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ACCESS TO INFORMATION IN THE PRIVATE SECTOR: AFRICAN  
INSPIRATION FOR U.S. FOIA REFORM

RICHARD J. PELTZ-STEELE\*

THE Freedom of Information Act of 1966 (FOIA)<sup>1</sup> was a landmark global example of transparency, or access to information (ATI), to ensure democratically accountable governance. Government had grown in the twentieth century, especially in the new administrative state, and FOIA re-balanced the distribution of power between people and public authority. Today in the twenty-first century, much power in American society has migrated from the public sector to the private sector, specifically into the hands of corporations. Even insofar as it works well, FOIA operates only against the conventional state by enabling an individual's capacity to realize civil and political rights. FOIA simply was not designed to enable the attainment of human necessities such as education and housing, much less environmental protection and healthcare, especially when the greatest threat to those rights is not government deprivation, but the commercial marketplace.

ATI in Africa is a different story. Three decades after FOIA, planted among the unprecedented ambitions of the South African constitution was a right of ATI.<sup>2</sup> And within that right lay an extraordinary new provi-

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1. Administrative Procedure Act of 1966, Pub. L. No. 89-487, § 3, 80 Stat. 250 (1967) (codified as amended at 5 U.S.C. § 552).

2. S. AFR. CONST., 1996, art. 32.

sion. As guaranteed by the South African constitution and enabling law, a person may request records from a nongovernmental respondent, a private body, if the person can show that the records are “required for the exercise or protection of any rights.”<sup>3</sup> In other words, South African ATI law jettisoned the historic barrier between public and private sectors. South African lawmakers were informed by the experience of apartheid, in which the private sector’s complicity had been a vital and brutal partner in state-sanctioned human rights abuse.

Blossoming beyond even the visioning of an apartheid remedy, ATI in the private sector has been construed by the courts in a wide range of applications, from intrafamilial business disputes to environmental conservation. South African courts have struggled to define “required” and “rights” in applying the ATI law. But South Africa has demonstrated that ATI in the private sector can work. The public-private division justifies a change in the terms of access, but not an absolute barrier. In the last five years, the South African approach has been reiterated in the domestic law of at least five other African countries and in pan-African human rights instruments meant to inspire more domestic adoptions.

In this article, I suggest that the African example inspire U.S. FOIA reform. In its time, FOIA has shone a light into the darkest corners of American politics. Now America deserves a new approach to restore power to the people in the age of the corporation.

## I. INTRODUCTION

Two hundred years after the world’s first access to information (ATI) legislation,<sup>4</sup> the Freedom of Information Act (FOIA)<sup>5</sup> inaugurated ATI in the modern age. FOIA set a new global pace for best information practices. Deriving from administrative procedural law, rather than from constitutional law directly,<sup>6</sup> FOIA expressed ATI as a right distinct from the civil and political freedom of expression, the more familiar American ideal. At the same time, FOIA vitally filled in the long-blank back side of the First Amendment coin.<sup>7</sup> For time and experience had shown that

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3. *Id.* art. 32(1)(b).

4. Kongl. Maj:ts Nådige Förröding, Angående Skrif-och Tryck-friheten [Royal Majesty’s Gracious Ordinance, Regarding Writing and Press Freedom] (1766) (Swed.) (commonly, “Freedom of the Press Act”), *available in* KARL-ERIK TALLMO, *THE HISTORY OF COPYRIGHT: A CRITICAL OVERVIEW WITH SOURCE TEXTS IN FIVE LANGUAGES* (unpublished and undated book manuscript), [http://www.copyrighthistory.com/swe\\_tf1766.html](http://www.copyrighthistory.com/swe_tf1766.html) [<https://perma.cc/EZ9T-GMMB>]. *See generally* MARIYA RIEKKINEN & MARKKU SUKSI, *ACCESS TO INFORMATION AND DOCUMENTS AS A HUMAN RIGHT* 6–9 (2015), <http://www.abo.fi/fakultet/media/24259/accesstoinformationpub.pdf> [Permalink unavailable] (describing content of act); David Goldberg, *From Sweden to the Global Stage: FOI as a European Human Right?*, 7 J. INT’L MEDIA & ENT. L. 1, 1–7 (2016–2017) (recounting history of Swedish law).

5. § 3, 80 Stat. 250.

6. FOIA amended the Administrative Procedure Act of 1946. *Id.*

7. U.S. CONST. amend. I.

even in a democracy, the freedom of expression is hollow if citizens do not “know what their government is up to.”<sup>8</sup> Necessarily complementary to the freedom to speak is the need to know something to speak about. Thus, with the advent of FOIA, two inter-dependent components of democratic governance had at last found expression in modern law.

Today the FOIA is wearing thin. It no longer stands apart in the world as a statement of best practices; often it is a more cautionary tale. The point on which experts at the 2017 Norman J. Shachoy Symposium of the *Villanova Law Review* seemed to agree is that FOIA, as it operates today, is broken. What to do about that admitted of many thought-provoking proposals; transparency advocates’ passion inspires optimism. But whether FOIA can be restored to its prominence as a global leader—shining as from a lighthouse upon a hill into the darkest corners of our world<sup>9</sup>—remains to be seen. When one panel was pressed to offer an ultimate fix for FOIA, Judicial Watch attorney Michael Bekesha suggested to “blow it up” and start from scratch.<sup>10</sup>

In a way, I aim here to blow up FOIA.<sup>11</sup> In the last fifty years, ATI—as indicated by that global moniker, which did not yet exist in 1966—has matured into a full-fledged fundamental, or human, right. The theory behind the genesis of that right, in short, posits that ATI represents a structural correction to the balance of power between people and public institutions. In other words, accountability is achieved through transparency. As government has grown in power and influence, especially amid the growth of the administrative state in the twentieth century, the law has maintained the balance of civil and political power by enlarging the right of people and civil society organizations vis-à-vis government.

However, in the latter decades of the twentieth century and the early decades of the twenty-first century, another explosion in power has occurred—this time, in the private sector. A growing inequality of wealth

8. *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)).

9. Growing up, I was inspired to pursue journalism, and later FOI/ATI in law, by the motto and logo of my hometown *Baltimore Sun* newspaper, since 1840: “Light for All.” HAROLD A. WILLIAMS, *THE BALTIMORE SUN, 1837-1987*, at 363 (1987); see also John Winthrop, Speech on *Arbella: City Upon a Hill* (1630) (transcript available at University of Houston, Digital History, [http://www.digitalhistory.uh.edu/disp\\_textbook.cfm?smtID=3&psid=3918](http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=3918) [<https://perma.cc/8V5B-3YYR>]) (“wee shall be as a Citty upon a Hill, the eies of all people are uppon us”); cf. *Matthew* 5:14.

10. Michael Bekesha, Judicial Watch, Presentation at the Villanova Law Review Norman J. Shachoy Symposium: Fifty Years Under the Freedom of Information Act, 1967-2017: Resolving FOIA Disputes (Oct. 20, 2017), *referenced in* @RJPeltzSteele, TWITTER (Oct. 20, 2017, 2:48 PM), <https://twitter.com/RJPeltzSteele/status/921448047405608960> [<https://perma.cc/B2R7-EBRC>].

11. That is a metaphor. Cf. Mike Butcher, *Joke About Blowing Something Up on Twitter, Get Arrested*, TECHCRUNCH (May 10, 2010), <https://techcrunch.com/2010/05/10/joke-about-blowing-something-up-on-twitter-get-arrested/> [<https://perma.cc/5RH4-CYCP>].

and opportunity plays out across the news of the day,<sup>12</sup> from Washington to Davos, with troubling dimensions for race, gender, and class divisions. Fraud in the banking sector led to a global financial crisis. Recklessness in industry has spoiled natural resources and poisoned human health. The Occupy movement and Arab Spring blended into an uneasy but persistent global movement with a broad agenda for social and economic justice. No wonder that popular entertainment is replete with dystopian futures in which corporations, not governments, are our most terrifying oppressors.<sup>13</sup>

However effective FOIA has been in empowering people with ATI in the public sector, the time has come for a corrective balance vis-à-vis the private sector. As it happens, precisely this legal mechanism—ATI in the private sector—exists uniquely in the continental human rights law of Africa. The African norm derives from ATI in the constitution and code of South Africa. The notion of ATI in the private sector was born in South Africa especially as a response to apartheid.

As we contemplate FOIA reform in the United States, I propose the African model of ATI in the private sector as an inspirational norm. The time has come for a corrective balance in the free flow of information, a reorienting of ATI to operate *horizontally*, between private requester and private respondent. Lest we wake up soon to find that a dystopian future vision has become our reality, we must be willing to blow up FOIA and embrace radical proposals: here, *to empower a person to make a FOIA request of a corporation*.

This article proceeds in three parts. Part II seeks to locate ATI in the contemporary theory of human rights law, demonstrating that the classical distinction between public and private sector no longer has prohibitive legitimacy in the operation of the right. Part III examines the emergence of ATI in the private sector in continental African legal norms, and the experience of the South African courts in construing ATI in the private sector since adoption of the national ATI statute. Part IV brings this experience home to the United States to imagine the transformative impact that ATI in the private sector could have in effecting social and economic justice for Americans.

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12. See generally THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 30–36 (Arthur Goldhammer trans., 2014) (summarizing historical forces of economic convergence and divergence, including “worrisome” stimuli of latter).

13. E.g., *Incorporated* (Syfy television series 2016–17); see also ELYSIUM (TriStar Pictures et al. 2013) (depicting dramatic socio-economic disparity). In the critically acclaimed television series *Mr. Robot* (USA Network television series, 2015 to present), antagonist “E Corp” is referred to as “Evil Corp.,” an unveiled commentary. Corporate hegemony also is satirized. See, e.g., *Corporate* (Comedy Central television series, 2018 to present).

## II. FRAMING ACCESS TO INFORMATION IN CONTEMPORARY HUMAN RIGHTS

ATI is a human right. After World War II, the Universal Declaration of Human Rights (UDHR) recognized the freedom “to seek, receive and impart information” as a component of article 19 freedom of expression.<sup>14</sup> The language was echoed in article 19 of the International Covenant on Civil and Political Rights (ICCPR) in 1966, the same year the U.S. Congress passed the FOIA.<sup>15</sup> There is a dearth of evidence that the terms of the UDHR were intended to create a fundamental right standing alone, apart from the freedom of expression. But in time, a distinct right did emerge in the transnational legal systems of the Americas, Europe, and Africa. Today there remains no serious dispute that ATI has arrived on the international human rights stage.<sup>16</sup>

Despite this conclusion, legal theorists have struggled to classify ATI in conventional human rights frameworks. Frameworks are merely descriptive, so this difficulty does not diminish ATI’s status in human rights law. However, understanding the difficulty in framing ATI helps to understand the difficulties inherent in its realization. Thus, understanding the complex nature of ATI as a human right helps to explain why the United States has been sluggish to embrace it. ATI’s complex nature also explains why, even upon aggressive embrace of the constitutional and statutory right, South Africa still struggles with implementation.<sup>17</sup>

Approaches to human rights once favored tripartite frameworks. One year after the ICCPR entered into force, Vasak described human rights as arising in three generations: (1) civil and political rights, as embodied in the ICCPR; (2) economic, social, and cultural rights, as embodied in the International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>18</sup> and (3) collective rights, also called development rights, or in

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14. G.A. RES. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

15. International Covenant on Civil and Political Rights, art. 19, Dec. 16, 1966, 999 U.N.T.S. 171 & 1057 U.N.T.S. 407 (entered into force Mar. 23, 1976.).

16. E.g., Matilda Lasseko Phooko, *An Actionable Constitutional Right of ATI, in ACCESS TO INFORMATION IN AFRICA: LAW, CULTURE AND PRACTICE* 171, 175 (Fatima Diallo & Richard Calland eds., 2013). See generally COLIN DARCH & PETER UNDERWOOD, *FREEDOM OF INFORMATION AND THE DEVELOPING WORLD: THE CITIZEN, THE STATE AND MODELS OF OPENNESS* 127-54 (2010) (locating ATI in human rights framework notwithstanding admonition against “human rights inflation” without reasoned analysis).

17. See Fola Adeleke, *Constitutional Domestication of the Right of Access to Information in Africa: Retrospect and Prospects*, in *ACCESS TO INFORMATION IN AFRICA: LAW, CULTURE AND PRACTICE* 83, 84 (Fatima Diallo & Richard Calland eds., 2013); Kristina Bentley & Richard Calland, *Access to Information and Socio-Economic Rights: A Theory of Change in Practice, in SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: SYMBOLS OR SUBSTANCE?* 341, 346 (Malcolm Langford & Ben Cousins eds., 2014).

18. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976.).

Vasak's terms, "'rights of solidarity.'"<sup>19</sup> Galtung roughly correlated these generations to colors, respectively, blue, red, and green.<sup>20</sup> Blue rights tend to be articulated negatively; that is, they require passive protection from government abridgment.<sup>21</sup> Red rights represent a significant shift for government because they entail a positive obligation to ensure, for example, housing, food, education, and employment.<sup>22</sup> Vasak described third-generation rights, green rights, to "include the right to development, the right to a healthy and ecologically balanced environment, the right to peace, and the right to ownership of the common heritage of mankind."<sup>23</sup> Green rights are the most difficult to attain, because "they can only be implemented by the combined efforts of everyone: individuals, states and other bodies, as well as public *and private* institutions."<sup>24</sup> Salient in our era of climate change, a clean environment, safe for human health, is a green right.<sup>25</sup>

The United States is good at blue rights. The 1791 Bill of Rights provided landmark protection for civil and political rights, mostly stated in the negative, such as the First Amendment's negative prohibition on government interference with freedom of religion and speech.<sup>26</sup>

The United States is not good at red rights. President Franklin Roosevelt's initiative to move the country in that direction<sup>27</sup> went nowhere, defeated in part ideologically, by America's social and economic libertarian ethos.<sup>28</sup> This stalled progression is not universal. The 1996 South Africa Constitution is famously expansive for its provision of red rights, though visiting a few South African townships readily proves that the promise is greater than the delivery. The effort to realize red rights, such as adequate housing, has required progressive implementation, ongoing judicial supervision, and recognition of limited justiciability. Green rights also can be found in the South African Constitution, though tend even more to a purely aspirational nature.

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19. Karel Vasak, *A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, UNESCO COURIER (Nov. 1977), at 29.

20. JOHAN GALTUNG, *HUMAN RIGHTS IN ANOTHER KEY* 154–56 (1994). Galtung also described "Colored," or "non-white," to represent a non-Western perspective—a laudable aim if unfortunate choice of term. *Id.*

21. Vasak, *supra* note 19, at 29.

22. *Id.*

23. *Id.*

24. *Id.* (emphasis added).

25. Galtung, *supra* note 20, at 156.

26. U.S. CONST. amend. I ("Congress shall make no law abridging . . .").

27. Franklin D. Roosevelt, State of the Union Message to Congress (Jan. 11, 1944) (transcript available at Franklin D. Roosevelt Presidential Library and Museum, [http://www.fdrlibrary.marist.edu/archives/address\\_text.html](http://www.fdrlibrary.marist.edu/archives/address_text.html) [<https://perma.cc/7UGC-SX73>]).

28. I intimate no normative judgment. As a libertarian, I admit circumspection of government power in the attainment of red rights, but conclude that the equation is not all or nothing.

These tripartite human rights frameworks have been criticized aptly as overly simplistic.<sup>29</sup> Vasak stated no time frames, and the concept of “generations” mistakenly suggests a unidirectional evolutionary process over time.<sup>30</sup> The reality is more complex. An advocate for red rights, for example, can declare credibly that food and shelter are higher priorities for people than electoral advocacy.<sup>31</sup> Blue rights might have been the principal concern of the First Congress of the United States because the privileged political class already had food and shelter. Such is not always the order of things. Meanwhile the Declaration of Independence might be said to have pitched its opening gambit in the key of green rights, concerned as it was with the collective right of self-determination.<sup>32</sup>

Attempting to locate ATI furthermore belies the tripartite framework.<sup>33</sup> Certainly ATI, as effected in FOIA, may be regarded as a blue right. One must know what the government is up to in order to be an informed elector and speaker on public affairs.<sup>34</sup> But the free flow of information does more than that. Vasak recognized that the freedom of information was vital to the mission of the United Nations Educational, Scientific and Cultural Organization to facilitate education and cultural exchange.<sup>35</sup> The freedom of information is also vital to environmental advocacy. In this vein, ATI is central to an array of international instruments in environmental law, including the Rio Declaration,<sup>36</sup> the Aarhus Convention,<sup>37</sup> and the Cartagena Protocol.<sup>38</sup>

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29. E.g., Steven L.B. Jensen, *Putting to Rest the Three Generations Theory of Human Rights*, OPEN GLOBAL RTS. (Nov. 15, 2017), <https://www.openglobalrights.org/putting-to-rest-the-three-generations-theory-of-human-rights/> [ <https://perma.cc/VZ5Z-G5TB>].

30. *Id.*

31. See Galtung, *supra* note 20, at 154–55.

32. THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

33. See Adeleke, *supra* note 17, at 84 (citing recognition of ATI alternatively as civil-political right and as socio-economic right).

34. See *supra* note 8 and accompanying text.

35. Vasak, *supra* note 19, at 32; see also Yvonne Donders, *International Covenant on Economic, Social and Cultural Rights: Accessibility and the Right to Information*, in THE UNITED NATIONS AND FREEDOM OF EXPRESSION AND INFORMATION: CRITICAL PERSPECTIVES 102–14 (Tarlach McGonagle & Yvonne Donders eds., 2015) (describing interplay of ICESCR and ATI in international law).

36. U.N. Doc. A/CONF.151/26 (Vol. I), United Nations Rio Declaration on Environment and Development, princ. 10, (June 13, 1992), <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> [ <https://perma.cc/V5W9-VGJP>] (requiring public access to information about hazardous materials and opportunity to participate in policymaking).

37. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 (entered into force Oct. 30, 2001) (granting public broad rights of access to information about environment and recourse to courts).

38. Cartagena Protocol on Biosafety to the Convention on Biological Diversity art. 20, 23, Jan. 29, 2000, 2226 U.N.T.S. 208 (entered into force Sept. 11, 2003) (creating information clearinghouse for information about safety of genetically



Ultimately, a better understanding of ATI emerges from an older, alternative framework of human rights that describes ATI as power. In a 1919 treatment, Wesley Newcomb Hohfeld described human rights as claims, liberties, powers, and immunities.<sup>39</sup> Still, the classification of ATI in this framework is variable. A request for information under a freedom of information act, subject to judicial enforcement, manifests as a *claim*.<sup>40</sup> But increasingly, scholars, such as Darch and Underwood,<sup>41</sup> have focused on ATI as *power*. When ATI is understood as effecting power, it is well described as “an enabler right.”<sup>42</sup> Viewed with this approach, ATI is not a human right *per se*; rather, ATI is a human right when it serves to facilitate the realization of another human right, whether blue, red, or green.

Two inquisitors in particular, Roberts and Calland, have championed ATI as power en route to explaining the role for ATI in the private sector. Though not unique in its conclusion,<sup>43</sup> Roberts’s 2001 treatment of structural pluralism<sup>44</sup> is the seminal work outside of South Africa concerning ATI and the private sector. By “structural pluralism,” Roberts referred to the late twentieth-century restructuring of the public sector, especially in the United States and Commonwealth countries, to deliver services from a

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modified organisms, and requiring dissemination of information to public to inform policymaking).

39. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 5 (1920); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710, 710 (1917).

40. Adeleke, *supra* note 1733, at 85.

41. Darch & Underwood, *supra* note 16, at 140–41. I oversimplify the picture here, because I do not think ATI as a human right remains a proposition in serious contention, human-rights-inflation objections notwithstanding. Aptly, Darch, and Underwood described rights in interactive relationships among their Hohfeldian capacities, diagrammable like molecules in biochemistry, and they endeavored to depict ATI. *Id.* at 139, 141.

42. Article 19, *Open Development: Access to Information and the Sustainable Development Goals* 9 (July 2017), <https://www.article19.org/data/files/medialibrary/38832/Open-Development—Access-to-Information-and-the-SDGs-2017.pdf> [https://perma.cc/Z4AC-9J5X]; see also UNESCO, *KEYSTONES TO FOSTER INCLUSIVE KNOWLEDGE SOCIETIES: ACCESS TO INFORMATION AND KNOWLEDGE, FREEDOM OF EXPRESSION, PRIVACY, AND ETHICS ON A GLOBAL INTERNET: FINAL STUDY* 29 (2015), <http://unesdoc.unesco.org/images/0023/002325/232563E.pdf> [https://perma.cc/DL5W-JXCL] (“UNESCO has also long emphasized access to information and knowledge as enablers for the right to education and development.”).

43. See Mazhar Siraj, *Exclusion of Private Sector from Freedom of Information Laws: Implications from a Human Rights Perspective*, 2 *J. ALT. PERSP. SOC. SCI.* 211, 215 (2010) (citing *HUMAN RIGHTS IN GLOBAL POLITICS* (Tim Dunne & Nicholas J. Wheeler eds., 1999); *INT’L COUNCIL ON HUMAN RIGHTS, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES* (2002); JANET DINE, *COMPANIES, INTERNATIONAL TRADE AND HUMAN RIGHTS* (1995); *TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS* (Jedrzej George Frynas & Scott Pegg eds., 2003)).

44. Alasdair Roberts, *Structural Pluralism and the Right to Information*, 51 *U. TORONTO L.J.* 243 (2001). The timing of this article in 2001 was auspicious. See *infra* note 326 and accompanying text.

broad range of private entities and public-private hybrids.<sup>45</sup> This privatization movement followed the earlier twentieth-century birth and rapid growth of the administrative state, the “fourth branch of government” in the United States. Because these changes shifted public power from elected office to the civil bureaucracy, they necessarily represented a diminution in public accountability through the traditional means of the ballot box. As a result, power in society shifted in favor of governors, at the expense of the governed.

Roberts termed this twentieth-century power shift, from people to government, a “democratic deficit.”<sup>46</sup> Bentley and Calland identified a corresponding shift in information flow, placing more information in the hands of government than in the hands of the electorate.<sup>47</sup> They termed the resulting deficit “information poverty.”<sup>48</sup> ATI laws, such as FOIA, came on the scene as a corrective for the democratic deficit and resulting information poverty. Calland described ATI in this sense as “reconfigur[ing] venerable information asymmetries between state and citizen.”<sup>49</sup> Through transparency, an ATI law restores information flow to the people, thereby bolstering accountability of the formerly opaque government. FOIA was designed to facilitate—to enable, or re-enable—the exercise of civil and political rights guaranteed in the Bill of Rights. It was natural for the 1966 FOIA to be born as an amendment to the 1946 Administrative Procedure Act (APA),<sup>50</sup> because procedural due process was the APA’s broader purpose.

The latter-twentieth-century privatization movement revived the problems of democratic deficit and information poverty, because again, power was moved away from the accountable offices of government. But on this occasion, ATI reform did not ensue. In the United States, privatization was an especial aim of reformers with regard to red rights, or social welfare services, such as health, housing, and infrastructure;<sup>51</sup> American foreign development policy correspondingly counseled privatization of health, education, and water services.<sup>52</sup> FOIA, born to redress

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45. *Id.* at 245–55.

46. *Id.* at 269.

47. Bentley & Calland, *supra* note 17, at 341.

48. *Id.*

49. Richard Calland, *Exploring the Liberal Genealogy and the Changing Praxis of the Right of Access to Information: Towards an Egalitarian Realisation*, 61 THEORIA 70, 71 (2014).

50. *See supra* note 6.

51. E.g., Marc Bendick, Jr., *Privatizing the Delivery of Social Welfare Services: An Idea to Be Taken Seriously*, in PRIVATIZATION AND THE WELFARE STATE 97, 97–98 (Sheila B. Kamerman & Alfred J. Kahn eds., 1989) (“America has always been a reluctant welfare state.”); Sheila B. Kamerman & Alfred J. Kahn, *Introduction: Privatization in Context*, in PRIVATIZATION AND THE WELFARE STATE 3, 4 (Sheila B. Kamerman & Alfred J. Kahn eds., 1989).

52. Santosh Mehrotra & Enrique Delamonica, *The Private Sector and Privatization in Social Services: Is the Washington Consensus “Dead”?*, 5 GLOBAL SOC. POL’Y 141, 142–43 (2005) (describing policy of 1980s and 1990s).

information poverty by facilitating the exercise of blue rights, was not perceived as a natural agent to facilitate the realization of red rights, much less green rights. But understood through the lens of ATI as power, it stands to reason that ATI is equally useful to enable red rights by facilitating the attainment of social services.<sup>53</sup> From the perspective of the person in need, it matters not whether the depriver or the provider is public, private, or a hybrid of both. The information poverty is the same, and ATI can be an equally potent corrective. Socio-economic freedom is especially vulnerable to monopolistic or oligopolistic power in access to services, from the most basic necessities to transportation and telecommunication, because consumers' market choices are reduced to few or none.<sup>54</sup>

Roberts argued that the public-private distinction ought to be jettisoned to reestablish a balance between the powerless and the powerful. Calland similarly described ATI as a vehicle to "escape legal formalism," indeed to escape ATI's own "liberal genealogy," an origin as subsidiary of civil and political rights in the UDHR and ICCPR.<sup>55</sup> According to Bentley and Calland, the very term "ATI," as adopted in South Africa and Canada, is better indicative of a deliberate corrective to the power dynamic than the passive and dubious "freedom of information" in the U.S. tradition.<sup>56</sup> ATI in the form of FOIA in the United States was an "ad hoc solution" amidst the civil rights struggle, not a panacea for information poverty.<sup>57</sup> Worse, the U.S. FOIA has been perverted to corporate use and objectives at the public expense<sup>58</sup>—a worsening problem, Professor Margaret Kwoka demonstrated in this symposium.<sup>59</sup>

Calland saw ATI as having the potential to "transmogrify" from a shield against government power to a sword in the attainment of egalitarianism, empowerment of the disadvantaged, and improvement of living conditions.<sup>60</sup> Those aims require ATI to work against public and private

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53. Bentley & Calland, *supra* note 17, at 346–47; Calland, *supra* note 49, at 71.

54. Richard Mulgan, *Comparing Accountability in the Public and Private Sectors*, 59 *AUSTL. J. PUB. ADMIN.* 87, 88 (2000); *see also* Peter Johan Lor & Johannes Jacobus Britz, *Is a Knowledge Society Possible Without Freedom of Access to Information?*, 33 *J. INFO. SCI.* 387, 388 (positing right of ATI as prerequisite to infrastructure development in information and communication technology); *cf. infra* note 261.

55. Calland, *supra* note 49, at 72–73, 85.

56. Bentley & Calland, *supra* note 17, at 344; *cf.* CORY DOCTOROW, *INFORMATION DOESN'T WANT TO BE FREE: LAWS FOR THE INTERNET AGE*, 118–19 (2014) (challenging notion that copyright protection furthers human rights).

57. Calland, *supra* note 49, at 73–74.

58. *Id.* at 75.

59. Margaret Kwoka, University of Denver Sturm College of Law, Presentation at the Villanova Law Review Norman J. Shachoy Symposium: Fifty Years Under the Freedom of Information Act, 1967-2017: The "On the Ground" Operation of FOIA (Oct. 20, 2017); *see also* Margaret Kwoka, *FOIA, Inc.*, 65 *DUKE L.J.* 1361, 1414–26 (2015) (describing how corporate use of FOIA undermines its public-interest aims).

60. Calland, *supra* note 49, at 78, 84.

power alike.<sup>61</sup> Anyway, Calland reasoned, even economic libertarians must acknowledge that free markets require a free flow of information.<sup>62</sup> In other words, ATI is an antidote to social and economic disparity—whether the perpetuation of poverty and privilege in South Africa,<sup>63</sup> or the rocketing hegemony of “the one percent” in America.

Roberts painstakingly cataloged how common law countries circumscribe ATI law by broadening definitions of public sector to include the “grey zone” of the quasi-public sector, defined by public function, funding, or power.<sup>64</sup> He found those approaches wanting and so searched for a principle other than the outmoded distinction between public and private sectors to define the appropriate scope of ATI. If ATI is a human right—its recognition as such was dawning in 2001—then, Roberts reasoned, the controlling principle should be the collateral fundamental right that ATI enables<sup>65</sup>—whether blue, red, or green. When the collateral human right at stake reaches a requisite threshold of necessity, then ATI should be the overriding policy imperative. Roberts quoted Hunt: “The very existence of institutional power capable of affecting rights and interests should itself be sufficient reason for subjecting exercises of that power to the supervisory jurisdiction of the [courts]”<sup>66</sup>—regardless of whether the institutional power rests in the public or private sector, or somewhere in between.

Calland and Roberts are not alone; they sing in a chorus of voices that recognize the potential excess of power in the private sector today, and the need to protect human rights horizontally in response. The International Council on Human Rights cataloged the human rights at stake in private sector activity as much as in public sector activity.<sup>67</sup> The list includes rights of every “color,” from freedoms of religion and expression; to access to education, healthcare, food, and housing; to guarantees of environmental protection, integrity of indigenous identity, and peace.<sup>68</sup>

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61. *Id.* at 72.

62. *Id.* at 76.

63. See Bentley & Calland, *supra* note 17, at 341.

64. Roberts, *supra* note 44, at 252–55.

65. *Id.* at 256–59.

66. *Id.* at 255 (quoting Murray Hunt, *Constitutionalism and Contractualisation of Government*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 21, 33 (Michael Taggart ed., 1997)).

67. Siraj, *supra* note 43, at 215–16. (citing INT’L COUNCIL ON HUMAN RIGHTS, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES (2002), [http://www.ichrp.org/files/summaries/7/107\\_summary\\_en.pdf](http://www.ichrp.org/files/summaries/7/107_summary_en.pdf) [<https://perma.cc/2MWD-ZAVG>]).

68. INT’L COUNCIL ON HUMAN RIGHTS, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES (2002), [http://www.ichrp.org/files/summaries/7/107\\_summary\\_en.pdf](http://www.ichrp.org/files/summaries/7/107_summary_en.pdf) [<https://perma.cc/2MWD-ZAVG>]). Besides ATI *per se*, the full catalog comprises life and liberty; no forced labor; non-discrimination; gender equality; civic freedoms, including expression, religion, and privacy; employment rights, including collective bargaining, workplace safety, and non-discrimination; economic and social rights, including

Watchdog organization Transparency International (TI) added transnational companies' potential to melt down the world economy to its list of already good reasons, such as corruption and money laundering, to worry about corporate accountability.<sup>69</sup> In 2012, TI published best practices in corporate transparency, which include country-by-country reporting of corporate holdings and basic financial data, including capital expenditures, revenues, taxes, and giving.<sup>70</sup> TI recognized affirmative disclosure regimes in extractive industries<sup>71</sup> and the U.S. Dodd-Frank Act<sup>72</sup>—which U.S. House Republicans sought to roll back in 2017<sup>73</sup>—as steps in the

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education, health, food, and housing; environmental integrity; protection of children; indigenous and minority group rights, including non-exploitation; justice, including access to courts, redress for victims, and punishment of perpetrators; protections against war, including humane treatment, limited arms trade, and no involuntary relocation. *Id.*

69. TRANSPARENCY INT'L, TRANSPARENCY IN CORPORATE REPORTING: ASSESSING THE WORLD'S LARGEST COMPANIES 4 (2012); *see also* George Monbiot, *A Monstrous Proposal*, MONBIOT.COM (May 7, 2012), <http://www.monbiot.com/2012/05/07/a-monstrous-proposal/> [<https://perma.cc/ATV7-NDWY>] (calling for extension of U.K. ATI law to private sector after financial bailouts, and comparing U.K. ATI law with South Africa's); Siraj, *supra* note 43, at 219–20; *Banking Scandal Exposes Weak Corporate Governance*, TRANSPARENCY INT'L (Nov. 11, 2015), <http://www.transparency.org.uk/press-releases/banking-scandal-exposes-weak-corporate-governance/#.Wlo0BDdG02w> [<https://perma.cc/2EX3-4NZ3>] (describing manipulation of benchmark loan interest rate by Barclays Bank personnel); *Three Steps to Stop Secret Companies*, TRANSPARENCY INT'L (Apr. 4, 2016), [https://www.transparency.org/news/feature/3\\_steps\\_to\\_stop\\_secret\\_companies](https://www.transparency.org/news/feature/3_steps_to_stop_secret_companies) [<https://perma.cc/AM6X-8SWV>]. I exclude from the scope of this research the growing body of work on the corporate social responsibility movement, or business and human rights, but note that the existence of the movement infers an understanding of excess in corporate power vis-à-vis the rights of persons. *See generally* KPMG, *THE ROAD AHEAD: KPMG SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2017*, at 4–5 (2017), [https://home.kpmg.com/content/dam/kpmg/campaigns/csr/pdf/CSR\\_Reporting\\_2017.pdf](https://home.kpmg.com/content/dam/kpmg/campaigns/csr/pdf/CSR_Reporting_2017.pdf) [<https://perma.cc/9TKN-YRMA>] (summarizing trends in corporate social responsibility).

70. Transparency in Corporate Reporting, *supra* note 69, at 9, 29, 42; *see also* *European Parliament Committee Sets the Tone for Europe's Debate on Multinational Transparency*, TRANSPARENCY INT'L (May 7, 2015), <https://www.transparency.org/news/pressrelease/european-parliament-committee-sets-the-tone-for-europes-debate-on-multinational> [<https://perma.cc/MA99-VPXC>] (describing support for country-by-country reporting initiatives within European Parliament).

71. The archetype of transnational voluntary compliance regimes is the Extractive Industries Transparency Initiative, which originated in 2002. *See, e.g.,* Andrés Mejía Acosta, *Impact and Effectiveness of Accountability and Transparency Initiatives: The Governance of Natural Resources*, 31 DEV. POL'Y REV. S89, S92–S93 (2013).

72. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111–203, 124 Stat. 1376. Dodd-Frank built upon a U.S. corporate disclosure tradition dating to 1911 and amped up after the Great Depression. Siraj, *supra* note 43, at 218–19. Siraj recalled that Louis Brandeis's famous quote, “sunlight is said to be the best of disinfectants,” was published in *Other People's Money—and How Bankers Use It* in 1914. Siraj, *supra* note 43, at 218.

73. *See* Financial CHOICE Act of 2017, H.R. 10, 115th Cong., 1st Sess. (introduced Apr. 26, 2017).

right direction. TI called for a comprehensive disclosure regime for all multinational corporations, rather than a sectoral approach.<sup>74</sup>

Pondering ATI in the private sector in 2010, Siraj examined the literature and opined that mushrooming transparency initiatives, compulsory and voluntary, were not stopping abuses of individual rights.<sup>75</sup> According to Siraj, privatization, deregulation, and globalization are driving data into the private sector hands of banks, telecommunication firms, hospitals, and educational institutions faster than the law can keep up.<sup>76</sup> Chirwa reasoned even earlier, in 2004:

[I]t has become increasingly clear that state action alone is not sufficient to guarantee the enjoyment of human rights. For example, access to essential medicine is not only dependent on the policies and actions of the state but also on the decisions and policies of pharmaceutical corporations. Banks and other financial institutions play a critical role in ensuring access to housing. With increasing privatisation, access to such basic services as water, health, education and electricity is also dependent on the actions and policies of private service providers.<sup>77</sup>

That private actors can abuse human rights is “emphatically so at the global level,” where transnational companies dwarf governments in resources and dominate them in power.<sup>78</sup> Toby Mendel in 2008, writing for UNESCO, advocated for ATI in the private sector as a construction of UDHR Article 19 in recognition of private bodies’ influence over “key public interests, such as environment and health.”<sup>79</sup>

Yet even as ATI laws reach out to private bodies through procurement processes, sectoral regulatory regimes, and privatized public services, ATI

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74. Transparency in Corporate Reporting, *supra* note 69, at 43.

75. Siraj, *supra* note 43, at 223.

76. *Id.* at 222; see also Grahame M. Morris, *Motion for Bill 109, Freedom of Information (Private Healthcare Companies)*, GRAHAME MORRIS MP (Oct. 9, 2013), <http://grahamemorrismp.co.uk/?p=2787> [<https://perma.cc/U5UJ-MN76>] (in moving bill to extend ATI law in public contracting, observing recent fraud on taxpayers by security contractors of more than £50 million, and recent fine for fraud by U.S. regulators of global healthcare provider of more than \$2 billion). Making a curious access argument based on institutional equity, Yo Zushi posited that public institutions of higher education in the United Kingdom get a bad rap because reports of sexual harassment are subject to public scrutiny, giving an appearance of higher incidence than in private educational settings, where they are not. Yo Zushi, *Are Freedom of Information Requests Poisoning Us Against the Public Sector?*, NEW STATESMAN (Mar. 9, 2017), <https://www.newstatesman.com/2017/03/foi-culture-public-sector-sexual-harassment-universities> [<https://perma.cc/J44F-454F>].

77. Danwood Mzikenge Chirwa, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights*, 5 MELBOURNE J. INT’L L. 1, 2 (2004).

78. Patrick Birkinshaw, Commentary, *Freedom of Information and Openness: Fundamental Human Rights?*, 58 ADMIN. L. REV. 177, 215–16 (2006).

79. TOBY MENDEL, FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY 32 (2d rev. & upd. ed. 2008).

has remained tied to the distinction between public and private.<sup>80</sup> The U.S. Congress entertains perennial bills aimed at access to privatized prisons—an example Roberts offered as urgent paradigm more than fifteen years ago<sup>81</sup>—but has passed none.<sup>82</sup> England, Australia, and Scotland have flirted with expansions aiming at the private sector, each on multiple occasions in recent decades and in recent years.<sup>83</sup> No Western country

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80. Siraj, *supra* note 43, at 223.

81. Roberts, *supra* note 44, at 265–69.

82. E.g., Lauren-Brooke “L.B.” Eisen, *Private Prisons Lock Up Thousands of Americans with Almost No Oversight*, BRENNAN CTR. FOR JUSTICE (Nov. 8, 2017), <https://www.brennancenter.org/analysis/private-prisons-lock-thousands-americans-almost-no-oversight> [<https://perma.cc/U2QU-QVDW>]; Alex Park, *Will Private Prisons Finally Be Subject to the Freedom of Information Act?*, MOTHER JONES (Dec. 16, 2014), <https://www.motherjones.com/crime-justice/2014/12/will-private-prisons-ever-be-subject-open-records-laws/#> [<https://perma.cc/3VAB-HXBZ>].

