



# Regulating Access to Political Funding Information

## EXECUTIVE SUMMARY

*Political parties have a huge role to play in our democracy, as they are the means through which government is constituted. Thus, political parties give citizens an opportunity to have a say on who will form or be part of government by exercising their democratic right to vote. In order for citizens to effectively exercise their democratic right to vote, thereby choosing which political parties will form the next government, they need adequate information that could influence the choice at hand. Therefore, transparency and openness are crucial elements that greatly influence the manner in which citizens exercise their right to make a political choice.*

## INTRODUCTION

Political parties perform vital functions in the democratic processes. They not only represent the voters/citizens, they are responsible for delegating who will shape and influence policies. It is therefore important that citizens have access to information regarding their activities, particularly those pertaining to their fundraising practices.

The policy positions of political parties and information on their funding form part of the information that citizens need in order to make informed political decisions. A large portion of party funding comes from private sources yet there is no legal requirement for political parties to disclose where they get that money. The lack of transparency or openness on private party funding practices means that donors could greatly influence a political party through striking illegal secret deals or irregularly lobbying for policies without the knowledge of the electorate.

Transparency enables stakeholders to monitor both party activities and their relationship with donors.

This can lead to a strengthening of the parameters of elections by availing citizens' with sufficient information regarding political parties thereby empowering citizens to make an informed political decision.

## REGULATING THE RIGHT TO KNOW

Contemporary South Africa is a democratic state founded on constitutional principles of accountability, responsiveness and openness.<sup>1</sup> The Constitution sets out a broad framework for the fight against secrecy through the promotion of a number of basic democratic principles, including transparency and openness.

In respect of enhancing transparency, section 32 of the Constitution states that "everyone has the right of access to any information held by the state" and "any information that is held by another person and that is required for the exercise or protection of any right". Thus, our constitutional democracy enshrines a right to know, as opposed to the apartheid era "need to know" practice, as means of promoting good governance.<sup>2</sup>



The control of information and enforced secrecy was at the heart of the anti-democratic character of the apartheid system, precisely because public access to information is at the core of any meaningful democratic participation. Without the right of access to information, the realization of all other rights is fundamentally compromised.

The Promotion of Access to Information Act 2 of 2000 (PAIA) is one of the legislative responses to fostering and enforcing a culture of accountable, responsive and open governance in South Africa.<sup>3</sup> The right of access to information should be viewed as including the right to have the mechanisms put in place in order to allow one to gain access to the information he/she require. As the pre-eminent legislation giving effect to the right of access to information, PAIA regulates public access to any recorded information held by either public or private bodies for the exercise or protection of any constitutional right. It defines and outlines the scope and content of the right of access to information by establishing procedures through which the public can gain access to information.

#### **ACCESSING PARTY FUNDING INFORMATION**

Despite being one of the more progressive access to information laws by international standards, PAIA is not without defects. Arguably, PAIA does not allow for the full realisation of the right of access to information, insofar as it fails to promote public access to information regarding the private fundraising activities of political parties. Although PAIA does not explicitly prevent anyone from requesting information about the sources of private donations to

political parties, there are a number of provisional aspects that create great difficulties or obstacles for public access to such information, and subsequently, limit the right to know. In this respect, PAIA is both over restrictive and under inclusive.

The first defect relates to the distinction made between public and private bodies resulting in two separate procedures and requirements (forms, payments etc.). PAIA is one of the few pieces of access to information legislation in the world to apply to both public and private bodies. Requesting access to information from public bodies, under PAIA, is relatively easier as compared to the more onerous process pertaining to private bodies.

Even though PAIA clearly separates a public body from a private one, the categories are not necessarily impermeable. There are some entities that may not be either strictly public or private, but hybrid entities comprising of both public and private elements.

Political parties are one such entity. Political parties in South Africa serve as links between society (the voters/citizens) and our political system (government). They are not public bodies yet they play immeasurable public roles. But this hybrid nature of political parties can create confusion as to which form and procedure to follow when requesting information.

However, the High Court in the IDASA case<sup>4</sup> tried to shed some light on this issue. The Court had to decide whether a political party constituted a public body in terms of PAIA.



In answering this question, the Court assessed the nature of the activity on which information was sought by the applicants. It then ruled that political parties are private entities as far as their fundraising activities are concerned.<sup>5</sup> This means that the applicable request form to be submitted will be for a “private body”. However, one will need to show that the information is “required for the exercise or protection of any rights” if one is to gain access to information about private donations made to political parties.

