WRITTEN SUBMISSION ON THE PROMOTION OF ACCESS TO INFORMATION AMENDMENT BILL

For Attention: Mr Zolani Rento and Mr G Dixon

Per Email: gdixon@parliament.gov.za and zrento@parliament.gov.za

Select Committee: Security & Justice

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Submitted by: My Vote Counts (MVC)

Contact:

Zahira Grimwood (MVC Political Systems Researcher)

zahira@myvotecounts.org.za

060 638 3075

1. Introduction:

1.1 My Vote Counts (MVC) appreciates the opportunity to engage with and make written comments on the Promotion of Access to Information Bill (the Bill).

1.2 Following MVC's successful litigation that challenged the constitutionality of the Promotion of Access to Information Act (PAIA), in the matter between *MVC NPC vs. the Minister of Justice and Correctional and Others,* the subsequent judgment from the Western Cape High Court and the confirmatory judgment from the Constitutional Court (ConCourt) in 2018, we have been eager for Parliament to introduce this Bill. and remedy the deficiencies of PAIA in relation to information about the private funding of political parties and independent candidates.

1.3. MVC understands that the deadline for Parliament to fulfil the Court order is in December 2019. If this Select Committee of Security and Justice (the Committee) is aware of whether Parliament will request an extension from the ConCourt, it would be highly appreciated if this could be communicated to those who make submissions. MVC is aware of the limited time left for Parliament to finalise amendments to PAIA.

2. Recording all private funding:

2.1. In Section 52A(1) of the Bill it states the following:

> " [...] The head of a political party must—
>
> (a) create and keep records of—
> (i) any donation exceeding the prescribed threshold that has been made to that political party in any given financial year; and
> (ii) the identity of the persons or entities who made such donations;"

2.2. In our last submission to the Portfolio Committee of Justice and Correctional Services, we recommended that PAIA state that **all** information (sources and amounts) on the private funding allocated to political parties and independent candidates, including donations, be recorded, preserved and reasonably accessible.

2.3. At hearings held with the legal advisers from the Department of Justice and Correctional Services and Parliament, the advisers argued that the Bill is being dovetailed with existing provisions in the Political Party Funding Act (PPFA). Further, the legal advisers argued that, according to Section 12 of the PPFA, all private funding will be recorded, as Section 12 states that:

> "12 (2) The accounting officer contemplated in subsection (1)(c) must—
> (a) account for all income received by the political party,"

2.4 Although Section 12(2) of the PPFA states that all income must be accounted for, this PPFA provision does not facilitate an obligation within this Bill or elsewhere to create, preserve and disclose records on the private funding of political parties and independent candidates for the purposes of requesting records. Instead, the head of a political party, in terms of this Bill, is limited to creating, keeping and disclosing records above the PPFA's "prescribed threshold."

2.5. Furthermore, to avoid a case where a form or source of private funding is not included by the PPFAs definition of a donation, and therefore not required to be disclosed, it is advised that an obligation explicitly states that all private funding, including donations, allocated to a political party must be disclosed. In order for the Bill to be compliant with the ConCourt ruling, PAIA specifically must be amended to ensure the facilitation of recordal, preservation and reasonable disclosure of the private funding information of political parties and independent candidates. We would like to use this opportunity, once again, to strongly recommend that this Bill in particular, explicitly states that records on the private funding of all political parties and independent candidates be created, preserved and made reasonably accessible, regardless of the value of the private funding allocation. For the sake of clarity and to avoid misinterpretation, it should be explicitly stated that the head of a political party, including independent candidates as per the Bill's definition of a political party, must create and keep records of each and every private funding contribution made to or on behalf of their political party.

2.6. Further, the PPFA does not apply to independent candidates and therefore the Bill does not create an obligation on independent candidates' accountants to account for all income. This gap further points to how relying on Section 12(2) of the PPFA does not fulfill the ConCourt order.

2.7. The following proposed draft amendment of Section 52A is recommended:

> " [...] (1) The head of a political party must—
>
> (a) create and keep records of—

(i) all private funding contribution(s) or allocation(s), including donation(s), that has been made to that political party in any given financial year; and
(ii) the identity of the persons or entities who made such donations;"

3. The date of making recordals and accessing information

3.1. Section 52A (1) of the Bill states that:

"The head of a political party must—
[...] (b) make the records available on a quarterly basis, as prescribed; [...]"

3.2. PAIA is for the purposes of making records available upon request. In the PPFA, quarterly disclosures apply to the Independent Electoral Commission (IEC) and not the political parties. The Regulations of the PPFA, which is yet to be published, will indicate when political parties and donors must disclose each donation above the prescribed threshold to the IEC within a required time period.

3.3. Firstly, there is a need for an obligation to clarify when a donation must be recorded. In its current form, Section 52A(1) of the Bill limits the accessibility of records, to donations allocated above the prescribed threshold that the IEC will disclose every three months. Instead, to ensure that there is clarity on when a record can be accessed through the Bill, a timeframe needs to be included on when a private funding contribution, including a donation, must be recorded after it is allocated to a political party or independent candidate. MVC proposes that after one month that a private funding contribution is made the head of a political party must create and keep records of that contribution for the purposes of requesting the records through this Bill.