83. E.g., Tom Brake, *The FOIA Has Just One Problem: It Doesn't Go Far Enough*, NEW STATESMAN (Jan. 19, 2016), <https://www.newstatesman.com/politics/stagers/2016/01/freedom-information-act-has-just-one-problem-it-doesnt-go-far-enough> [<https://perma.cc/797F-R3MG>] (calling for legislation to extend ATI law to security contractors, train service providers, hospitals, and any “social enterprise or charity carrying out public sector work”); Australian Law Reform Comm’n, *Freedom of Information Act 1982—Open Government*, AUSTL. LAW REFORM COMM’N, <https://www.alrc.gov.au/inquiries/freedom-information-act-1982-open-government> (last modified Sept. 30, 2015) [<https://perma.cc/5C6F-LY8F>] (describing multiple considerations and rejections of private-sector expansion in Australia ATI law); Peter Hall & Kirsten Whitfield, *Freedom of Information—Application to Private Businesses Providing Public Services*, LEXOLOGY (Feb. 25, 2013), <https://www.lexology.com/library/detail.aspx?g=5271f213-2291-41ec-85ee-08a3f0fc1e03> [<https://perma.cc/W3M6-UAVB>] (describing “sigh of relief” in private sector after government decision to focus on contractual transparency rather than further ATI expansion to ensure public contractor accountability); Rachel Morrison, *Extending Freedom of Information to the Private Sector*, CMS LAW-NOW (June 16, 2016), <http://www.cms-lawnow.com/ealerts/2016/06/extending-freedom-of-information-to-the-private-sector> [<https://perma.cc/BR28-NKZM>] (describing 2013 administrative order that brought recreational, cultural, and sporting trusts within reach of Scotland ATI law, and proposal to extend reach farther, to schools and prisons); PA Media Lawyer, *Labour Vows to Extend Freedom of Information Act to Cover Private Sector*, PRESS-GAZETTE (Oct. 3, 2012), <http://www.pressgazette.co.uk/labour-vows-extend-freedom-information-act-cover-private-sector/> [<https://perma.cc/KL5D-RZ6D>] (discussing party pledge to extend ATI law to private contractors operating prisons, education, and health services); *Practice Notes, Freedom of Information*, PRACTICAL L., UK Practice Note No. 0-200-9452, at 36 (Thomson Reuters 2017) (discussing possibility that Ministry of Justice would extend ATI law to private companies with “‘effective monopolies’ over public services (such as water and energy companies)”); SCOTTISH GOV’T, *EXTENDING COVERAGE OF THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002—BUSINESS AND REGULATORY IMPACT ASSESSMENT*, Jan. 11, 2016, § 4, <http://www.gov.scot/Resource/0049/00492105.pdf> [Permalink unavailable] (considering options to extend ATI law to schools, health services, prisons, or entities serving “functions of a public nature”); William Turvill, *FOIA Should Apply to Private Firms Carrying Out Public Sector Work Valued at £5m or More, Report Suggests*, CITY AM (Mar. 1, 2016), <http://www.cityam.com/235719/freedom-of-information-act-should-apply-to-private-firms-carrying-out-public-sector-work-valued-at-5m-or-more-report-suggests> [<https://perma.cc/A8XW-WXUT>] (describing conclusion of independent commission that ATI law should be extended to public contractors in

has made the leap cross-sectorally beyond the public-private divide. In this respect, post-apartheid South Africa stepped out alone.

### III. ACCESS TO INFORMATION IN THE PRIVATE SECTOR IN AFRICA

Transparency in the private sector is not new. Access to information is afforded by legislation in certain economic sectors as a feature of regulatory oversight. ATI laws across the globe afford varying levels of access to information in the private sector via government procurement processes and contract supervision. ATI laws also variably authorize access to information in the hands of quasi-public bodies, including all manner of public-private hybrids. These many modes of ATI vis-à-vis the private sector are not the focus of this article, but it is important to recognize that they exist. These modes of access recognize that power has been relocated in private bodies, away from purely public bodies and so away from existing channels of accountability. Access restores the balance by drawing these private bodies back into the accountability orbit.

The focus of this article is the right of ATI in the purely private sector. This right of ATI developed uniquely in post-apartheid South Africa<sup>84</sup> and is now taking shape on the African continent. Exercised horizontally, this right compels a private actor to positive action in responding to a request under access law.<sup>85</sup> Once triggered upon certain threshold conditions, and cross-sectoral in scope, this right of ATI proceeds to override “the classical liberal insistence on differential treatment of the public and private.”<sup>86</sup> In Roberts’s terms, genuine access to the private sector requires

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limited fashion, balancing public accountability with cost burden borne indirectly by taxpayers).

84. Roberts, *supra* note 44, at 252.

85. Beyond the scope of this article, rights of personal access and correction that have come to be norms—and indeed, human rights—of European data protection law overlap with ATI in practice, but differ qualitatively. Data protection rights are limited to a person’s access to her or his own information and predicated on fundamental rights of personal privacy and personal integrity. *See generally* Richard J. Peltz-Steele, *Mind the Gap: Understanding the U.S. Perspective on Privacy in Safe Harbor/Data Transfer Negotiations*, in *ENJEUX EUROPÉENS ET MONDIAUX DE LA PROTECTION DES DONNÉES PERSONNELLES annex.*, at 165-69 (Alain Grosjean ed., 2015) (describing evolving American perspective on data protection); Richard J. Peltz-Steele, *The Pond Betwixt: Differences in the US-EU Data Protection/Safe Harbor Negotiation*, 19 J. INTERNET L. 1, 17–20 (2015) (describing data protection equivalents in U.S. law). The right of ATI in the private sector conceptualized by Calland and Roberts is motivated by the protection of rights, which may include personal privacy. But ATI is grounded broadly in public interest and derived from the family of expressive freedoms in the tradition of Emerson’s First Amendment theory. *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–79 (1963) (describing rationales: social, including political, decision-making; “individual self-fulfillment”; ascertainment of truth; and the social “balance between stability and change”).

86. Roberts, *supra* note 44, at 244; *see also* Mulgan, *supra* note 54, at 87, 96 (recognizing threat to freedom in private power irrespective of classical liberal paradigm).



the “piercing of corporate privacy,”<sup>87</sup> or an invasion of economic liberty.<sup>88</sup> This vein of ATI originated uniquely as a product of the South African experience. The following part A describes the development of ATI rights in South Africa and on the continent, and part B recounts South African courts’ experience construing ATI in the private sector.

#### A. *Access to Information After Apartheid*

Secrecy was a weapon of the apartheid regime in South Africa.<sup>89</sup> In reaction, transparency and accountability were clarion demands of reformers when the regime crumbled in 1991.<sup>90</sup> Private actors had played a key role in perpetuating oppression and abuse during apartheid. So legal reformers set their sights on the rights of individuals vis-à-vis both public and private sectors, i.e., in the human rights vernacular, both vertically and horizontally.<sup>91</sup> Cognizant of recent apartheid and a government campaign of privatization already underway, representatives of the African National Congress and constitutional assembly were willing to disregard the classical public-private distinction<sup>92</sup> with a verve that was lacking in the U.S. Reconstruction.<sup>93</sup> By way of comparison, the 1875 Civil Rights Act and 1883 *Civil Rights Cases*, and the famous dissent of Justice Harlan, were concerned with “inns, public conveyances on land or water, theatres, and other places of public amusement”—to wit, housing, transportation, culture, and sport.<sup>94</sup> So for Reconstruction, horizontal civil rights was the path not taken.

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87. Roberts, *supra* note 44, at 251.

88. Roberts authored his treatment of structural pluralism, *supra* note 44, in the early years of personal privacy and data protection law and well before the debate over corporate personhood exploded with *Citizens United v. FEC*, 558 U.S. 310 (2010). It is doubtful he intended to take sides in the later debate, so “corporate privacy” might have been an unfortunate choice of words.

89. Richard Calland, *Illuminating the Politics and Practice of Access to Information in South Africa*, in PAPER WARS: ACCESS TO INFORMATION IN SOUTH AFRICA 1, 2–4 (Kate Allan ed., 2009), <http://foip.saha.org.za/static/paper-wars-access-to-information-in-south-africa> [<https://perma.cc/FMX4-4KZE>]; Darch & Underwood, *supra* note 16, at 233–35 (describing surveillance machinery that “underpinned every aspect of the functioning of the apartheid state,” and destruction of records to conceal abuse).

90. Calland, *supra* note 89, at 4–5; Dan Ngabirano, *The Uganda Freedom of Information Campaign: Stuck in the Mud?*, in ACCESS TO INFORMATION IN AFRICA: LAW, CULTURE AND PRACTICE 191, 208–09 (Fatima Diallo & Richard Calland, eds. 2013).

91. See generally Sandra Liebenberg, *Socio-Economic Rights Beyond the Public-Private Law Divide*, in SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: SYMBOLS OR SUBSTANCE? 63, 66–72 (Malcolm Langford & Ben Cousins eds., 2014) (describing extension of human rights from vertical to horizontal application through South Africa constitutional process).

92. Adeleke, *supra* note 17, at 89.

93. See *Civil Rights Cases*, 109 U.S. 3, 23 (1883) (construing amends. XIII–XIV of the U.S. Constitution).

94. *Civil Rights Cases*, 109 U.S. at 9, 37 (majority opinion and dissent of Harlan, J.) (quoting and citing the Civil Rights Act of 1875, § 1).

Post-apartheid law recognized ATI explicitly. The 1993 interim constitution vested in “[e]very person . . . the right of access to all information held by the state or any of its organs at any level of government,” but only “in so far as such information is required for the exercise or protection of any of his or her rights.”<sup>95</sup> The interim constitution marked a significant departure from opaque oppression, but the rights-required language, a precondition to all access, was still cautious relative to global ATI norms.<sup>96</sup> The government in 1994 appointed a team to develop enabling legislation, which fed into the negotiation for a permanent constitution.<sup>97</sup>

The permanent 1996 constitution further liberalized access. Moving the rights-required qualifier, article 32 of the constitution declared, “(1) 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 the exercise or protection of any rights.”<sup>98</sup> A second paragraph required implementing legislation “to give effect to this right,” allowing “for reasonable measures to alleviate the administrative and financial burden on the state.”<sup>99</sup> Article 32 thus contemplated a groundbreaking horizontal right of ATI.<sup>100</sup>

While the dismantling of apartheid laid essential groundwork, many factors influenced the advent of horizontal ATI. The European Data Protection Directive was adopted in 1995 and advanced the notion that personal privacy justified a horizontal imposition of rights against the private sector for access to a requester’s personally identifying information.<sup>101</sup> European advisers playing a part in the development of the new South African constitution imported that idea;<sup>102</sup> extrapolation to the protection of human rights beyond privacy was not a great leap.

95. S. AFR. (INTERIM) CONST., 1993, art. 23.

96. Kate O’Regan, Democracy and Access to Information in the South Africa Constitution: Some Reflections, Address at The Constitutional Right of Access to Information Conference (Sept. 4, 2000), in THE CONSTITUTIONAL RIGHT OF ACCESS TO INFORMATION 11, 11, 12, (2000), [http://www.kas.de/wf/doc/kas\\_4936-1522-2-30.pdf?040625152235](http://www.kas.de/wf/doc/kas_4936-1522-2-30.pdf?040625152235) [<https://perma.cc/CPY6-WJ6T>].

97. Ngabirano, *supra* note 90, at 209.

98. S. AFR. CONST., 1996, art. 32(1).

99. *Id.* art. 32(2).

100. See, e.g., Sebastian Roling, Transparency & Access to Information in South Africa: An Evaluation of the Promotion of Access to Information Act 2 of 2000, 1, 3 (2007) (unpublished LL.M. dissertation, University of Cape Town), <http://www.publiclaw.uct.ac.za/usr/publicLaw/LLMPapers/roling.pdf> [<https://perma.cc/XMT3-CENF>] (“Shaken by the experiences of iron-tight secrecy during Apartheid, South Africa decided to make the society transparent in large leaps.” (footnotes omitted)).

101. Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31; see *supra* note 85.

102. See, e.g., Michael Lange, Welcoming Remarks (Sept. 4, 2000), in THE CONSTITUTIONAL RIGHT OF ACCESS TO INFORMATION, 7, 7–8, (2000), [http://www.kas.de/wf/doc/kas\\_4936-1522-2-30.pdf?040625152235](http://www.kas.de/wf/doc/kas_4936-1522-2-30.pdf?040625152235) [<https://perma.cc/W3RW-34>].

At the same time, expanded ATI in the new South African constitution cannot be viewed apart from the document's commitment to socioeconomic rights, unprecedented in the global history of constitutional law. While the justiciability of those rights remained to be determined, ATI was recognized for its capacity to enable rights to housing, healthcare, food, water, social security, education,<sup>103</sup> and anti-discrimination, as well as the possibility of land restitution<sup>104</sup> and the collective right to a clean environment.<sup>105</sup> Responsive to apartheid, ATI enabled constitutional fairness in the administrative process.<sup>106</sup> Constitutionalizing ATI meant that legislative limits on access—even for the legitimate aims of privacy, confidentiality, national security, and law enforcement—would be constrained by necessity and proportionality, with the burden on the government to justify the exemption.<sup>107</sup> With human rights as the firm foundation for ATI, application regardless of the public or private nature of the responding entity made sound public policy sense, despite the departure from foreign models.<sup>108</sup> According to Calland, “the extension of the right of ATI to privately held information was a groundbreaking and arguably radical broadening of the scope of the right—a crossing, so to speak, of a legal and political rubicon.”<sup>109</sup>

The constitutionally required implementing legislation took shape in the Promotion of Access to Information Act of 2000 (PAIA).<sup>110</sup> PAIA operationally superseded ATI claims under the 1996 constitution.<sup>111</sup> Though influenced by ATI laws in the common law cohort of Australia, Canada, Ireland, New Zealand, and the United States,<sup>112</sup> PAIA marked a

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TB] (describing influence of German political organization Konrad Adenauer Foundation, conference sponsor, on South African constitutional process, informed by data protection law).

103. O'Regan, *supra* note 96, at 14.

104. Michael Asimow, *Administrative Law Under South Africa's Interim Constitution*, 44 AM. J. COMP. L. 393, 394 (1996).

105. OPEN DEMOCRACY ADVICE CTR., RIGHT TO ACCESS INFORMATION TRAINING MANUAL 14 (2011), <http://www.r2k.org.za/wp-content/uploads/2012/12/rti-training-manual-dec-2012.pdf> [<https://perma.cc/6K6C-JE62>] (emphasizing “adequate health care, education and clean environment”).

106. Asimow, *supra* note 104, at 395; Calland, *supra* note 89, at 6; O'Regan, *supra* note 96, at 14.

107. O'Regan, *supra* note 96, at 13, 15; *see* Promotion of Access to Information Act 2 of 2000 § 9(b) (S. Afr.) [hereinafter PAIA].

108. Jonathan Klaaren, Iain Currie & Andrew Smith, *Analysing Foreign Access to Information Legislation from a South African Viewpoint*, Address at The Constitutional Right of Access to Information Conference (Sept. 4, 2000), in *THE CONSTITUTIONAL RIGHT OF ACCESS TO INFORMATION*, 29, 30 (2000), [http://www.kas.de/wf/doc/kas\\_4936-1522-2-30.pdf?040625152235](http://www.kas.de/wf/doc/kas_4936-1522-2-30.pdf?040625152235) [<https://perma.cc/W3RW-34TB>].

109. Calland, *supra* note 49, at 79.

110. PAIA, § 9(b) (S. Afr.).

111. *Inst. for Democracy in S. Afr. v. Afr. Nat'l Cong.* 2005 (5) SA 39 (C), at para. 14–19 (S. Afr.).

112. Roling, *supra* note 100, at 10.

significant departure by effecting the constitutional guarantee of direct access to the private sector.<sup>113</sup> PAIA echoes the constitution, reaching both state information holdings and “any information that is held by another person and that is required for the exercise or protection of any rights.”<sup>114</sup> Public bodies include quasi-public entities through a disjunctive power or function test.<sup>115</sup> Defining a “private body,” PAIA includes natural persons and partnerships, insofar as they are engaged in “any trade, business or profession,” and “any former or existing juristic person.”<sup>116</sup>

PAIA spells out procedures for access to private bodies apart from access to public bodies, though the provisions play out in parallel. PAIA puts the onus on the requester “to identify the right the requester is seeking to exercise or protect and provide an explanation of why the requested record is required for the exercise or protection of that right.”<sup>117</sup> Public bodies acting in the public interest may assert private persons’ rights and act as requesters.<sup>118</sup>

A private body under PAIA affirmatively must compile and maintain an access manual that lists contact information and describes categories of information already publicly available, information available through other legislation, and a “description of the subjects on which the body holds records and the categories of records held on each subject.”<sup>119</sup> PAIA authorizes denial of access by private respondents upon grounds<sup>120</sup> that track those that pertain to public bodies<sup>121</sup> and include the privacy of a third-party natural person,<sup>122</sup> trade secrets and commercially sensitive

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113. Yvonne Burns, Introduction, (Sept. 4, 2000), in *THE CONSTITUTIONAL RIGHT OF ACCESS TO INFORMATION*, 5, 5 (2000), [http://www.kas.de/wf/doc/kas\\_4936-1522-2-30.pdf?040625152235](http://www.kas.de/wf/doc/kas_4936-1522-2-30.pdf?040625152235) [<https://perma.cc/W3RW-34TB>].

114. PAIA, § 9(a) (S. Afr.).

115. *Id.* § 1 (“public body”).

116. *Id.* (“private body”).

117. *Id.* § 53(1)(d). Requesters may seek personal data, as in the data protection vein, *id.* § 50(3), but PAIA requests are not constrained by any requirement of personal identification. Under the PAIA, a form request published by the South African History Archive, “Form C,” invites the user to “indicate which right is to be exercised or protected,” and then “[e]xplain why the record requested is required for the exercise or protection of the aforementioned right.” South Africa Historical Archive, PAIA Resource Kit, at 4, [http://foip.saha.org.za/uploads/images/PAIA\\_Resource\\_Kit%20\(3\).pdf](http://foip.saha.org.za/uploads/images/PAIA_Resource_Kit%20(3).pdf) [<https://perma.cc/G4S9-DBAJ>] (“Form C”). To meet the rights-required test, a user of the private-sector access provision necessarily forfeits the usual ATI norm of neutrality with respect to requester identity and motive. See Richard J. Peltz-Steele (né Peltz), Joi Leonard & Amanda J. Andrews, *The Arkansas Proposal on Access to Court Records: Upgrading the Common Law with Electronic Freedom of Information Norms*, 59 ARK. L. REV. 555, 705 (2010) (explicating multistate norm).

118. PAIA, § 50(2) (S. Afr.).

119. *Id.* § 51(1)–(3).

120. *Id.* §§ 63–69.