The second problematic aspect of PAIA relates to the (lengthy) list of grounds on which a request for access to information can be refused.<sup>6</sup> Once a requester has gone through the procedural requirements of properly completing the forms, paying relevant fees and satisfying the threshold enquiry, the document must be released unless a ground of refusal stipulated in the PAIA applies. It is not uncommon for a request for private party funding information, even after meeting all the procedural requirements in terms of PAIA, to be refused.

Political parties refuse requests for disclosures of their donation information citing a number of defences, all of which pivot around the right to privacy. Some of those grounds of refusal include privacy of a third party where a party may refuse access to a record if the disclosure “would involve the unreasonable disclosure of personal information about a third party, including a deceased individual”. A party may also refuse to disclose information if it contains commercial information of a third party or of the body itself such as trade secrets, financial, commercial, scientific or technical information.

A party might also refuse access if the information sought was provided in confidence as the disclosure would constitute “an action for breach of the duty of confidence owed to a third party in terms of an agreement”.

Whilst there may be legitimate reasons to limit access to information – as no right is ever absolute – there is a real risk of these exemption provisions being used to conceal unethical dealings under the guise of “sensitive or confidential information”. The reluctance of political parties to share information about their finances raises much concern. Surely, our political parties should not refuse to provide information about monies received if they have nothing to hide. Whatever the case, the protection of the privacy of political parties or their donors cannot be at the expense of democracy and accountability. Voters need all the information about their parties to enable them to make an informed political decision. A fair balance needs to be struck between these conflicting rights through careful party finance regulation.

Additionally, PAIA contains “public interest override” provisions as a safeguard.<sup>7</sup> The public interest override provides for mandatory disclosures of information irrespective of any of the listed grounds for refusals, however, the override provisions in PAIA are too narrow to rely on in accessing information. Mandatory disclosures can only occur in instances where the record would reveal evidence of illicit acts and/or serious public safety or environmental risk. These requirements essentially render the override provisions ineffective due to the cost implications and difficulties associated with proving such an allegation.



## NEED FOR PARTY FINANCE REGULATION

Effective access to information is essential for effective governance, fighting corruption as well as encouraging public participation in national politics. Having access to information, particularly from institutions that perform public functions, promotes public awareness and act as an effective countermeasure against secrecy, impropriety, fraud, and maladministration within public bodies that could lead to abuses of public power. Thus, transparency and accountability are also safeguards against corruption in public life.

Aside from state accountability, the right of access to information is equally important for the exercise of other fundamental rights, particularly those of civil and political nature such as the right to vote. The South African Constitution envisions a more participatory democracy,<sup>8</sup> not simply a representative one characterised by voting every five years. This, and the fact that political parties are the only avenue through which we can choose our government necessitates regulations that engender access to all party information, including party donations. Access to this information is crucial for the public in making informed political decisions when they go about exercising their fundamental right to associate freely.

## CONCLUSION

The role political parties play in our democracy cannot be understated. As institutions directly involved in the democratic process, political parties wield immense public power.

It is trite to suggest that political parties are not impervious to “capture”. Secrecy fosters the conditions in which party corruption, and other impropriety, can occur. In this respect, political parties need to be held to the same strict disclosure and accountability requirements as all public bodies. They must be made to disclose for public knowledge all party information, including the sources and amounts of donations received. Proactive disclosure by political parties will assist in monitoring party activities and challenge party corruption and related scandals.

## REFERENCES

- <sup>1</sup> Section 1(d) of the Constitution of the Republic of South Africa, Act 108 of 1996.
- <sup>2</sup> In re: Certification of the Constitution of the Republic of South Africa 1996, note 24 at para 85.
- <sup>3</sup> Promotion of Access to Information Act 2 of 2000, see the Preamble and sections 9 and 11.
- <sup>4</sup> *Institute for Democracy in South Africa (IDASA) and Others v African National Congress and Others* 2005 (5) SA 39 (C).
- <sup>5</sup> *IDASA*, para 52 at page 21.
- <sup>6</sup> See Chapter 4 of PAIA, specifically sections 33-45 and 62-69 respectively.
- <sup>7</sup> See sections 46 and 70 of PAIA respectively.
- <sup>8</sup> Section 19 of the Constitution.