAIA was simply not applicable.

company), Petroleum Agency of South Africa (PASA), and the National Energy Regulator of South Africa (Nersa). The nature of the information requested can be grouped into the following categories:

13.1. Procurement contracts for the purchase of coal, diesel, petroleum and gas, including tender bids and adjudications;

13.2. Negotiated pricing agreements (NPA) between Eskom and large-scale smelters for electricity supply, including the price formulations;

13.3. Contract documentation for all independent power producers contracted by the DMRE in terms of its Renewable Energy Independent Power Producer Procurement Programme, including the total contract value to suppliers.

13.4. The records of decisions relating to the awarding of certain gas-supply and refurbishment contracts by Petro-SA.

13.5. Due diligence records of public finance institutions such as the Development Bank of Southern Africa relating to fossil fuel companies.

13.6. Mining and drilling rights and the applications for these licenses.

14. The requested information has not been disclosed. Where it has, this has been a result of a court order. This means that requesters are required to engage in internal appeal processes with the public entity itself (where applicable), which, if unsuccessful, leave a requester with the option of approaching the Information Regulator[14] and/or petitioning the High Court by way of application.[15] This process is, inevitably, lengthy and costly.

15. The grounds upon which the information has been refused can be grouped into the following categories:

15.1. Information that contains financial, commercial, scientific or technical information, other than trade secrets, the disclosure of which would be likely

[14] The regulatory body established in terms of the Protection of Personal Information Act 4 of 2013.

[15] Section 78 and 82 of the Act.

to cause harm to the commercial or financial interests of the State or a public body[16];

15.2. Information that, if disclosed, could reasonably be expected to i) put a public body at a disadvantage in contractual or other negotiations, or ii) prejudice a public body in commercial competition.[17]

15.3. Records (such as report, minutes, opinions) used "for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law."[18]

15.4. Information which, if disclosed, could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting candid communication or conduct or consultation, or would frustrate the success of a (proposed or contemplated) policy.[19]

15.5. Records supplied in confidence by a third party that, if disclosed, could reasonably be expected to prejudice the future supply of similar information, or information from the same source and it is in the public interest that similar information should continue to be supplied.[20]

15.6. Trade secrets or information that contains financial, commercial, scientific or technical information of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that party;[21]

15.7. Information supplied in confidence by a third party, the disclosure of which could reasonably be expected to put the third party at a disadvantage in contractual or other negotiations or prejudice that third party in commercial competition.[22]

---

[16] Section 42(3)(b).

[17] Section 42(3)(c).

[18] Section 44(1)(a).

[19] Section 44(1)(b).

[20] Section 37(1).

[21] Section 36(1)(a)-(b).

[22] Section 36(1)(c).

15.8. Records containing information that, if disclosed, would amount to a breach of a duty of confidence owed to a third party.

16. The final three categories listed above fall into the mandatory protection of the Act. The remaining categories are discretionary, requiring the information officer to consider the conditions set out in the provision concerned.

17. The High Court has made it clear that these obligations are mandatory, which means the mandatory provisions cannot be invoked prior to third party notification.[23] Yet this happens repeatedly, notwithstanding this injunction.

18. In respect of the mandatory protections, it is important to note that public entities have frequently justified refusals based on these provisions without undertaking the obligations triggered by the Act when these provisions are invoked. Broadly put, information officers must take "all reasonable steps to inform a third party to whom or which the record relates of the request."[24]

19. In respect of the discretionary protections ("commercial interests"), the persistent experience of organisations seeking the information we describe above is blanket refusals relying on these provisions with very little reasoning or justification for their use. To simply rely on the "commercial interests" without more is to ignore the very clear principles identified by the Courts in a number of instances. The Supreme Court

---

[23] *The South African History Archive Trust v The South African Reserve Bank and Another* [2020] 3 All SA 380 (SCA).

[24] Section 47(1). The Supreme Court of Appeal has stated in *Health Justice Initiative v Minister of Health and Another* [2020] 3 All SA 380 (SCA): "*It seems somewhat obvious, in the context of public procurement but in particular in the present instance, that just because there is a confidentiality clause, does not mean that the information and documentation can be withheld on that basis alone. [it has previously been held that] …'[D]etails as to the nature of this confidence, whether it arises from the agreements themselves or some other basis, what aspects of the agreements the duty of confidence covers, and whether the duty of confidence contains any exceptions, for example, in relation to disclosures required by law or pursuant to a court order*.'

of Appeal has stated the following in a case concerning a request to Eskom for an electricity-supply contract:[25]

> "*A party who relies on these provisions to refuse access to information has a burden of establishing that he or she or it will suffer harm as contemplated in ss 36(1)(b) and (c). The party upon whom the burden lies. . . must adduce evidence that harm 'will and might' happen if the holder of the information parts with or provides access to information in its possession relating to the contracts. The burden lies with the holder of the information and not with the requester*."