121. Roling, *supra* note 100, at 21–22.

122. PAIA, § 63. (S. Afr.).

information,<sup>123</sup> breach of confidentiality obligation to a third party,<sup>124</sup> risk to safety of person or property,<sup>125</sup> legal privilege,<sup>126</sup> and research integrity.<sup>127</sup> Most exemptions are subject to a public-interest override when disclosure would reveal illegality or “imminent and serious public safety or environmental risk,” or the public interest in disclosure “clearly outweighs” the harm that the exemption seeks to avert.<sup>128</sup>

Following the example of its 1995 predecessor,<sup>129</sup> PAIA was accompanied by the formation of an independent civil society organization to support implementation, the Open Democracy Advice Centre (ODAC).<sup>130</sup> Still today, ODAC vigorously seeks to effect social and economic justice through PAIA and complementary whistleblower protection law.<sup>131</sup>

PAIA pronounced lofty aims, but the story on the ground is mixed.<sup>132</sup> In an influential 2012 report, ODAC lamented an increasing trend toward secrecy in both public and private sectors, accompanied by tactics of intimidation and a drive to commodify information.<sup>133</sup> Calland opined in 2014 that it had yet to be proved whether transparency through PAIA and sectoral laws, especially in extraction and construction, had “delivered real accountability in corporate power.”<sup>134</sup> Bentley and Calland blamed “incapacity and incompetence rather than indifference or unwillingness” as the “main drivers” of noncompliance.<sup>135</sup> Constitutional ATI and PAIA have not yet lived up to their promise, Bentley and Calland concluded, mostly for three reasons that are familiar to access advocates in all parts of the world: (1) complexity of process still excludes poor communities from using the system without the intermediation of civil society organizations; (2) without an intermediate enforcement agent such as an information commissioner, judicial enforcement is too costly, time consuming, and complicated to make access practical, incentivizing authorities to deny access excessively; and (3) the political establishment has not effectively overthrown the culture of habitual secrecy.<sup>136</sup>

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123. *Id.* § 64.

124. *Id.* § 65.

125. *Id.* §§ 66, 68.

126. *Id.* § 67.

127. *Id.* § 69.

128. *Id.* § 70.

129. Ngabirano, *supra* note 90, at 209.

130. *Id.* at 209–10.

131. *Our History*, OPEN DEMOCRACY ADVICE CTR. (May 12, 2013), <https://www.opendemocracy.org/za/index.php/who-we-are/our-history> [https://perma.cc/GJH6-B5G4].

132. Darch & Underwood, *supra* note 16, 237–42 (describing reports, especially by ODAC and South African History Archive).

133. DALE T. MCKINLEY, *THE RIGHT TO KNOW, THE RIGHT TO LIVE: OPEN DATA IN SOUTH AFRICA* 7 (2012), <https://opengovernmentafrica.files.wordpress.com/2013/04/info-needs-report.pdf> [https://perma.cc/3HRV-FHX3].

134. Calland, *supra* note 49, at 79.

135. Bentley & Calland, *supra* note 17, at 345.

136. *Id.* at 361.

Compliance notwithstanding, ODAC's stated priorities suggest PAIA's extant potential. ODAC determined that human rights realization was wanting for transparency in areas including housing, development planning, land and property disposition, social welfare, energy, environment, and public spending.<sup>137</sup> ODAC reported mixed success, and opportunity for more work, with PAIA to investigate public-private partnerships; anticorruption in procurement; private land ownership; utility pricing; medical malpractice in healthcare; environmental impact of industrial production, utility infrastructure, and waste disposal; genetic modification of organisms; and human displacements occasioned by the 2010 World Cup.<sup>138</sup> Indeed, Calland pointed to a continuing need for PAIA to prove itself against the private sector, especially amid privatization in healthcare.<sup>139</sup>

The 1996 constitution and 2000 PAIA exerted substantial influence in the development of ATI at the continental level. The "right to receive information" was enumerated apart from the freedom of expression in the African Charter on Human and Peoples' Rights (African Charter),<sup>140</sup> which was developed in the early 1980s. ATI was subsequently incorporated into various sectoral and regional African legal instruments.<sup>141</sup> Considering the vast social and economic needs of people throughout Africa relative to the number of aspirational international legal instruments, Darch and Underwood suspected that "the freedom of information idea

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137. McKinley, *supra* note 133, at 12–13.

138. *Id.* at 20–92.

139. Calland, *supra* note 49, at 79.

140. African Charter on Human and People's Rights art. 99, Oct. 12, 1986, [http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf) [https://perma.cc/TSZ4-X3ZC]; see Darch & Underwood, *supra* note 16, at 243.

141. Lasseko Phooko, *supra* note 16, at 179 (discussing sectoral instruments of the South African Development Community regarding anti-corruption, mining, fishery and forest management, wildlife conservation, transport and communication, and cultural information and sport); DRAFT MODEL LAW ON ACCESS TO INFORMATION IN AFRICA, MEDIA INST. OF S. AFRICA, <https://misaswaziland.com/draft-law-on-access-to-information-in-africa/> [https://perma.cc/66ZN-66GD] (last visited Jan. 19, 2018); e.g., African Charter on Democracy, Elections, and Governance art. 19(2), Oct. 24, 2011, [http://www.achpr.org/files/instruments/charter-democracy/aumincom\\_instr\\_charter\\_democracy\\_2007\\_eng.pdf](http://www.achpr.org/files/instruments/charter-democracy/aumincom_instr_charter_democracy_2007_eng.pdf) [https://perma.cc/D5FP-J8NT]; African Charter on Statistics princ. 11, Feb. 4, 2009 [https://au.int/sites/default/files/treaties/7794-treaty-0037\\_-\\_african\\_charter\\_on\\_statistics\\_e.pdf](https://au.int/sites/default/files/treaties/7794-treaty-0037_-_african_charter_on_statistics_e.pdf) [https://perma.cc/CM5V-UMAL] (transparency); African Charter on Values and Principles of Public Service and Administration art. 66, Jan. 31, 2011, [https://au.int/sites/default/files/treaties/7798-treaty-0042\\_-\\_african\\_charter\\_on\\_the\\_values\\_and\\_principles\\_of\\_public\\_service\\_and\\_administration\\_e.pdf](https://au.int/sites/default/files/treaties/7798-treaty-0042_-_african_charter_on_the_values_and_principles_of_public_service_and_administration_e.pdf) [https://perma.cc/GT5U-UMQ7]; African Union Convention on Preventing and Combating Corruption art. 99, Jan. 3, 2003, [https://au.int/sites/default/files/treaties/7786-treaty-0028\\_-\\_african\\_union\\_convention\\_on\\_preventing\\_and\\_combating\\_corruption\\_e.pdf](https://au.int/sites/default/files/treaties/7786-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf) [https://perma.cc/XS28-3HL3]; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Maputo Protocol") art. 2(2), 4(2)(f), 5(a), 14(2)(a), 18(2)(b), Nov. 7, 2003, [http://www.achpr.org/files/instruments/women-protocol/achpr\\_instr\\_proto\\_women\\_eng.pdf](http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf) [https://perma.cc/BGM4-WKTC].

may be under wider critical examination in African countries than the data in the global surveys indicate.”<sup>142</sup>

At the national level, ATI is recognized in constitutional law in Africa with more than the usual incidence.<sup>143</sup> The constitutions of Africa run the gamut in range of ATI recognition. The most recent serious advancement in ATI in African constitutional law came with the 2010 adoption of a new constitution for Kenya, its second major reform since its independence.<sup>144</sup> The 2010 constitution declared, “(1) Every citizen has the right of access to—(a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.”<sup>145</sup> Two differences from the South African language are noteworthy: first, vestment of the right in “citizen[s]” rather than “[e]veryone”; second, the addition of “or fundamental freedom.”<sup>146</sup> Kenya implemented its constitutional ATI provision with an ATI statute in

142. Darch & Underwood, *supra* note 16, at 243.

143. Emi MacLean, *Right to Information and Access to Legal Information*, Slide Presentation to African Legal Information Institute, Nov. 8, 2012, at 9–10, <https://www.africanlii.org/sites/default/files/2.RTI%20and%20judicial%20decisions.pdf> [<https://perma.cc/D872-Z6DV>] (finding ATI explicitly in 16 African constitutions, and ATI as an aspect of the freedom of expression in 17 African constitutions). As of 2013, in an admittedly non-exhaustive survey, Ngabirano found ATI in the constitutions of Cameroon, D.R. Congo, Ghana, Kenya, Madagascar, Malawi, Morocco, Mozambique, Senegal, South Africa, Tanzania, and Uganda. Ngabirano, *supra* note 90, at 194 n.19.

144. See Edwin Abuya, *Realizing the Right of Access to Information in Kenya: What Should Stakeholders Be on the Lookout For?*, in ACCESS TO INFORMATION IN AFRICA: LAW, CULTURE AND PRACTICE 215, 219–20 (Fatima Diallo & Richard Calland eds., 2013) (describing ATI in the 2010 constitutional framework).

145. CONSTITUTION art. 35(1) (2010) (Kenya). A second paragraph affords a data protection-like right, “to the correction or deletion of untrue or misleading information that affects the person,” and a third paragraph affirmatively compels state publication of “any important information affecting the nation. *Id.* art. 35(2)-(3).

146. A high court decision on ATI in government procurement, under the new Kenyan law, is as yet unique, but tentatively indicates that these differences are salient. In *Nairobi Law Monthly Co. v. Kenya Elec. Generating Co.* (2013) Pet. No. 278 of 2011, ¶¶ 1–3 (H.C.K.) (Kenya), the court rejected a bid by a legal periodical conducting an anti-corruption investigation to access government contracts with six multinational companies for geothermal well drilling. Prophylactically analyzing the claim against the respondent as a private entity, *cf. infra* text accompanying note 274, the court denied access. Though initially receptive, *Nairobi Law Monthly Co.*, at ¶¶ 59–63, the court rejected the periodical’s media freedom claim as bootstrapping the job of journalism to disproportionately constitutional significance, *id.* at ¶¶ 69–70. Regardless, the court denied access because the periodical was not a “citizen” under the constitutional ATI provision, which aimed to exonerate personal rights. *Id.* at ¶¶ 76–82. On both points, the Nairobi high court pointed to U.S. precedents. See *id.* at ¶¶ 72–74 (quoting IAIN CURRIE & JOHAN DE WAAL, *THE BILL OF RIGHTS HANDBOOK* 364–65, 694 (5th ed. 2005) (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978))); *id.* at ¶ 80 (quoting *Paul v. Virginia*, 75 U.S. 168, 177 (1869) (construing U.S. CONST. art. IV, § 2, cl. 1)).

2016; the statute echoes the language of the constitution in authorizing horizontal application.<sup>147</sup>

Implementing the African Charter, the African Commission incorporated ATI into the 2002 Declaration of Principles on Freedom of Expression in Africa, in which the commission also included the South African approach to ATI in the private sector.<sup>148</sup> However, in domestic legislation, African countries' ATI laws run thin.<sup>149</sup> To facilitate the recognition of ATI in domestic law in Africa, the African Commission in 2013 adopted a model ATI law (African Model Law).<sup>150</sup> The product of a two-and-a-half year drafting process coordinated by the Centre for Human Rights at the University of Pretoria,<sup>151</sup> the African Model Law represents a thorough compilation of best practices in contemporary ATI law.<sup>152</sup> The Pan-African Parliament, the inter-governmental legislative body of the African

147. Access to Information Act, No. 31 of 2016, § 4(1) (Kenya).

148. Declaration of Principles on Freedom of Expression in Africa art. IV (Oct. 23, 2002), <http://hrlibrary.umn.edu/achpr/expressionfreedomdec.html> [<https://perma.cc/6CWQ-D4FR>]. Ten years after adoption of the declaration, a commission resolution called for expansion of the ATI article and African recognition of International Right to Know Day, September 28. African Commission Resolution No. 222, Resolution to Modify the Declaration of Principles on Freedom of Expression to Include Access to Information and Request for a Commemorative Day on Freedom of Information, May 2, 2012, <http://www.achpr.org/sessions/51st/resolutions/222/> [<https://perma.cc/T2UH-HKVU>]. International Right to Know Day was created at a conference of civil society organizations in Bulgaria in 2002. Access to Information Programme (Bulgaria), *28 September International Right to Know Day: The Idea*, <http://www.righttoknowday.net/en/idea/> [<https://perma.cc/35Z7-QR8F>] (last visited Jan. 19, 2018).

149. Darch & Underwood, *supra* note 16, at 207 ("The 'veritable wave' that has been 'sweeping the globe' has passed the African continent almost completely by . . . ." (footnote omitted)); MacLean, *supra* note 143, at 11 (listing 10 African countries with "differing levels of protection" of ATI in 2012); *A New Model Law on Access to Information for Africa*, FREEDOMINFO.ORG (Apr. 12, 2013), <http://www.freedominfo.org/2013/04/african-model-access-law-issued-by-rights-panel/> [<https://perma.cc/UZ3Y-JAMA>] (listing 11 of 54 countries with domestic ATI legislation in 2013). MacLean reported additional ATI mechanisms in sub-national legislation, anti-corruption laws, archive laws, evidence and administrative codes, civil and criminal procedural codes, and sectoral laws in health, environment, extractive industry regulation, and public finance. MacLean, *supra* note 143, at 12.

150. AFR. COMM'N ON HUM. & PEOPLES' RTS. [ACHPR], MODEL LAW ON ACCESS TO INFORMATION FOR AFRICA (2012) [hereinafter African Model Law], [http://www.achpr.org/files/instruments/access-information/achpr\\_instr\\_model\\_law\\_access\\_to\\_information\\_2012\\_eng.pdf](http://www.achpr.org/files/instruments/access-information/achpr_instr_model_law_access_to_information_2012_eng.pdf) [<https://perma.cc/92DD-BRTB>] (adopted 2013).

151. *A New Model Law on Access to Information for Africa*, FREEDOMINFO.ORG (Apr. 12, 2013), <http://www.freedominfo.org/2013/04/african-model-access-law-issued-by-rights-panel/> [<https://perma.cc/3YC5-55E3>].

152. Though in sum the African Model Law is exemplary, there remain points worth quibbling over. For example, the African Model Law might afford respondent authorities too much latitude to refuse requests perceived to be "manifestly vexatious." See African Model Law, *supra* note 150, at para. § 37; see also Stephen Mutula & Justus M. Wamukoya, *Public Sector Information Management in East and Southern Africa: Implications for FOI, Democracy and Integrity in Government*, 29 INT'L J. INFO. MGMT. 333, 334 (2009) (discussing treatment of quasi-public bodies).



Union, called on countries to adopt the African Model Law and to review existing ATI laws to ensure compliance with pan-African norms.<sup>153</sup>

Also following the South African example, the African Model Law extends ATI to the private sector. Apart from public and quasi-public bodies, a “private body” is defined exhaustively to include natural persons, businesses, or any other “juristic person,” such as an estate.<sup>154</sup> ATI is afforded as against a private body when “the information may assist in the exercise or protection of any right.”<sup>155</sup> The express “general principles” of the model law articulate the same right of ATI as against public, quasi-public, and private bodies, to be effected “expeditiously and inexpensively,” adding the rights-assistive requirement for only the latter class of respondents.<sup>156</sup> Commenters on the African Model Law divergently rated private-sector accountability its “key strength,” especially regarding the environmental and health risks in extractive and other industries,<sup>157</sup> and wrung their hands over potential adverse impact on small business.<sup>158</sup>

The example of South African and the African Model Law is gaining traction, if not universal embrace.<sup>159</sup> Besides Kenya in 2016, four countries have adopted laws granting access to the records of private bodies. Sierra Leone, South Sudan, and Rwanda all adopted new ATI laws in 2013. Sierra Leone grants access when “necessary for the enforcement or protection of any right”;<sup>160</sup> South Sudan grants access when “necessary for the

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153. Pan-African Parliament, *Midrand Declaration on Press Freedom in Africa* (May 15, 2013), [https://africacheck.org/wp-content/uploads/2014/06/Midrand-Declaration-on-Press-Freedom\\_FINAL\\_En-3-1.pdf](https://africacheck.org/wp-content/uploads/2014/06/Midrand-Declaration-on-Press-Freedom_FINAL_En-3-1.pdf) [<https://perma.cc/39JX-N5N9>].

154. African Model Law, *supra* note 150, para. § 1.

155. *Id.* para. § 12(1)(b).

156. *Id.* para. § 2(a)–(b).

157. Jemima V. Hartshorn, *Can the Model Law on Access to Information for Africa Fulfil Expectations?* (Paper at European Consortium for Political Research Conference on Regulatory Governance, Barcelona 2014), at 10, 12, <http://reggov2014.ibei.org/bcn-14-papers/66-212.pdf> [<https://perma.cc/33E8-8HH2>]. Hartshorn worried, though, that lack of precise definitions in the African Model Law could facilitate domestic legislative overrides that would be abused by authoritarian regimes. *Id.* at 13.

158. Eduardo Bertoni & Gladisley Sánchez, *Draft Model Law for African Union States on Access to Information: Comments and Recommendations*, CENTRO DE ESTUDIOS EN LIBERTAD DE EXPRESIÓN Y ACCESO A LA INFORMACIÓN, <http://www.palermo.edu/cele/pdf/investigaciones/AU-Draft-Model-Law-CELE.pdf> [<https://perma.cc/LKW3-82SN>]. Bertoni and Sánchez wrote on behalf of the Centro de Estudios en Libertad de Expresión y Acceso a la Información at the University of Palermo (Argentina) Law School. Their analysis was informed by experience with the 2010 Model Inter-American Law on Access to Information, AG/Res. No. 2607 (XL-O/10), which does not extend to the purely private sector.

159. For rejection of liberal private-body access, see Access to Information Act, Act No. 13 of 2017, pt. 2, 5 (Malawi); Organic Law No. 2016-22 of Mar. 24, 2016, ch. 1 (Tunisia).

160. Right to Access Information Act, Law No. 2 of Oct. 31, 2013, pt. II.2(2) (Sierra Leone).

exercise or protection of any right.”<sup>161</sup> Rwanda grants access to private bodies “whose activities are in connection with public interest, human rights and freedoms,”<sup>162</sup> and further authorizes courts to order access to private bodies when “required in the interest to preserve the life or liberty of persons.”<sup>163</sup> Tanzania adopted a new ATI law in 2016, and it extends access to registered private companies “in possession of information which is of significant public interest.”<sup>164</sup>

#### B. *Judicial Construction of Access to Information in the Private Sector*

When Calland advocated for ATI in the private sector in the new South African constitutional regime of the late 1990s, and Roberts advanced the cause at the international level in 2001, there was yet little experience with the idea on the ground. The courts allowed direct enforcement action under the 1993 interim and 1996 constitutions during the long wait for implementing legislation.<sup>165</sup> Constitutional litigation by its nature is uncommon and tends to tackle issues only in broad contours. PAIA, not in force until 2001, represented a turning point at which questions of ATI implementation ripened for judicial review in lower courts and set the common law interpretive machine in motion. There is now a body of case law with which to analyze the application of ATI to the private sector.

From the case law, four observations may be derived: (1) “rights” and “required” are construed loosely; (2) “reasonably required” analysis is fact-intensive and susceptible of a wide range of factors; (3) courts at least early on exhibited a greater comfort with ATI in the private sector in claims invoking corrective justice than in claims invoking distributive justice; and (4) despite that early inclination, later case law demonstrates that ATI in the private sector holds tremendous potential for the attainment of human rights at all levels, including collective rights. Taking a wider view, the takeaway from the case law is that even while struggling with the fine points of application,<sup>166</sup> South African courts have proven that ATI in the private sector works.