3.4. Secondly, the Bill should allow for a record to be accessed once that record comes into existence. Otherwise, the Bill has no value for requesting information from the head of a political party or an independent candidate, if the Bill must merely disclose what will already be automatically disclosed by the IEC.

4. Term for preservation of records

4.1. In Section 52A(1)(c), it states the following:

> "[...] (c) keep the records for a period of at least five years after the records concerned have been created."

4.2. The ConCourt judgement's order, however, does not qualify the preservation of records with reasonableness. The time-period of five years is an arbitrary and short time-period. It must be ensured that the relevant records are accessible at any time after it is created, regardless of when the record comes into existence.

4.3. Firstly, the Independent Electoral Commission (IEC) publishes official records older than the last five years on the public funding of political parties allocated through the Public Funding of Represented Political Parties Act (1997). Electronically, there will be no burden on political parties to upload and preserve publicly available electronic records on their private funding.

4.4. In addition, in consideration of the limited access to or unavailability of electronic records, particularly for the poorer and rural population, hard-copy availability of records should be obligatory.

4.5. In the case of independent candidates or small political parties, who may not have websites, hard-copy records of their funding is necessary.

4.6. The risk involved in not preserving records after five years, is that the ability to hold parties accountable and potentially uncover corruption through the Bill is temporary. If it is a burden to hold records for five years, the records must be transferred to the national archives.

4.7. A donor may also manipulate the five-year period by allocating donations in tranches over more than five years. Further, a donor may donate through more than one individual or entity, but if each of these donations are under the prescribed threshold, it will go unrecorded and be undetectable.

4.8. Finally, PAIA's Chapter 2 on the "General Provisions of PAIA" states the following in Section 3:

> "This Act applies to
> (a) a record of a public body; and
> (b) a record of a private body, regardless of when the record came into existence."

4.9. Therefore, based on PAIA's Chapter 2(3), regardless of when the record was created or when PAIA was implemented, one should be able to use PAIA to make requests for records that exist, from a private entity, regardless of when the record was created.

5. Fees

5.1. In Paragraph 70 of the ConCourt judgement, it states that:

> "Part of what stands in the way of making information reasonably accessible to voters in terms of PAIA is the laborious procedure to be followed and the fees actually or potentially payable by the requester of the information. It does not help much that this crucial information could only be freely accessible at the discretion of the Minister. Reasonable access should be institutionalised. It is not to be subject to the benevolent exercise of a ministerial discretion. This is so because it ultimately helps to determine whether those elected will handle the bread and butter issues of the people well. It must, so to speak, be free-flowing."

5.2. Based on Paragraph 70 of the judgement, quoted above, special provisions, eliminating fees, should be made for private funding requests made to political parties and independent candidates. Regardless of whether political parties are private entities or not, no South Africans should be barred from effectively making political choices to exercise the right to vote, particularly when it comes to deciding who to vote for or who not to vote for. Access to information, particularly in a highly unequal and impoverished developing country, should be available to all citizens who seek to exercise the right to vote, free of charge.

5.3. This Committee must also consider the strong emphasis the ConCourt made in their order on how Section 19[1] of the Constitution, read with Section 32(1b)[2], protects one's right to access information for the sake of making political choices. By imposing a fee on requestors, one is limiting access to those who can afford it.

6. **Conclusion**

6.1. To conclude, I would like to bring the Select Committee's attention to Paragraph 54 of the ConCourt judgement, where it states that:

> "Access to public office is a highly contested terrain. Contestants ought therefore to have virtually unrestrained access to information on the private funding of one another. This way they would be able to use it to expose and eliminate corruption or the appearance of corruption tied to funding."

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[1] **Section 19 of the Constitution states the following:**

"19. Political rights.-

(1) Every citizen is free to make political choices, which includes the right-

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party;

and (e) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right-

(a) to vote in elections for any legislative body established in terms of the Constitu- tion, and to do so in secret; and

(6) to stand for public office and, if elected, to hold office."

[2] **Section 32(1b) of the Constitution states the following:**

"(1) Everyone has the right of access to-

[...] (b) any information that is held by another person and that is required for the exercise or protection of any rights."

6.2. In Paragraph 46 of the judgement it states the following:

> "[...] even apart from disclosure being an aid that could discourage corruption, information does help one to know more about an entity or person."

6.3. In light of the above quoted sections of the judgement, MVC would like to urge the Committee to consider whether this Bill, dovetailed with the PPFA, does eliminate the risk that the undue influence of secret funding can have on South Africa's political system. In light of trying to deter and expose corruption, sustainable solutions are needed to enhance transparency and accountability mechanisms in the country. In the Bill's current form, it facilitates secrecy, watering down its effectiveness.

6.4. Finally, MVC would like to thank this Committee for considering this written submission.