20. It is alarming that Eskom, despite having lost on the issue of disclosing procurement and supply contracts in the High Courts, persists with this poor line of reasoning and justification,[26] particularly since, being an organ of state, it is constitutionally obliged to conduct its operations in a transparent and accountable manner. The *Afriforum* case notes: "it is a well-known fact that one of the major issues which Eskom has experienced for years is irregular expenditure pertaining to procurement of goods over a wide spectrum."[27]

21. When it comes to PAIA requests in relation to gas exploration and production rights applications (to PASA specifically), there has been partial compliance with some records being handed over, but notably missing were the Environmental Authorisations for onshore gas activities by companies. Over a period of more than a year, PASA has failed to comply with PAIA, including providing reasons for its refusal to provide the requested records.[28]

---

[25] *BHP Billiton PLC Inc v De Lange* 2013 (3) SA 571 (SCA).

[26] Recently, in the case of *Afriforum NPC v Eskom Holdings* SOC and Another (2023/002513) [2024] ZAGPPHC 270 (22 March 2024), the High Court ordered Eskom to disclose to the applicant procurement contracts for the purchase and transportation of coal, and for the purchase of diesel. The respondent had refused to disclose on the discretionary grounds we describe above.

[27] At para 63. Notably, irregular spending and malfeasance at Eskom have been highlighted in both the State Capture Commission reports and in the Auditor General's recent reports.

[28] See an outline of the PAIA request by the Centre for Environmental Rights and its history, available at https://cer.org.za/programmes/transparency/litigation/access-to-environmental-licences-for-gas-projects and at https://cer.org.za/wp-content/uploads/2023/12/PASA-PAIA-Chronology.pdf.

RECOMMENDATIONS

22. We respectfully request the Office of the Special Rapporteur on Climate Change recommend the following to States, in particular South Africa:

    22.1. That public bodies respond meaningfully to the Promotion of Access to Information Act's requirement that certain records be voluntarily (private persons) or automatically (public entities) disclosed, thus dispensing with the ostensible requirement that an individual utilise the Act to access any and all information.[29] Such records should, whenever possible, be readily available online.

    22.2. That the Information Regulator undertake a proactive role in ensuring that public bodies are responding to information requests lawfully and timeously. Accordingly, that it lessens the need to act as a complaints body by engaging with stakeholders and identifying areas of concern as well as facilitating engagement between state entities and the public.[30]

    22.3. That the state and public entities respond to requests in a manner that is truly reflective of the constitutional principles of openness, transparency and accountability. This would require a fundamental shift away from blanket or poorly reasoned refusals and the adoption of a responsive process.

---

[29] Section 15 of the Act states: "…public bodies must make available in the prescribed manner a description of—

a) the categories of records of the public body that are automatically available without a person having to request access in terms of this Act, including such categories available—

i) for inspection in terms of legislation other than this Act;

ii) for purchase or copying from the body; and

iii) from the body free of charge…"

[30] It is worth noting the words of Judge Navsa of the Supreme Court of Appeal in *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice* 2015 (1) SA 515 (SCA) at para 71:

"It is …. in accordance with international trends, and constitutional values and norms, that our legislature has recognised, in the field of environmental protection… the importance of consultation and interaction with the public. After all, environmental degradation affects us all. One might rightly speak of collaborative corporate governance in relation to the environment."

OPEN SECRETS

Clare Ballard (cballard@opensecrets.org.za)
Qiqa Nkomo (qnkomo@opensecrets.org.za)
Jane Borman (jborman@opensecrets.org.za)

ENDORSED BY THE FOLLOWING ORGANISATIONS:

THE CENTRE FOR ENVIRONMENT RIGHTS (https://cer.org.za/)

Contact: Tabitha Paine tpaine@cer.org.za

CORRUPTION WATCH

Contact: Melusi Ncala melusin@corruptionwatch.org.za

THE LEGAL RESOURCES CENTRE

Contact: Anneline Turpin anneline@lrc.org.za