##### 1. *Loose Construction of “Rights” and “Required”*

The rights-required test of the 1996 constitution and the 2000 PAIA, in its section 50—“any information that is held by another person [private body] and that is required for the exercise or protection of any rights”—

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161. Right of Access to Information Act, 2013, Act No. 65, ch. I.4(4) (S. Sudan).

162. Law No. 04/2013 of Aug. 2, 2013, art. 1, 13 (Rwanda).

163. *Id.* art. 14.

164. Access to Information Act, 2016, Law No. 6 of 2016, 2(2)(b)(ii) (Tanz.).

165. See Bentley & Calland, *supra* note 17, at 344 (“long and painstaking process”).

166. See MENDEL, *supra* note 79, at 340 (“teething problems”).

point to two key questions: (1) what rights are “any rights”?, and (2) when is access “required,” or necessary?

Functionally, it is difficult to disentangle the two questions. Both inquiries conjure a sliding scale that begins on the low end with mere desire and the means to effectuate it, and runs to a high end of life and liberty, and the necessity of survival. Because of this interrelationship, a judicial inquiry can be dynamic, allowing a weaker assertion of rights accompanied by greater need, or inversely, a firm claim of right with more speculative necessity. Still, formally, it is helpful to remain mindful of the twofold inquiry.

Because the 1993 interim constitution used the rights-required test for ATI claims of public bodies, some case law from that time has been carried over to inform PAIA section 50 construction. The focus of this article is PAIA construction, but interpretive guidance must begin with these earlier-derived principles. On the “rights” question, oft cited is the pre-PAIA *Cape Metropolitan Council v. Metro Inspection Services (Cape Metro)*.<sup>167</sup> The “required” question was examined in a line of pre-PAIA cases, of which *Van Huyssteen v. Minister of Environmental Affairs and Tourism*<sup>168</sup> offers a useful example.

“Any rights” is expansive. The term has been construed to embrace both fundamental rights, such as fair trial,<sup>169</sup> and common law rights, such as claims in contract and tort. That slope makes a stopping point difficult to locate. *Cape Metro* involved a contract dispute between a council and contract levy collector, Metro, amid allegations of fraud in claims for commissions.<sup>170</sup> Metro sought council records to clear its name.<sup>171</sup> The court described Metro’s asserted rights for ATI purposes as (1) enforcing “a contractual or delictual claim for damages,” and (2) “constitutional rights to equality or to protect its business reputation and good

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167. *Cape Metro. Council v. Metro Inspection Serv. W. Cape CC* [2001] ZASCA 56.

168. *Van Huyssteen v. Minister of Env'tl. Affairs & Tourism* 1996 (1) SA 283 (C) (High Ct. E. Cape Prov. Div. June 28, 1995), *reprinted in* 1 COMPENDIUM OF JUDICIAL DECISIONS ON MATTERS RELATED TO ENVIRONMENT: NATIONAL DECISIONS 59, 71 (1998) [hereinafter COMPENDIUM], [http://www.right2info.org/resources/publications/case-pdfs/south-africa\\_van-huyssteen-and-others-nno-v-minister-of-environmental-affairs-and-tourism-and-others](http://www.right2info.org/resources/publications/case-pdfs/south-africa_van-huyssteen-and-others-nno-v-minister-of-environmental-affairs-and-tourism-and-others) [https://perma.cc/ZT6V-E7P8].

169. *E.g., Shabalala v. Attorney-Gen. of Transvaal* (CCT23/94) [1995] ZACC 12, 1995 (12) BCLR 1593, 1996 (1) SA 725 (allowing ATI in police records to protect right to fair trial).

170. *Cape Metro. Council*, [2001] ZASCA 56 at 5 para. 6. Though decided in 2001, the court applied the language of the 1993 interim constitution. *See id.* para. 26.

171. Constitutional administrative fairness would have afforded Metro an explanation of the cancellation had the council used its state powers to cancel the contract. S. AFR. (INTERIM) CONST., 1993, para. § 24, *later revised and recodified in* S. AFR. CONST., 1996, para. § 33. But the court held that the state had canceled under ordinary common law contract, *Cape Metro. Council*, [2001] ZASCA 56 at 20 para. 22, so Metro had to resort to constitutional ATI, S. AFR. (INTERIM) CONST., 1993, § 23, *later revised and recodified in* S. AFR. CONST., 1996, § 32.

name.”<sup>172</sup> Critically, invoking precedent, the court reaffirmed that “‘rights’ in [ATI] in the interim Constitution included *not only* fundamental rights as set out in the . . . the interim Constitution”—and moreover, that the same principle carried over into ATI in the 1996 constitution.<sup>173</sup> Contract enforcement seemed sufficient to Metro’s purpose, though the court pinned its decision on protection of Metro’s corporate reputation.<sup>174</sup>

“Required” was part of the *Cape Metro* analysis too, and the court signaled that the term is not strictly construed. Softening the plain language, the court opined, “Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right.”<sup>175</sup> The “assistance” approach made its way in the African Model Law.<sup>176</sup>

A line of older cases, of which *Van Huyssteen* is exemplary, elaborated on this construction by approaching “required” with the trusty common law standby, reasonableness.<sup>177</sup> *Van Huyssteen* involved land trustees seeking access to environmental ministry records about a steel mill proposed for construction on neighboring wetlands. The trustees feared that the authorities would approve the mill before an environmental inquiry was concluded.<sup>178</sup> In making a rezoning decision, the ministry was bound to observe environmental conservation law,<sup>179</sup> and some experts had asserted a pollution threat to a lagoon on the trust property.<sup>180</sup> The court concluded that the trustees “reasonably require[d]” access to ministry records to be able to make their case, a showing that sufficed under the constitutional ATI provision.<sup>181</sup>

The *Van Huyssteen* court derived “reasonably required” from an earlier case in the line, *Nortje v. Attorney General*.<sup>182</sup> In *Nortje*, accused persons had won access to statements about their cases in police records.<sup>183</sup> Advocates in *Nortje* had argued over whether “required” meant “needs” or

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172. *Cape Metro. Council*, [2001] ZASCA 56 at 22 para. 24.

173. *Id.* at 23 para. 27 (emphasis added) (citing *Van Niekerk v. Pretoria City Council* 1997 (3) SA 839 (T) at 844A-846G).

174. *Id.* at 23–24 para. 29. Neither the interim constitution nor the 1996 constitution explicitly protects reputation, but reputational interest is sometimes formulated as an aspect of human dignity or privacy.

175. *Id.* at 23 para. 28.

176. See *supra* notes 155–156 and accompanying text.

177. See generally Randy T. Austin, *Better Off with the Reasonable Man Dead or the Reasonable Man Did the Darndest Things*, 1992 BYU L. REV. 479, 480–81.

178. *Van Huyssteen*, 1996 (1) SA 283 (C), *reprinted in* COMPENDIUM, *supra* note 168, at 62–63.

179. *Id.* at 65–70, 75 (reviewing environmental conservation law).

180. *Id.* at 73.

181. *Id.* at 71 (citing S. AFR. (INTERIM) CONST., 1993, para. § 23 (ATI)).

182. *Nortje v. Attorney Gen.* 1995 (2) SA 460 (C).

183. *Van Huyssteen*, 1996 (1) SA 283 (C), *reprinted in* COMPENDIUM, *supra* note 168, at 70 (citing *Nortje*, 1995 (2) SA 460 (C) at 474F–475A).

“desires.”<sup>184</sup> While desire might say too little, and need too much, the *Nortje* court had concluded that witness statements “would ordinarily be reasonably required by an accused person in order to prepare for trial in a criminal prosecution,” criminal defense being a cognizable right “beyond question.”<sup>185</sup>

## 2. Multiple Factors in “Reasonable” Necessity

The “reasonably required” standard of the *Nortje-Van Huyssteen* line of cases ultimately took on the imprimatur of the Supreme Court of Appeal (SCA) in construction of PAIA section 50. Two SCA cases, in 2005 and 2006, have become seminal PAIA precedents, *Clutchco v. Davis*<sup>186</sup> and *Unitas Hospital v. Van Wyk*.<sup>187</sup> Both cases involved straightforward attempts to apply the PAIA to a private body. The court acknowledged up front in *Clutchco*: “In extending the fundamental right of access to information to records held by private bodies, the Constitution and the statute have taken a step unmatched in human rights jurisprudence.”<sup>188</sup> Yet neither case bore overtones of public accountability, and both requesters failed. The cases demonstrate the interrelationship between the strength of the rights assertion and the urgency of the “required” assertion, as well as the highly mutable nature of the “required” analysis.

In *Clutchco*, the “rights” claim was weak, and the court seemed to amp up its demand on the “required” question. Whether the former state caused the latter is difficult to determine, because *Clutchco* was clouded by the parallel operation of a sectoral disclosure statute. *Clutchco* arose out of a struggle between father and son over ownership of the family company.<sup>189</sup> The son, Davis, estranged from the company and a thirty-percent shareholder, sought access to company books upon an asserted right to value his shares for sale, after refusing a buy-out offer.<sup>190</sup> The court assumed *arguendo* that Davis’s right held water, though never analyzed it on the merits.<sup>191</sup> Suggesting that Davis’s personal reputation might be tied up somehow with his financial valuation claim, the court quoted *Cape Metro* approvingly with regard to reputation as a viable rights theory.<sup>192</sup> Again, though, the “rights” basis never took center stage, as the court found Davis’s case flawed on the “required” analysis.

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184. *Id.* (citing *Nortje*, 1995 (2) SA 460 (C) at 474F-475A) (quotation marks omitted).

185. *Id.* (citing *Nortje*, 1995 (2) SA 460 (C) at 474F-475A) (quotation marks omitted).

186. *Clutchco (Pty.) Ltd. v. Davis* [2005] ZASCA 16, [2005] 2 All SA 225 (SCA), 2005 (3) SA 486 (SCA), ¶ 10.

187. *Unitas Hosp. v. Van Wyk* 2006 (4) SA 436.

188. *Clutchco*, [2005] ZASCA 16 at 7 para. 10.

189. *Id.* at 2–6 para. 2–9.

190. *Id.* at 3, 5, 7–8 para. 3, 7–8, 11.

191. *Id.*

192. *Id.* (quoting *Cape Metro. Council*, [2001] ZASCA 56).

The “required” inquiry in *Clutchco* was clouded by the Companies Act, which compelled disclosure of some facts from the company’s books, but not the detailed information that Davis wanted.<sup>193</sup> The court did not hold the Companies Act to override PAIA, but because the legislature had expressly provided for disclosure of only selected data, the court demanded of Davis a “substantial foundation” for his PAIA access.<sup>194</sup> The court explained, “In enacting PAIA, Parliament could not have intended that the books of a company, great or small, should be thrown open to members on a whiff of impropriety or on the ground that relatively minor errors or irregularities have occurred.”<sup>195</sup>

Citing the *Nortje* line of cases, *Clutchco* reaffirmed and elaborated on the “reasonably required” test.<sup>196</sup> Whereas “required” might span a range from mere desire to assistive to indispensable, or “dire necessity” at the extreme, the intended meaning must settle at “more than ‘useful’” and shy of “‘essential.’”<sup>197</sup> To articulate “required,” a requester must “‘lay a proper foundation for why that document is reasonably “required” for the exercise or protection of his or her rights.’”<sup>198</sup> The court reasoned that specificity in the request aids the argument on “necessity,” so the requester’s explanation of how disclosure will protect the asserted right is crucial.<sup>199</sup> The court ultimately settled on “reasonably required in the circumstances [as] about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need.”<sup>200</sup> Because “an experienced accountant and auditor” had failed to agree that disclosure would support Davis’s claim,<sup>201</sup> so he could not meet the “required” standard.<sup>202</sup>

The incompatibility of the Companies Act with PAIA section 50 became clearer in a 2017 high court case, in which facts similar to *Clutchco* played out again. In *Loest v. Gendac*, a shareholder and involuntarily removed director of a software engineering firm sought access to more information than the Companies Act provided, again claiming a right to value his holdings.<sup>203</sup> Loest had a better claim than Davis, because Loest produced for the court a contract that allowed him to demand a fair valua-

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193. *Id.* at 10–13 para. 14–16.

194. *Id.* at 13 para. 17; *cf.* *Nova Prop. Grp. Holdings Ltd. v. Cobbett* [2016] ZASCA 63, 2016 (4) SA 317 (SCA) at 13–14 para. 20–21 (holding that by design of Parliament, Companies Act provision affording unqualified public access to securities registers and directors registers operates in alternative to PAIA section access, which is qualified by PAIA exemptions).

195. *Clutchco*, [2005] ZASCA 16 at 13 para. 17.

196. *Id.* at 12–13.

197. *Id.* at 8–10 para. 11 (quoting precedents, quotation marks omitted).

198. *Id.* at 8–9 para. 12.

199. *Id.* (quoting *Cape Metro. Council*, [2001] ZASCA 56).

200. *Id.* at 10 para. 13.

201. *Id.* at 13–14 para. 18.

202. *Id.*

203. *Loest v. Gendac* 2017 (4) SA 187 (GP) at 4–6 para. 6–12 (S. Afr.).

tion of his shares.<sup>204</sup> His rights claim therefore could rest cleanly on contract enforcement. For its part, the Companies Act did not preclude the use of external remedies for disgruntled shareholders to extract valuation data.<sup>205</sup> However, pointing to *Clutchco*, the court again weighed the Companies Act in the “required” analysis.<sup>206</sup> The existence of remedies in the Companies Act for disappointed shareholders weighed heavily against Loest’s “required” claim under PAIA.<sup>207</sup> The burden on the company to have to defend in parallel processes and the attendant risk of abusive claims led the court to reject Loest’s claim as not “required.”<sup>208</sup>

The breadth of the “required” analysis took on another dimension in *Unitas Hospital*, in which the court held “that any attempt to determine its meaning in the abstract would be a futile exercise[; rather,] the question whether a particular record is ‘required’ for the exercise or protection of a particular right is inextricably bound up with the facts of the matter.”<sup>209</sup> Van Wyk’s husband died in intensive care at Unitas Hospital after receiving a surgery to treat Crohn’s disease.<sup>210</sup> Van Wyk suspected malpractice by the nursing staff, and moreover suspected that neglect in her husband’s case had been documented in a hospital assessment report.<sup>211</sup> Thus in anticipation of a negligence claim, Van Wyk sought access to the report under PAIA section 50.<sup>212</sup> Initially Van Wyk did not specify a rights basis, “[m]aybe because of her belief that the report was directly linked to the death of her husband.”<sup>213</sup> Pressed, she asserted that access would serve “the exercise and protection of her right to claim damages.”<sup>214</sup> The lower court had accepted that theory, but the hang-up came with the “required” analysis. The parties disagreed over what the report would show. The lower court had reasoned that even if the report proved not to support a negligence claim, Van Wyk would “know this early and therefore avoid unnecessary litigation.”<sup>215</sup>

Reviewing precedents on “required,” including *Nortje* and *Cape Metro*, the court noticed “reluctance . . . to make any positive statements. . . . The inclination is rather to define the expression in terms of what it does not mean.”<sup>216</sup> Desire, usefulness, and relevance are not sufficient.<sup>217</sup> Essen-

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204. *Id.* at 9–11 para. 18.

205. *Id.* at 19 para. 39.

206. *Id.* at 17, 20–21 para. 32, 40, 45–46.

207. *See id.* at 21 para. 45–46.

208. *Id.* at 21 para. 46.

209. *Unitas Hosp. v. Van Wyk* 2006 (4) SA 436 at 5 para. 6 (S. AFR.).

210. *Id.* at 5 para. 7.

211. *Id.* at 5 para. 8–9.

212. *Id.* at 4 para. 3.

213. *Id.* at 6 para. 11.

214. *Id.* at 6–7 para. 14.

215. *Id.* (quoting lower court opinion, quotation marks omitted).

216. *Id.* at 7 para. 16.

217. *Id.*

tiality or necessity is not required.<sup>218</sup> The court liked the “assistance” language of *Cape Metro*, but opined that assistance alone would still fall short.<sup>219</sup> Then quoting the “reasonably required” conclusion of *Clutchco*, the court took refuge in the facts of the case.<sup>220</sup> The court observed that were Van Wyk to initiate litigation with the hospital, the rules of discovery would supersede PAIA, and the report would be subject to disclosure in discovery.<sup>221</sup>

The heart of the matter, then, was whether PAIA section 50 may be employed as a tool in pre-litigation discovery.<sup>222</sup> *Unitas Hospital* is therefore similar to *Clutchco* in that the “required” analysis was clouded by the operation of a parallel disclosure system. Reiterating the angst seen in *Clutchco* and *Loest*, the court evinced distaste for PAIA as an instrument of “‘fishing expeditions.’”<sup>223</sup> PAIA should be construed consistently with the statutory deference to discovery that attaches after litigation is initiated, the court concluded, denying access.<sup>224</sup>

However, the line that *Unitas Hospital* drew against pre-litigation discovery was not bright. The court disclaimed that “reliance on [section] 50 is automatically precluded merely because the information sought would eventually become accessible under the rules of discovery.”<sup>225</sup> The prospect of litigation rather becomes a factor in the “required” analysis. In an earlier case in which the court properly awarded access, the requester required a report of a public body in order to determine whether the body could be held responsible for property damage.<sup>226</sup> If Van Wyk could have made such a claim about the hospital report, she failed to do so at first, and did so only upon an alleged inference later.<sup>227</sup> Her claim was contradicted by the affidavits of hospital officials, which asserted that the nursing report was not related to Van Wyk’s husband in particular and would not advance her case.<sup>228</sup> Van Wyk therefore failed even to meet the “assistance” threshold of *Cape Metro*, much less the substantiality demand of *Clutchco*.<sup>229</sup>

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218. *Id.*

219. *Id.* at 7–8 para. 16–17.

220. *Id.* at 7–8 para. 17–18.

221. *Id.* at 8 para. 19. Jurisdictions vary in their treatment of ATI interaction with discovery; there is no universal norm. Unlike in South Africa, for example, Arkansas law allows ATI and civil discovery to function in parallel. See generally JOHN J. WATKINS, RICHARD J. PELTZ-STEELE & ROBERT E. STEINBUCH, *THE ARKANSAS FREEDOM OF INFORMATION ACT* 455–86 (6th ed. 2017).

222. *Unitas Hosp. v. Van Wyk* 2006 (4) SA 436 at 8 para. 20 (S. Afr.).

223. *Id.* at 8 para. 21.

224. *Id.*

225. *Id.* at 9 para. 22.

226. *Id.* (discussing *Van Niekerk v. Pretoria City Council* 1997 (3) SA 839 (T) (S. Afr.)).

227. *Id.* at 9 para. 23.

228. *Id.*

229. *Id.* at 10 para. 25. Justice Cameron disagreed with the court opinion, authored by Justice Brand, considering that a report on the efficacy of the nursing



The *Clutchco* court's recitation on "reasonably required" might have been circularly unhelpful, but it made for lasting precedent, especially after a clarifying boost from *Unitas Hospital*. *Unitas Hospital* stressed the fact-intensive nature of the inquiry, thus inviting development through further challenges meaning to distinguish themselves on facts. The fact-intensive, reasonableness recitation of the "required" analysis reaffirmed the mutability of the test, which can account for any number of factors, including: the strength of the rights claim; factual evidence such as expert testimony and documents, whether supporting or undermining the requester's claim; and the compatibility of the PAIA with other disclosure laws of which the requester might avail, including parallel sectoral disclosure systems and subsequent litigation discovery.

### 3. *Comfort with Corrective Justice*

*Clutchco* became an influential precedent in two more cases that followed quickly thereafter, *Institute for Democracy in South Africa (IDASA) v. African National Congress (ANC)*<sup>230</sup> in the high court and *Claase v. Information Officer of South African Airways (Pty.) Ltd.*<sup>231</sup> in the SCA, and later, *Fortuin v. Cobra Promotions CC*<sup>232</sup> in the high court. *IDASA v. ANC* and *Claase* differ dramatically in their implication of public interest, yet considered on that basis, their results are counter-intuitive. Powerful public interests in *IDASA v. ANC* were not enough to carry the day for access, while a modest personal rights assertion in *Claase* revealed a court frustrated with access wrongfully denied. Together the cases suggest that at least early on, courts were more comfortable affording section 50 access upon claims in corrective justice than upon claims in distributive justice.

In *IDASA v. ANC*, civil society organizations proffered a host of rights in a bid to access the contribution records of major political parties. The respondents were held private bodies for purpose of their fundraising, so the ATI claim arose under PAIA section 50.<sup>233</sup> Unlike Davis in *Clutchco*, IDASA asserted manifold theories of rights grounded in the prolific 1996 constitution: democratic governance, free expression, free association, "political choice," "fair and regular elections," democratic accountability

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staff plainly would be relevant to Van Wyk's negligence claim. He therefore concluded that the court construed "required" too stringently. *Id.* at 12–13 para. 36–39 (Cameron, J.A., dissenting). Other justices formed the majority with Justice Brand. Justice Cloete explained that Van Wyk did not "require[]" the report because "she could comfortably do without it." *Id.* at 18 para. 64 (Conradie, J.A., dissenting).

230. *Inst. for Democracy in S. Afr. v. Afr. Nat'l Cong. (IDASA)* [2005] ZAWCHC 30, 2005 (5) SA 39 (C), [2005] 3 All SA 45 (C). The institute is known by the acronym "IDASA," because it was previously called the Institute for Democratic Alternatives in South Africa.

231. *Claase v. Info. Officer of S. Afr. Airways (Pty.) Ltd.* [2006] SCA 163 (RSA) (S. Afr.).

232. *Fortuin v. Cobra Promotions CC* 2010 (5) SA 288 (ECP) (S. Afr.).

233. *IDASA*, [2005] ZAWCHC 30 at 10–11 para. 32.

to localities, and administrative accountability.<sup>234</sup> Sifting the theories to discard the less justiciable and more attenuated, the court focused on the “free[dom] to make political choices” under the 1996 constitution, including party organization and the “right to free, fair and regular elections for any [constitutional] legislative body.”<sup>235</sup>

The court reiterated the “reasonably required” language of *Clutchco* and analyzed the asserted electoral rights on that basis.<sup>236</sup> IDASA relied on experts in political science to establish the importance of transparency of political contributions and an appropriately informed and empowered electorate.<sup>237</sup> The court was unimpressed. The experts pointed to campaign transparency mechanisms in other countries, but none derived from ATI legislation nor constitutional litigation.<sup>238</sup> IDASA could not, then, close the loop by explaining how contribution-record access would further electoral rights.<sup>239</sup> In the court’s assessment, IDASA advocated for “a general principle or abstract right to disclosure,” but failed to articulate why anyone “require[s] such information *now*.”<sup>240</sup> Adding salt to the wound, the court undid IDASA with its own words, quoting a position paper in which the organization had touted the instant litigation as “‘part of a broader campaign to lobby for regulation of private funding to political parties.’”<sup>241</sup> That IDASA itself viewed access as a policy question dovetailed with the court’s observation that other countries establish transparency by sectoral legislative choice<sup>242</sup>—to wit, the court referenced, U.S. campaign finance regulation.<sup>243</sup>

If Davis was too self-absorbed in articulating his need to know in *Clutchco*, and IDASA had its head too high in the clouds in articulating a public interest in *IDASA v. ANC*, the claimants in *Claase v. South African Airways (SAA)*<sup>244</sup> and *Fortuin v. Cobra Promotions CC*<sup>245</sup> found the sweet spot in between. Like Davis, Claase, in the SCA, and Fortuin, in the high court, were individual claimants motivated by their own pecuniary interests. But their pitches resonated with the courts in a way IDASA’s had not. Lamented the *Claase* court, “[D]isregard of the aims of [PAIA] and the ab-

234. *Id.* at 13–14 para. 36 (citing S. AFR. CONST., 1996, para. 1(d), 16, 18, 19(1)–(2), 41(1)(c), 152(1)(a), 195(1)).

235. S. AFR. CONST., 1996, para. §§ 19(1)–(2).

236. *IDASA*, [2005] ZAWCHC 30 at 16 para. 42.

237. *Id.* at 17 para. 43.

238. *Id.* at 18 para. 45.

239. *Id.* at 19 para. 47.

240. *Id.* at 19 para. 48 (emphasis in original).

241. *Id.* at 19–20 para. 49 (quoting IDASA position paper).

242. *Id.* at 20–21 para. 51.

243. *Id.* at 23, para. 58 (quoting at length *Buckley v. Valeo*, 424 U.S. 1, 67–68 (1976), and referencing, but not citing, Publicity of Political Contributions Act of 1910 (later Federal Corrupt Practices Act), Pub L. No. 61-274, 36 Stat. 822 (effective June 25, 1910)).

244. *Claase v. South African Airways* [2006] SCA 163 (RSA) (S. Afr.).

245. *Fortuin*, 2010 (5) SA 288 (ECP).

sence of common sense and reasonableness has resulted in this court having to deal with a matter which should never have required litigation.”<sup>246</sup>

Like Van Wyk, Claase essentially sought pre-litigation discovery. The case arose collaterally to a contract dispute between retired airline pilot Claase and South African Airways (SAA), his former employer, over free business-class tickets as a perk of his retirement plan.<sup>247</sup> Claase suspected he was being denied seats when they were available on selected flights, so he sued under PAIA for data about one flight in particular.<sup>248</sup> Articulating a right for section 50 purposes, Claase claimed simply enforcement of his retirement contract. The court opined that a requester must make a *prima facie* showing of a cognizable right, even if the existence of the right remains arguable.<sup>249</sup> Claase met that burden with the terms of the contract, which plainly entitled him to business class seats at no charge in some circumstances.<sup>250</sup> On the “required to exercise or protect” analysis, the court had no trouble concluding that disclosure “would be decisive,” “bring[ing] a short sharp end to the dispute”; there either had or had not been available business-class seats.<sup>251</sup> So irritated was the appellate court with SAA—which had further muddled the case by earlier producing for Claase a non-responsive record—that the court entered an award for punitive costs.<sup>252</sup>

Like *Clutchco*, *Fortuin* arose from an ownership dispute over a small business. Collateral to a breach of contract claim, Fortuin sought access to more detailed financial information about the business than he was entitled to under corporate disclosure law.<sup>253</sup> The respondent argued that Fortuin was on “a mere ‘fishing expedition,’” suggestive of *Unitas Hospital*, and that the PAIA should not be used to expand on corporate disclosure law, suggestive of *Clutchco*.<sup>254</sup> The court took its cue from *Clutchco*, finding a parallel ATI law “a factor” in the “required” analysis and demanding “a cogent foundation for the request.”<sup>255</sup> Fortuin argued that he needed the financial information to assess the value of his interest in the business as a step toward choosing his remedy.<sup>256</sup> Like the court in *Claase*, the *Fortuin* court awarded access, finding overriding value in a pre-litigation use of PAIA that might lay a claim to rest or encourage settlement.<sup>257</sup>

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246. *Claase*, [2006] SCA 163 (RSA) at 2 para. 1.

247. *Id.* at 2–3 para. 2–3.

248. *Id.* at 3–4 para. 4.

249. *Id.* at 5–6 para. 8.

250. *Id.* at 4–5 para. 7.

251. *Id.* at 8 para. 9.

252. *Id.* at 7–8 para. 11.

253. *Fortuin v. Cobra Promotions CC 2010 (5) SA 288 (ECP)*, at 1–2 para. 2 (S. Afr.).

254. *Id.* at 12 para. 24.

255. *Id.* at 14 para. 27.

256. *Id.* at 14 para. 28.

257. *Id.* at 14–15 para. 29–31.

Both short opinions, *Claase* and *Fortuin* clarified PAIA operation in at least three respects. First, the decisions clearly reaffirmed that common law contract enforcement is a sufficient “right” under section 50. The private-sector ATI test does say “any right” in PAIA, the 1996 South Africa constitution, and the African Model Law—though the Kenyan adaptation says “any right or fundamental freedom,” suggesting a loftier equation.<sup>258</sup> Certainly one might bootstrap a contract claim with a constitutional invocation, such as the right of access to the courts for the fair resolution of disputes.<sup>259</sup> But that was not necessary. *Claase* prevailed on contract alone, and *Fortuin* on his *Clutchco*-like valuation claim, neither with asserted dimension in human rights law.

Second, *Claase* and *Fortuin* successfully used PAIA for what was essentially pre-litigation discovery, or more accurately, litigation-avoidance discovery, in purely private disputes. PAIA plainly may be used to advance personal interests, as long as they pass muster under the rights-required test; the exercise or protection of a personal right is itself sufficiently imbued with public interest to warrant the operation of PAIA. In other words, PAIA section 50 is principally a mechanism of corrective justice. That ATI laws are often used by civil society organizations that have the resources to litigate sometimes clouds the corrective role of ATI litigation, especially when the respondent is a private body. Moreover, *Claase* and *Fortuin* confirmed that *Unitas Hospital* was to be taken seriously, that pre-litigation discovery is not impermissible, as long as the claimant advances a credible connection between right and disclosure. A policy case can be articulated against ATI use that might short-circuit litigation, but the courts recognized overriding value in early and efficient dispute resolution.

Third, the SCA’s frustration with the costs incurred in lengthy “pre-trial litigation,” i.e., before the contract case even took shape, marked a shift in tone from previous cases. *Claase* came only 20 months after *Clutchco*. In that time, the SCA moved from reverence for PAIA’s unprecedented scope to exhausted disappointment that appellate litigation is needed to get a private respondent to follow the law. At risk of reading too much into this aspect of the case, the court’s frustration might highlight both the difficulty of enforcing section 50 for individual claimants against much better resourced respondents, and the court’s commitment to routinize ATI in the private sector, notwithstanding objections predicated on economic liberty. *Fortuin* came four years later still, maybe indicating that the high courts got the message.

In sum, the divergence between *IDASA*, on the one hand, and *Claase* and *Fortuin*, on the other hand, might demonstrate a preference in section 50 application for corrective over distributive justice, or at least an early discomfort with distributive justice in the provincial high court. In the

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258. See *supra* notes 145–146 and accompanying text.

259. S. AFR. CONST., 1996, para. § 34.

previous cases in which a claimant had asserted an individual financial interest, *Clutchco* and *Loest*, their claims were derailed by a parallel disclosure system in the Companies Act. In *Unitas Hospital*, Van Wyk also asserted a financial interest by way of tort liability. Ostensibly she too was derailed by a parallel access system in litigation discovery, though, too, she had pleaded poorly. In other words, *Unitas Hospital* might have arisen on bad facts;<sup>260</sup> the proposition to take away from it might be that PAIA and pre-litigation discovery *are* compatible when pleaded properly. IDASA failed in its claim against the political parties because it asserted only a generalized interest in transparency as good public policy. Thus looking across the range of *Clutchco*, *Unitas Hospital*, *Loest*, *IDASA*, *Claase*, and *Fortuin*, one consistent pattern emerges, that PAIA section 50 works better upon credible claims in corrective justice. That understanding is consistent with section 50's insistence on the assertion of a right as a prerequisite for one private actor's horizontal claim against another. That approach moreover reinforces ATI's proper role as an enabler right, working not as a right *per se*, but to facilitate attainment of a conventional right.

That said, there remains plenty of room to argue for PAIA application in distributive justice. Cases in the following part 4 regard use of PAIA in pursuit of green rights. There are indications of potential expansion on that front where hot-button issues are concerned, such as the environment, development, and the revelation of truth about apartheid.<sup>261</sup> Perhaps like Van Wyk, IDASA pleaded poorly to make a sufficiently specific case for distributive justice. Or perhaps, from a legal realist perspective, IDASA was not able to draw a win simply because all of the major political parties, including the ANC, were lined up in opposition. The water was too choppy with political question for the court to risk a swim. Or perhaps IDASA was just too conventional a claim, tied to mundane blue rights in political process, rather than sexy green rights in the contemporary fashion. It remains to be seen: a preference for corrective justice might prove to be more an artifact of section 50 nascence than nature.

#### 4. *Pursuit of Green Rights*

Whether PAIA section 50 works better in corrective justice by its nature or just to date, a compelling question arises in whether and how section 50 can be used to assert collective rights, or green rights. Though not all of the following PAIA cases arise under section 50, they all invite exploration of the potential to use section 50 to enable green rights, namely in relation to environmental protection, sustainable development, and the

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260. See Calland, *Exploring the Liberal Genealogy*, *supra* note 49, at 84–85 (assessing Van Wyk's claim as too speculative).

261. See Roling, *supra* note 100, at 17–18 (quoting *Unitas Hosp.*, 2006 (4) SA 436, at 13 para. 40 (“Other entities, like the listed public companies that dominate the country's economic production and distribution, though not ‘public bodies’ under PAIA, should be treated as more amenable to the statutory purpose of promoting transparency, accountability and effective governance.”)).

right to truth about apartheid. And all of these cases resulted in favorable rulings for requesters.

a. Environment and Public Health

In the vein of environmental protection and public health, a high court case in 2005 merits mention for its private-sector implications, even though it involved access to a public entity. In *Trustees for the Time Being of Biowatch Trust v. Registrar: Genetic Resources*,<sup>262</sup> the court awarded presumptive access to civil society organization Biowatch to information in a public registry of genetically modified organisms (GMOs). From the private sector, biotechnology heavy-hitter Monsanto, along with two U.S. seed companies doing business in South Africa, intervened as *amici* to resist access.<sup>263</sup> Worried about contamination of native maize by introduced strains that are genetically modified to tolerate insecticides, Biowatch initially sought access under the 1996 constitution and sectoral environmental law.<sup>264</sup> Over objections of respondents and corporate intervenors, the court allowed the requests to carry over under PAIA.<sup>265</sup> The corporate intervenors argued vigorously for protection of information on grounds of commercial confidentiality.<sup>266</sup> Without ruling on the merits, the court allowed that the registrar might subsequently deny access insofar as required to protect commercial confidentiality, “if he were honestly and *bona fide* of the opinion that such a refusal is justified.”<sup>267</sup>

*Biowatch* simultaneously demonstrated PAIA’s vitality in access and its safeguards to protect economic liberty in the private sector. It is not difficult to imagine a PAIA request lodged directly against a company, as Monsanto must have realized. The 1996 constitution guarantees a right to a

262. *Trs. for Time Being of Biowatch Tr. v. Registrar: Genetic Res.* [2005] ZAGPHC 135 at 58–62 para. 69.

263. *Id.* at 3–4 para. 7–10. ODAC intervened as *amicus* on behalf of Biowatch. *Id.* at 4–5 para. 11.

264. *Id.* at 8–17 para. 17–21.

265. *Id.* at 38–40 para. 38.

266. *Id.* at 39–44 para. 39–40.

267. *Id.* at 44 para. 41. A curious epilog played out in *Biowatch* over fees. Generally South Africa follows the British rule on fee awards, but courts may except to the American rule when a private “party litigates for public purposes and in the public interest,” but loses, especially in constitutional litigation. *IDASA*, [2005] ZAWCHC 30 at 23–35 para. 59–61. In *Biowatch*, the court of first instance ordered Biowatch to pay Monsanto’s fees—the seed companies declined to seek fees—because Biowatch’s requests had “compelled Monsanto [and intervenors] . . . to come to court to protect their interests. The issues were complex and the arguments presented by them were of great assistance.” *Id.* at 58 para. 68. In a later disposition, the constitutional court recognized that as a result of the fee award, “[a] shockwave appears to have swept through the public interest law community.” *Trs. for Time Being of Biowatch Tr. v. Registrar, Genetic Res.* [2009] ZACC 14 at 3 para. 5. Further recognizing that “Biowatch had been largely successful in its claim against the government agencies, and . . . obtained information, whose release Monsanto had strongly opposed,” the court reversed and charged Biowatch’s fees to the public respondents. *Id.* at 3, 55 para. 4, 61.

healthy environment, as well as environmental protection for future generations, “through reasonable legislative and other measures, that— (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development.”<sup>268</sup> *Van Huyssteen* demonstrated how administrative fairness<sup>269</sup> bolsters environmental legislation. Thus PAIA can be used aggressively to investigate compromised genetic integrity in native crops, which could have serious repercussions for farmers who cannot afford to get into the GMO game—a serious problem in the United States and globally.<sup>270</sup> At the same time, the court afforded deference to public officials to protect trade secrets and commercially sensitive information, and the same PAIA exemptions are available to private-sector respondents.<sup>271</sup> A future clash on these competing positions is inevitable.

#### b. Sustainable Development

In the vein of sustainable development, a high court case in 2011 garnered international attention, as it arose from South Africa’s hosting of the 2010 FIFA World Cup of men’s soccer (football). The World Cup is the world’s premiere sporting event by many measures, and 2010 marked the tournament’s first siting in Africa. As a result, watchdogs from media to academia were keen to analyze the game’s social and economic impact.<sup>272</sup> In *M&G Media Ltd. v. 2010 FIFA World Cup Organising Committee*,<sup>273</sup> the Mail & Guardian (M&G), a Johannesburg-based weekly newspaper, sought access to procurement records of the quasi-public organizing committee. Most of the lengthy court opinion was preoccupied with whether the respondent was a public or private body, owing to its oddly hybrid constitution. Ultimately, the court equivocated and opted for an over-inclusive ruling: M&G was entitled to have its request fulfilled either way.<sup>274</sup>

On the section 50 analysis, invoking *Cape Metro*, the court emphasized the word “any” before “rights” in PAIA, indicating a legislative “intention

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268. S. AFR. CONST., 1996, para. § 24.

269. *Id.* para. § 33.

270. See, e.g., *Monsanto Co. v. White*, No. 5:03-cv-02804-CLS (N.D. Ala. 2008) (Memorandum Opinion, Dec. 16, 2005; Consent Judgment, July 5, 2006; Satisfaction of Judgment, July 11, 2008). Compare *Monsanto, Michael White Documentary: “Seeding Fear”* (July 24, 2015), <https://monsanto.com/company/media/state-ments/seeding-fear-documentary/> [Permalink unavailable], with *SEEDING FEAR* (Kings Point 2015), <https://vimeo.com/117750603> [Permalink unavailable].

271. PAIA, para. §§ 64, 68, 69.

272. See, e.g., Richard J. Peltz-Steele & Jose A. Benavides, *World Cup Dreaming: Sporting Activism and the Incrementalist Advancement of Sexual Equality Through Association Football*, 118 W. VA. L. REV. 95, 107–12, 115 (2015) (discussing relationship of men’s FIFA World Cup and host nations, including South Africa, and South Africa’s investment wager in hosting).

273. *M&G Media Ltd. v. 2010 FIFA World Cup Org. Comm. S. Afr. Ltd.* 2011 (5) SA 163 (GSJ) at 1–2 para. 1–3.

274. *Id.* at 53 para. 163.

to ensure . . . the broadest possible interpretation.”<sup>275</sup> M&G relied on the freedom of expression,<sup>276</sup> within which the 1996 constitution specifically articulates “freedom of the press and other media.”<sup>277</sup> Relative to PAIA section 50, the role of media in particular was “significant,” because it invoked “the duty as public watchdog, and the information they require in order to discharge this obligation.”<sup>278</sup> The court bolstered its view with reference to media freedom in South Africa constitutional court precedent, as well as European, United Kingdom, and Canadian case law.<sup>279</sup> The court analogized to “the special position of journalists,” who are afforded latitude even in defense of falsehood in defamation law.<sup>280</sup>

On the “required” analysis, the court invoked *Clutchco* and *Unitas Hospital* for a reasonableness approach,<sup>281</sup> yet even then seemed to give M&G a break at every turn. Loosely, the court opined that “a record will be ‘required’ where there has been a demonstration of some connection between the requested information and the exercise or protection of the right.”<sup>282</sup> Furthermore generously to the media claimant, the court recognized that a requester who does “not usually know [a record’s] contents . . . cannot be expected to demonstrate a link between the record and rights with any degree of detail or precision.”<sup>283</sup> As if more words in the mix would help, the court proffered “enhance and promote” rights to define “required” to exercise or protect. Accepting the fact-intensive approach of *Unitas Hospital*, the court regarded M&G as further advantaged by the synchronous accountability function of media and PAIA, all the more when the target of media investigation is “the most significant sporting event in the world,” as opposed to the “corner fish-and-chips shop.”<sup>284</sup>

With that setup, the court had little difficulty concluding that M&G access was “required” to investigate the possibility of “corruption, graft and/or incompetence.”<sup>285</sup> Though M&G seems not to have made a *prima facie* showing of wrongdoing, the court was satisfied by committee pledges that procurement processes “created opportunities for small businesses and previously disadvantaged communities.”<sup>286</sup> “[T]he public has a ‘right to know’ that this in fact is so”;<sup>287</sup> inversely, “[t]he consequences of inaccurate reporting may be devastating.”<sup>288</sup> The court moreover rejected “as

275. *Id.* at 107 para. 334.

276. *Id.* para. 337.

277. S. AFR. CONST., 1996 para. § 16(1)(a).

278. *M&G Media*, 2011 (5) SA 163 (GSJ) at 108 para. 338.

279. *Id.* para. 341.

280. *Id.* at 109 para. 343.

281. *Id.* at 114 para. 350–51.

282. *Id.* at 115 para. 352.

283. *Id.* at 115 para. 353.

284. *Id.* at 115–16 para. 355–56.

285. *Id.* at 117 para. 360.

286. *Id.* at 122–23 para. 383–85.

287. *Id.* at 123 para. 384.

288. *Id.* at 124 para. 387.



without substance” the respondent’s resistance to disclosure on grounds of competitive commercial exemption.<sup>289</sup>

From a bird’s eye view, *M&G Media* seems inconsistent with *IDASA*. As alluded to above, it is impossible to know for sure why the results differed in two cases oriented in distributive justice. It might be that the Johannesburg high court in *M&G*, near the seat of the constitutional court, was more willing to go out on a limb than the Cape high court in *IDASA*, sitting in the legislative capital, was not. Or it might have been that *M&G* pleaded better than *IDASA* did. *M&G* reduced its theoretical angst over efficacy in development to the possibility of small business operators losing out to fat cats. In contrast, *IDASA* seemed unable to bring its theoretical claim of electoral integrity down to earth with any specific risk of impact. Or it might have been that the World Cup-and-development question, which was a pervasive anxiety in South African social and political spheres, was a terrain on which the Johannesburg high court felt comfortable, unlike the risk of judicial capital had the Cape court stepped out against the ANC and other political parties. More experience is needed to see which case is the rule and which is the exception.

### c. Post-Apartheid Truth

In the post-apartheid vein, another case about PAIA access in the public sector merits mention, because in fact, the respondent was a private body. In *Mittalsteel South Africa Ltd. v. Hlatshwayo*,<sup>290</sup> the court treated Mittalsteel as a public body under the quasi-public reach of the PAIA when Hlatshwayo, a researcher, sought historical records dating from 1965 to 1973. The steel company had been privatized by statute in 1989, but the request sought records from the company’s prior lifecycle as state-controlled “ISCOR, the largest steel producer in South Africa.”<sup>291</sup> Because Mittalsteel was compelled to respond as a public body, there was no need for Hlatshwayo to satisfy the rights-required burden.

Though the court opinion made no mention of apartheid, that subject lay at the heart of Hlatshwayo’s query. The graduate student was investigating historical labor conditions at ISCOR,<sup>292</sup> including a troubling mix of “racial despotism,” the “cheap black labour system,” and Afrikaner nationalism in the “apartheid company state.”<sup>293</sup> Such investigation dem-

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289. *Id.* at 131–32 para. 408–13.

290. *Mittalsteel S. Afr. Ltd. v. Hlatshwayo* 2006 SCA 94 (RSA) at 17 para. 28.

291. *Id.* at 2 para. 1, 15–17 para. 23–27.

292. *Id.* at 2 para. 2.

293. Mondli S. Hlatshwayo, *The Politics of Production and Forms of Worker Response at the ISCOR Vanderbijlpark Works, 1965–1973*, at 53 (2003) (unpublished M.A. thesis, University of the Witwatersrand), available at Academia.edu, [https://www.academia.edu/24723973/THE\\_POLITICS\\_OF\\_PRODUCTION\\_AND\\_FORMS\\_OF\\_WORKER\\_RESPONSE\\_AT\\_THE\\_ISCOR\\_VANDERBIJLPARK\\_WORKS\\_1965-1973](https://www.academia.edu/24723973/THE_POLITICS_OF_PRODUCTION_AND_FORMS_OF_WORKER_RESPONSE_AT_THE_ISCOR_VANDERBIJLPARK_WORKS_1965-1973) [Permalink unavailable]; cf. *infra* note 296 and accompanying text.

onstrates the vital connection between ATI and the right to truth, which motivates organizations such as the South African History Archive to be zealous advocates and users of ATI.<sup>294</sup> Though such application of PAIA lacks prospective implications for the private sector, the prospect of access to privatized entities in their historical guises vigorously enables the right to truth. In turn, revelation of truth about apartheid has relevance in addressing the dramatic and ongoing socio-economic inequalities that grip South Africa today. And while apartheid was a wrong of more naked magnitude than the invidious oppression of Jim Crow's America, a parallel prospect for the use of ATI in historical access can readily be drawn to the United States with implications for understanding racial and class strife and formulating redressive strategies.

d. All of the Above

A second case of environmental protection litigation by a civil society organization arose under section 50 and reached SCA decision in 2014. Moreover, *ArcelorMittal South Africa Ltd. v. Vaal Environmental Justice Alliance (VEJA)*<sup>295</sup> reverberated with ramifications for both development and apartheid truth.

VEJA sought historical and strategic environmental information from steel producer Arcelor about its operations at Vanderbijlpark and Vereeniging, focusing especially on waste disposal and particularly on one “comprehensive strategy document.”<sup>296</sup> The court opened its opinion with remarkable receptiveness to the collective rights dimension of VEJA's position:

First, the world, for obvious reasons, is becoming increasingly ecologically sensitive. Second, citizens in democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect of governments and in relation to corporations. In South Africa, because of our past, the latter aspect has increased significance.<sup>297</sup>

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294. The South African History Archive in fact developed “Form C.” See *supra* note 117.

295. Co. Sec'y, *ArcelorMittal S. Afr. Ltd. v. Vaal Env'tl. Justice Alliance* [(2014)] ZASCA 184, 2015 (1) SA 515 (SCA) (S. Afr.).

296. *Id.* 3–4 para. 2, 7–9 para. 9. Apartheid-era labor practices in steel production at Vanderbijlpark by an ArcelorMittal predecessor were the subject of the researcher's inquiry in *MittalSteel*. See *supra* notes 290–293 and accompanying text. The strategy document VEJA sought also was historical, if not going back as far as apartheid, dating to 2000. *ArcelorMittal*, [(2014)] ZASCA 184, at 9 para. 17. Grousing and “dithering” in response to the request, Arcelor attorneys demanded that VEJA explain “how the ‘alleged existence’ of the requested documentation came to VEJA's knowledge.” *Id.* at 8 para. 12, 32 para. 81.

297. *ArcelorMittal*, [(2014)] ZASCA 184, at 3 para. 1.

The court furthermore characterized the case as an “entanglement” of commercial development and environmental preservation, both constitutional priorities that must be balanced.<sup>298</sup>

On the rights inquiry, the court allowed VEJA to rely on the constitutional right to a healthy environment, as in *Biowatch*.<sup>299</sup> The Rights-required analysis was tempered, as usual, by *Clutchco* and *Unitas Hospital*.<sup>300</sup> Again notwithstanding the court’s distaste for generalized claims in distributive justice in *IDASA*, the SCA in *ArcelorMittal* recognized VEJA as a “genuine advocate[ ] for environmental justice.”<sup>301</sup> The court rejected an array of Arcelor counterarguments, including that VEJA wished to situate itself as a shadow regulatory authority;<sup>302</sup> that VEJA should have availed itself of access under sectoral environmental law rather than PAIA;<sup>303</sup> and that VEJA was on a fishing expedition.<sup>304</sup>

Unlike the motives of the requesters seeking financial disclosures in excess of statutory terms in *Clutchco* and *Fortuin*,<sup>305</sup> VEJA’s aims coincided with the aim of environmental regulation, making PAIA complementary rather than circumventive.<sup>306</sup> Parallel accountability through environmental regulation bolstered rather than undermined VEJA’s PAIA-rights claim, because constitutional policy calls for “collaborative corporate governance in relation to the environment.”<sup>307</sup> In analyzing Arcelor’s asserted grounds for exemption, the court again referenced South African history as the basis for deliberate constitutional imposition of horizontal-rights assertions.<sup>308</sup> The court concluded: “Corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced.”<sup>309</sup>

*ArcelorMittal* evidenced a strong commitment to ATI in the private sector and rattles any limitations on section 50 derived from prior cases. Insofar as the “required” analysis demands a substantial foundation, VEJA managed to get there by focusing its inquiry on waste disposal and an internal assessment known to exist. Though collateral disclosure laws are sometimes unamenable to parallel expansion through PAIA, the parallel path is open when piling on is consistent with the laudable objectives of

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298. *Id.* at 4–5 para. 3–4.

299. *Id.* at 20 para. 41 (quoting S. AFR. CONST., 1996, para. § 24).

300. *Id.* at 22 para. 49–50.

301. *Id.* at 23 para. 53.

302. *Id.*

303. *Id.* at 25 para. 58–59.

304. *Id.* at 26 para. 60.

305. *See id.* at 31–32 para. 80 (expressly distinguishing *Clutchco*).

306. *Id.* at 26–30 para. 60–74.

307. *Id.* at 23 para. 53, 29 para. 71, 30 para. 73–74, 32–33 para. 83.

308. *Id.* at 31 para. 78.

309. *Id.* at 32 para. 82.

both systems. If *IDASA* in the provincial court suggested a greater judicial comfort with corrective justice, relative to distributive justice, the SCA's flattery of VEJA suggests that *IDASA* was oriented the wrong way.<sup>310</sup> In the end, little certainty can be attached to any conclusion besides the absolute mutability of the rights-required analysis.

#### IV. CONCLUSION: OUT OF AFRICA<sup>311</sup> AND HOME AGAIN<sup>312</sup>

As freedom of expression doctrine evolved in U.S. law, especially against the backdrop of the civil rights movement in the latter half of the twentieth century, it became obvious that free speech could not rationally be cabined within its core purpose of political participation.<sup>313</sup> In Thomas I. Emerson's landmark 1963 exposition of rationales for the freedom of expression, politics was only a part of one broader rationale, "social, including political, decision-making."<sup>314</sup> Alongside it were "individual self-fulfillment," the ascertainment of truth, and the social "balance between stability and change."<sup>315</sup> Bolstered by this perspective, the freedom of expression was expanded to protect all "private speech" with norms that powerfully disfavor content discriminatory regulation. Social interactions, art, and even the proposition of a commercial transaction all came within the purview of the freedom of speech.<sup>316</sup>

The freedom of information did not transform similarly in the United States. There are many reasons why it did not follow a path in tandem with its expression partner. Among them, first, the freedom of expression had an originalist underpinning, for which the British rule against prior

310. See Shannon Bosch, Note, *IDASA v. ANC—An Opportunity Lost for Truly Promoting Access to Information*, 23 S. AFR. L.J. 615, 618–19 (2006) (finding *IDASA v. ANC* inconsistent with purpose of PAIA).

311. Harvey M. Feinberg & Joseph B. Solodow, *Out of Africa*, 43 J. AFR. HIST. 255, 255 (2002) (dating phrase "out of Africa" to Ancient Greece and explaining that "[i]t regularly signals a particular uniqueness in Africa—the capacity for creating novelties—and conveys admiration thereof"); see also ISAK DINESEN (KAREN BLIXEN), *OUT OF AFRICA* (1937); *OUT OF AFRICA* (Mirage Enters. & Universal Pictures 1985).

312. THE ORIGINAL MOTHER GOOSE'S MELODY 21 (John Newberry ed., John Munsell's Sons ed. 1889) (c. 1760), [https://books.google.com/books/about/The\\_Original\\_Mother\\_Goose\\_s\\_Melody.html?id=5I5BAAAAYAAJ](https://books.google.com/books/about/The_Original_Mother_Goose_s_Melody.html?id=5I5BAAAAYAAJ) [Permalink unavailable] ("Home again, home again"), quoted in *BLADE RUNNER* (Ladd Co. et al. 1982).

313. See, e.g., Stuart Taylor Jr., *How Bork Recast Ideas in His Senate Testimony*, N.Y. TIMES, Sept. 21, 1987, <http://www.nytimes.com/1987/09/21/us/how-bork-recast-ideas-in-his-senate-testimony.html> [<https://perma.cc/5LFL-TXEA>] (referencing Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971)).

314. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878 (1963).

315. *Id.* at 878–79.

316. E.g., Eugene Volokh, *Freedom of Speech and of the Press*, in THE HERITAGE GUIDE TO THE CONSTITUTION 406, 409–12 (David F. Forte & Matthew Spalding eds., 2d ed. 2014).

restraint was a progenitor.<sup>317</sup> In contrast, the freedom of information arose in response to trending secrecy in the public sector in the 20th century.<sup>318</sup> In that time frame, the freedom of information grew out of administrative procedural law and ran contrary to the eighteenth-century Framers' *de facto* penchant for secrecy.<sup>319</sup> Second, the freedom of expression was enshrined explicitly in the Constitution,<sup>320</sup> so has been subject to evolution by interpretation and progressivism. In contrast, the freedom of information is fixed in the text of the U.S. code,<sup>321</sup> inclining courts to defer to legislatures for reform. Third, the freedom of expression has an intrinsic value that resonates in the libertarian tradition of being left alone, unless and until one causes harm to another.<sup>322</sup> In contrast, the freedom of information compels extrinsic engagement between requester and respondent.<sup>323</sup> Fourth, the freedom of expression usually has no pecuniary cost, requiring only official tolerance.<sup>324</sup> In contrast, the freedom of information compels the respondent to expend resources to fulfill the bargain.<sup>325</sup>

Finally, there is a matter of timing. If the freedom of information was to experience the sort of sea change that exploded the freedom of expression in the United States in the late twentieth century, it missed the window of the civil rights movement. After September 11, 2001, the United States entered a new era marked by interminable war abroad and divisive politics at home: ingredients for suspicion and secrecy rather than coalition-building and transparency.<sup>326</sup> For these and other reasons, freedom

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317. *E.g., id.* at 407; see BLACKSTONE'S COMMENTARIES ABRIDGED 463 (William C. Sprague ed., 9th ed. 1915) (1899), [https://books.google.com/books/about/Blackstone\\_s\\_Commentaries.html?id=jAU9AAAAIAAJ](https://books.google.com/books/about/Blackstone_s_Commentaries.html?id=jAU9AAAAIAAJ) [Permalink unavailable].

318. See HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS 12–13 (1953).

319. RICHARD J. PELTZ-STEELE, THE LAW OF ACCESS TO GOVERNMENT 4, 126–28 (2012).

320. U.S. CONST. amend. I.

321. *E.g.*, 5 U.S.C. § 552.

322. *E.g.*, HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY 57 (2009) (highlighting libertarian theory of First Amendment).

323. See CROSS, *supra* note 318, at 6 (contrasting role of ATI in modern society with historic British common law, “when there were few contacts between government and subject”).

324. See, *e.g.*, Michael Carl Tschantz et al., On Modeling the Costs of Censorship 3–4 (Sept. 10, 2014) (paper archived at Cornell University arXiv), <https://arxiv.org/pdf/1409.3211> [<https://perma.cc/5XMN-WB3A>] (describing “arms race” precipitated by censorship, so inferring minimal costs in absence of censorship).

325. See, *e.g.*, David Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1123–31 (2017) (cataloging costs of federal FOIA compliance and characterizing costs as tax burden).

326. See, *e.g.*, James T. O'Reilly, “Access to Records” Versus “Access to Evil”: Should Disclosure Laws Consider Motives as Barrier to Records Release?, 12 KAN. J.L. & PUB. POL'Y 559, 568–72 (2002) (describing impact of September 11 attacks on federal transparency policy); see also Alasdair Roberts, Four Challenges to the Open Soci-

of information in the United States did not follow the path to realization in fundamental rights, as occurred in international and foreign law.

Americans have muddled through with a statutory right to ATI, rather than a fundamental, or human, right. As statutory ATI goes, FOIA is not bad.<sup>327</sup> Arguably excepting national security and Exemption 1,<sup>328</sup> most of the problems discussed by participants in the Shachoy Symposium were process-oriented; FOIA does effectuate a policy of transparency in the big picture. But lack of recognition of ATI as a fundamental right inhibits its efficacy as an enabler right and downplays its significance in maintaining the balance of power that is required for democracy to thrive. Emerson's rationales recognize that freedom of expression is about more than democratic participation. The same is true for ATI. Yet FOIA remains tethered to the civil-political sphere.<sup>329</sup> As Calland characterized FOIA, it was an ad hoc solution to a civil rights problem of one time, in one space.<sup>330</sup>

True, even freedom of expression in America has not been well operationalized as a horizontal right. Loyal to American libertarian ethos, U.S. law tends to leave freedom of expression vis-à-vis the private sector to the law of obligations, more so than in Europe.<sup>331</sup> However, the language of freedom of expression at least is the language of human rights. When Americans talk about football players taking a knee, the question is framed by the freedom of speech, even though the National Football League and its franchises are private bodies.<sup>332</sup> Debate surrounds whether and when employees in the private sector, the public sector besides, can be "#FiredForFacebook."<sup>333</sup> Freedom of contract, or economic liberty, is viewed as in tension with free speech, because both are regarded as sacro-

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ety, Keynote Address at the International Conference of Information Commissioners (Sept. 20, 2017), <https://medium.com/@AlasdairRoberts/four-challenges-to-the-open-society-92ae38489408> [<https://perma.cc/RAQ9-4AYU>] (lamenting change in attitude toward freedom of information from progressivism in 1980s and 1990s to "politics as usual" after September 11, 2001).

327. See generally Toby Mendel, *The Fiftieth Anniversary of the Freedom of Information Act: How It Measures Up Against International Standards and Other Laws*, 21 COMM. L. & POL'Y 465, 465–66 (2016) (finding FOIA "languish[ing]" relative to global developments, but in step with its generation of ATI laws).

328. 5 U.S.C. § 552(b)(1).

329. E.g., Roy Peled & Yoram Rabin, *The Constitutional Right to Information*, 42 COL. HUM. RTS. L. REV. 357, 360 (2011) (deriving "right to information [as] precondition for the exercise of procedural political rights" from James Madison).

330. See *supra* note 57 and accompanying text.

331. This contrast goes a long way to explain the trans-Atlantic divide over data protection, an area in which, to Europeans' frustration, the American state action doctrine precludes horizontal extrapolation from the Fourth Amendment. See Peltz-Steele, *Mind the Gap*, *supra* note 85, at 162–65.

332. See, e.g., Mark A. Konkell & Diana R. Hamar, *Trump v. the NFL: Can the Players Sue the President? The Answer Isn't So Simple*, N.Y. ST. B.J. 17, 17 (Nov./Dec. 2017).

333. Christina Jaremus, *#FiredForFacebook: The Case for Greater Management Discipline in Discipline or Discharge for Social Media Activity*, 42 RUTGERS L. REC. 1, 3 (2014–2015).

sanct, regardless of the space in which conflict occurs. Freedom of expression in the private sector therefore resonates in a way that freedom of information does not—but should.<sup>334</sup>

Public access to the private sector is not foreign to the American experience. Access to the private sector has been part of modern information policy discussion in the United States since the privatization movement of the Reagan Administration in the 1980s.<sup>335</sup> The American legal system features a number of sectoral affirmative disclosure regimes applicable to private actors, often developed in response to crises. In financial regulation, Dodd-Frank, mentioned in part II, *supra*, was a legislative response to the financial crisis.<sup>336</sup> The financial crisis and its fallout in the housing sector continue to fuel debate over opening the books of the nation's private, but government-constituted, loan assistance authorities.<sup>337</sup> The Environmental Protection Agency runs the Toxic Release Inventory Program (TRI), a statutory response<sup>338</sup> in part to the Union Carbide disaster in Bhopal, India, and a subsequent toxic spill in West Virginia.<sup>339</sup> Legal reforms after September 11 were supposed to encourage the private sector to disclose critical infrastructure vulnerabilities

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334. See, e.g., Alexa Capeloto, *Transparency on Trial: A Legal Review of Public Information Access in the Face of Privatization*, 13 CONN. PUB. INT. L.J. 19, 20 (2013) (“[Thomas] Jefferson and even [Lyndon B.] Johnson could not have foreseen a time when ‘the finances of the Union’ would become as deeply enmeshed with private enterprise as they are today.”).

335. *Id.*

336. See *supra* notes 72–73 and accompanying text. Of course, Dodd-Frank was not the first of its kind. For example, the Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745, followed corporate accounting scandals including the collapse of Enron.

337. See, e.g., Kelsey Ramirez, *House Committee Considers Bill to Open Records at Fannie Mae and Freddie Mac*, HOUSING WIRE (Apr. 24, 2017), <https://www.housingwire.com/articles/39934-house-committee-considers-bill-to-open-records-to-fannie-freddie> [<https://perma.cc/V678-A37M>].

338. Emergency Planning and Community Right-to-Know Act of 1986, Pub. L. No. 99–499, 100 Stat. 1728, §§ 300–330; Pollution Prevention Act of 1990, Pub. L. No. 101–508, 104 Stat. 1388–321, §§ 6601–6610 (codified at 42 U.S.C. §§ 13101–13109). TRI collects data from businesses in mining, utilities, electronics, manufacturing, publishing, and waste management about substances hazardous to human health or the environment. 40 C.F.R. §§ 372.22, 372.45, 372.65.

339. Siraj, *supra* note 43, at 221 (numbering casualties at 7,000 dead and 65,000 injured); EPA, *Learn About the TRI*, <https://www.epa.gov/toxics-release-inventory-tri-program/learn-about-toxics-release-inventory> [<https://perma.cc/U9V9-ZRTU>] (recalling 1984 tragedy in which toxic cloud of methyl isocyanate gas escaped Union Carbide Chemical plant, inflicting death and permanent disabilities). U.S. legislators took notice when less than a year after Bhopal, a Union Carbide facility in West Virginia experienced release of toxic gas, also a methyl isocyanate derivative, injuring 135. Ben A. Franklin, *Toxic Cloud Leaks at Carbide Plant in West Virginia*, N.Y. TIMES, Aug. 12, 1985, <http://www.nytimes.com/1985/08/12/us/toxic-cloud-leaks-at-carbide-plant-in-west-virginia.html> [<https://perma.cc/4WWN-SLZM>]. Cf. Richard J. Peltz-Steele, *Accountability in the Private Sector: African Ambition for Right to Information in India*, 25 RES. J. SOC. SCI. 203, 208–09 (2017) (describing TRI to contextualize analysis of Indian ATI law).

to public authorities by exempting disclosure from public scrutiny.<sup>340</sup> The wisdom of that trade-off is debatable, but the private sector stands ready to strike a similar bargain in cybersecurity.<sup>341</sup> The Family Educational Rights and Privacy Act allows a data protection-like right of access to records about oneself as against private education providers from K12 to university.<sup>342</sup> Pre-litigation discovery already enjoys limited recognition in civil procedure in the United States as an antidote for information asymmetries that impinge on access to justice.<sup>343</sup>

As a cross-sectoral device, FOIA performs poorly at access in the private sector, even insofar as it might afford access indirectly, through public contracting or to quasi-public bodies.<sup>344</sup> An amendment to FOIA in 1974 defined “agency” to include “any . . . Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . , or any independent regulatory agency.”<sup>345</sup>

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340. See, e.g., Brett Stohs, *Protecting the Homeland by Exemption: Why the Critical Infrastructure Information Act of 2002 Will Degrade the Freedom of Information Act*, 2002 DUKE L. & TECH. REV. 18; Kristen Elizabeth Uhl, Comment, *The Freedom of Information Act Post-9/11: Balancing the Public’s Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261, 285–304 (2003).

341. See David Inserra & Paul Rosenzweig, *Cybersecurity Information Sharing: One Step Toward U.S. Security, Prosperity, and Freedom in Cyberspace*, BACKGROUND (Heritage Found.), Apr. 1, 2014, at 1–2, [http://thf\\_media.s3.amazonaws.com/2014/pdf/BG2899.pdf](http://thf_media.s3.amazonaws.com/2014/pdf/BG2899.pdf) [Permalink unavailable].

342. 20 U.S.C. § 1232g(a)(1)(A). The Obama Administration proposed broader commercial data protection rights in an effort to smooth over trans-Atlantic privacy negotiations, but only a voluntary program was implemented. Doron S. Goldstein, Megan Hardiman, Matthew R. Baker & Joshua A. Druckerman, *Understanding the EU-US “Privacy Shield” Data Transfer Framework*, J. INTERNET L. 1, 19 (2016); Peltz-Steele, *The Pond Betwixt*, *supra* note 84, at 19.

343. Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 53–60 (2010) (discussing limited procedural mechanisms for pre-litigation discovery, especially in state law, as needed correctives for would-be plaintiff to meet pleading standards); Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 220–22 (2007) (linking pre-litigation discovery and access to justice). Anticipatory civil rights claims under Federal Rule of Civil Procedure 27, FED. R. CIV. P. 27, sometimes look a lot like ATI demands, with facts comparable to those in *Unitas Hospital*, but invariably fare poorly. See Ann K. Wooster, Annotation, *Construction and Application of Fed. R. Civ. P. 27*, 37 A.L.R. Fed. 2d 573, §§ 30, 32, 40 (originally published 2009).

344. See generally Pozen, *supra* note 325, at 1114–15, 1117 (citing inapplicability of FOIA to private sector, in contrast with South African law, as evidence of FOIA’s “regressive, corporate skew”).

345. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat 1561, § 3 (codified at 5 U.S.C. § 552(f)). Amendment in 2016 liberalized access by codifying presumptive openness in agency disclosure analysis. FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, § 1. Though the substantive scope of access to procurement and contracting was not changed, private business went on the defensive. See, e.g., Jon W. Burd, Tracye Winfrey Howard & George E. Petel, *New FOIA Improvement Act Increases Necessity for Contractors to Create Robust FOIA Exemption Record*, 2 PRATT’S GOV’T CONTRACTING L. REP. 304, 304–05 (2016); Doug Proxmire, *New FOIA Rules Open Contractors to More Risks of Disclosure*, WASH. TECH. (Feb. 17, 2017),



As intended, the change brought entities such as Amtrak and the U.S. Postal Service into FOIA's ambit.<sup>346</sup> Legislative history indicated that Congress intended a function or control test.<sup>347</sup> However, examining the 1974 standard in case law, Craig Feiser found an unduly restrictive Supreme Court approach, limited to "official control": (1) "creation or possession by a federal agency," and (2) "control . . . through both possession and use in the agency's official duties."<sup>348</sup> This limited reach for FOIA falls well short of the funding, function, and power approaches that populate state and foreign ATI laws today, and shorter still of the full range of privatized bodies.<sup>349</sup> As Matthew Bunker and Charles Davis observed, "prisons, hospitals, schools, development agencies, film commissions, and dog-racing tracks have been the focus of privatization efforts."<sup>350</sup> The League of Women Voters added case studies of the privatization of libraries and wastewater treatment, schools and prisons besides, at state and local levels.<sup>351</sup>

Private prisons offered Roberts's example of the need for ATI in the private sector in 2001,<sup>352</sup> and the example is no less paradigmatic today. Private prisons impinge directly on the undisputedly fundamental right of liberty, and they unquestionably employ a uniquely state power, the involuntary deprivation of liberty, all at public expense. Thus, every ordinary

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<https://washingtontechnology.com/articles/2017/02/17/insights-proxmire-foia-advice.aspx> [<https://perma.cc/8UJ6-K9UC>].

346. Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities under Federal Law*, 52 FED. COMM. L.J. 21, 32 (1999).

347. *Id.* at 57.

348. *Id.* at 45, 56. Often cited to exemplify the Supreme Court approach is *Forsham v. Harris*, 445 U.S. 169 (1980). The case offers less than an ideal example, though, as it involved scientific data gathered upon public grant support. *Forsham*, 445 U.S. at 171–76. Nevertheless, official control became the test also in cases concerning entities less than arm's length from government.

349. Craig D. Feiser, *Protecting the Public's Right to Know: Debate Over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. U. L. REV. 825, 836–60 (2000); Roberts, *supra* note 44, at 244–51; see also Diane Di Ianni, *The Legal Framework of Transparency and Accountability Within the Context of Privatization* 7–11 (2011) (study for League of Women Voters) (electronic copy on file with author) (examining public contracting broadly, including sport and transportation infrastructure). One ATI advocate compared privatization to a "‘cloaking device’ that keeps . . . functions and expenditures from public view just as Star Trek's evil Klingon Empire used such a device to make its starship invisible." Mitchell W. Pearlman, *Looking for an Invisible Government* (undated paper in online archive of Connecticut Freedom of Information Commission), <http://www.state.ct.us/foi/Articles/Invisible%20Government.htm> [<https://perma.cc/W8UV-4U7Z>], *cited in* Di Ianni, *supra*, at 8.

350. Matthew D. Bunker & Charles N. Davis, *Privatized Government Functions and Freedom of Information: Public Accountability in an Age of Private Governance*, 75 JOURNALISM & MASS COMM. Q. 464, 464 (1998).

351. LEAGUE OF WOMEN VOTERS OF THE MIDLAND AREA, LEAGUE OF WOMEN VOTERS NATIONAL STUDY ON PRIVATIZATION OF GOVERNMENT SERVICES, ASSETS AND FUNCTIONS 10-13 (2012), [http://lwv-midland.org/files/privatization\\_summary030112.pdf](http://lwv-midland.org/files/privatization_summary030112.pdf) [<https://perma.cc/89F9-VE67>].

352. Roberts, *supra* note 44, at 265–69.

trigger of quasi-public access seems pulled, yet FOIA's *official* control test cannot get there. Accordingly, many access advocates have leveled their sights on private prisons, the definitive treatment being Nicole Cásarez's.<sup>353</sup> At one immigration detention facility on the Florida Everglades in the 1980s and 1990s, "complaints of beatings or rape" were "almost routine,"<sup>354</sup> and detainees were reportedly exposed to outdoor temperatures exceeding 100 degrees for hours a day.<sup>355</sup> In 1995, Cásarez marveled that watchdog access to expose such conditions could turn on whether the facility was managed directly by the government or by a private contractor.<sup>356</sup> Remarkably, despite congressional dithering,<sup>357</sup> the problem persists. "America's for-profit prison industry controls 126,000 Americans' lives," the Brennan Center For Justice reported in 2017. "It's a \$5 billion sector—one that encompasses the operation of 65% of the nation's immigration detention beds."<sup>358</sup> Opacity breeds maladministration,<sup>359</sup> and maladministration means squandered public resources at best, human rights abuses at worst.

However, to speak of access needs in particular service sectors is to lose sight of the forest for the trees. The South African ATI model is not sectoral. The innovation to be gleaned from Africa is not as much ATI vis-à-vis private bodies as the rejection of the public-private distinction. In conventional ATI, the public-private line defines the outer limit of ATI. There is no good reason for so bright-line a rule.

Rather, the public-private line marks the boundary at which the presumption of access inverts. The presumption of access to public information—derived from common law, so pre-dating statutory ATI<sup>360</sup>—favors the requester as citizen of the respondent democracy. The respondent bears the burden of producing the requested records for inspection or justifying an exemption from disclosure. When information in the private sector is at issue, the respondent, unlike the government, enjoys countervailing rights, such as privacy and economic liberty. The presumption is therefore of nondisclosure. However, the requester should be entitled to assert a right that overcomes the presumption. That part of the equation

353. Nicole B. Cásarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249 (1995).

354. Alfonso Chardy, *A Look Inside Krome: From Cold War Base to Immigrant Detention Facility*, MIAMI HERALD, Oct. 6, 2015, <http://www.miamiherald.com/news/local/immigration/article38001279.html> [<https://perma.cc/35ML-49VQ>] (recalling 1980s to 1990s).

355. HUMAN RIGHTS WATCH, PRISON CONDITIONS IN THE UNITED STATES 97 (1991), cited in Cásarez, *supra* note 353, at 250.

356. Cásarez, *supra* note 353, at 251.

357. See *supra* note 82 and accompanying text.

358. Eisen, *supra* note 82.

359. Andrea Headley & Jean-Claude Garcia-Zamor, *The Privatization of Prisons and its Impact on Transparency and Accountability in Relation to Maladministration*, 1 INT'L J. HUMAN. SOC. SCI. & EDUC. 23, 30–32 (2014).

360. CROSS, *supra* note 318, at 22.

is left out in American ATI, limited as it is by application in a civil-political vein. The African rights-required analysis allows for competing values to be re-balanced.

The rights-required analysis in the United States need not look the same as it does in South Africa. Considering rights, the American constitution is neither as expansive nor as abstract as the South African constitution. American “rights” might be confined by the fundamental rights analysis of the Fourteenth Amendment<sup>361</sup> or the Privileges and Immunities Clause.<sup>362</sup> The Kenyan implementation of the African Model Law suggests that approach.<sup>363</sup> The “required” analysis in American law might be construed more strictly, in the sense of strict-scrutiny narrow tailoring, rather than the loose totality approach of South African necessity. Overall, “required” might authorize access only to publicly traded companies, whose regulatory framework already signals a policy calculation that diffuse shareholder interests justify greater public scrutiny.<sup>364</sup> ATI in the private sector might be implemented through the financial regulatory system, rather than as an overgrowth of public administrative law.

Or we might be bold.

The United States continues to suffer strife of racial and class division—much of it the slow burn of deep wounds that erupted once into civil war and never healed in the faltering era of Reconstruction; some of it the yawning divide of haves and have-nots that seems to have consigned the American dream to fading reverie.<sup>365</sup> Privatization periodically waxes in fashion, as seems to be the present lead of the Department of Education.<sup>366</sup> Meanwhile acute disasters such as the Deepwater Horizon oil spill<sup>367</sup> and chronic conditions such as climate change remind us of the

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361. U.S. CONST. amend. XIV, § 1; see James W. Ely, Jr., *Due Process Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 506, 509–10 (David F. Forte & Matthew Spalding eds., 2d ed. 2014) (“incorporation doctrine”); see also *Developments in the Law: State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1266–78 (examining confusion over state action doctrine in Fourteenth Amendment civil rights jurisprudence).

362. U.S. CONST. art. IV, § 2, cl. 1; see David F. Forte & Ronald D. Rotunda, *Privileges and Immunities Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 349, 352–53 (David F. Forte & Matthew Spalding eds., 2d ed. 2014).

363. See text accompanying *supra* note 258.

364. Cf. *supra* note 261.

365. E.g., Roger C. Altman, *Commentary: The American Dream is Dead, and Voters Are Angry*, CHI. TRIB., Oct. 27, 2017, <http://www.chicagotribune.com/news/opinion/commentary/ct-angry-voters-trump-elections-20171027-story.html> [https://perma.cc/5P2R-8VXN].

366. See, e.g., Leslie Postal, Beth Kassab & Annie Martin, *Schools Without Rules: An Orlando Sentinel Investigation*, ORLANDO SENTINEL, Oct. 17, 2017, <http://www.orlandosentinel.com/features/education/os-schools-without-rules-story-gallery-story-gallery.html> [https://perma.cc/W2L3-6GUX] (examining “nearly \$1 billion” in state scholarships distributed to private schools in one year).

367. E.g., Lynn M. Grattan et al., *The Early Psychological Impacts of the Deepwater Horizon Oil Spill on Florida and Alabama Communities*, 119 ENVTL. HEALTH PERSP. 838 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3114820/> [https://per

inevitable interdependence of commerce, the environment, and human life. Americans are entitled to truth, opportunity, and prosperity no less than the people of Kenya, Rwanda, Sierra Leone, South Sudan, South Africa, and Tanzania. Americans are due a restoration of democratic power in balance with contemporary governmental *and* corporate power—no less than was needed to re-balance the scales with the administrative state in 1966.

African ATI is bold.

FOIA once was bold, but no longer is. Let's blow it up.

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ma.cc/7XWT-T5XV] (assessing intangible damages); Lawrence C. Smith, Jr., L. Murphy Smith & Paul A. Ashcroft, *Analysis of Environmental and Economic Damages from British Petroleum's Deepwater Horizon Oil Spill*, 74 ALBANY L. REV. 563, 576 (2010/2011) (estimating economic damages at \$36.9 billion); *see also* Renuka Rayasam, *America Can't Trust Public Water, so It's Turning to Private Companies*, QUARTZ, Oct. 25, 2016, <https://qz.com/817913/america-cant-trust-public-water-so-its-turning-to-private-companies/> [https://perma.cc/V7EF-PS5X] (describing trending privatization of water provision since Flint, Michigan, disaster).