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THE JUST ENERGY TRANSITION (JET) IN SOUTH AFRICA:

Approaches to accessing information and knowledge for transition-affected communities

Report 1: Best Practices in Accessing Jet Information and Knowledge

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CONTENTS

ACRONYMS AND ABBREVIATIONS

African Charter	African Charter on Human and Peoples' Rights, 1981
African Commission	African Commission on Human and Peoples' Rights
ATI	Access to information
ATI Network	Access to Information Network
AU	African Union
Bali Guidelines	Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 2010
CALS	Centre for Applied Legal Studies
CCD Report	World Bank Group *Country Climate and Development Report – South Africa* (October 2022)
CESCR	International Covenant on Economic, Social, and Cultural Rights, 1976
CRD	United Nations Convention on the Rights of the Child, 1989
CSO	Civil society organisation
DFFE	Department of Environment, Forestry, and Fisheries
DMR	National Department of Mineral Resources
DOH	National Department of Health
Escazu Agreement	Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, 2018
Framework Report	Presidential Climate Commission *A Framework for a Just Transition in South Africa* (June 2022)
GHG	Greenhouse gas
GW	Gigawatt
ICCPR	International Covenant on Civil and Political Rights, 1976
IPCC	Intergovernmental Panel on Climate Change
JET	Just energy transition
JET-IP	South Africa's Just Energy Transition Investment Plan (2023-2027)
MOU	Memorandum of Cooperation
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
MW	Megawatt
NEMA	National Environmental Management Act 107 of 1998
NDCs	Nationally determined contributions
PAIA	Promotion of Access to Information Act 2 of 2000
PCC	Presidential Climate Commission
SCA	Supreme Court of Appeal
UN	United Nations
UNECE	United Nations Economic Commission for Europe
UNEP	United National Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change, 1992
UNICEF	United Nations Children's Fund

EXECUTIVE SUMMARY

As we enter a new era of a just and equitable transition toward a low-carbon and climate resilient society, there is an opportunity – if not a calling – to re-examine and consider ways to potentially reset the governance culture and practices surrounding the proactive publication, accessibility, and dissemination of relevant information, starting with South Africa's just energy transition ("JET"). **This research explores this opportunity with the objective of enhancing access to JET-related information and knowledge that supports transition-affected communities and stakeholders to defend their rights and advance their priorities**.

This report is the first of three outputs that will be published through this exploratory research. It provides foundational information to support transition-affected communities and civil society organisations that seek JET information and knowledge, through an overview of the current status of the JET process in South Africa, a review of access to information provisions and developments from applicable international and regional environmental and human rights frameworks, and a critical analysis of the key developments and implementation challenges under the access to information regime in South Africa.

This research is based on the fundamental understanding of access to environmental information in its broadest terms, meaning the surroundings within which humans exist, and on which a society depends, made up of the land, water and atmosphere of the earth, micro-organisms, plant, and animal life, and the conditions that influence human health and well-being. Considering the far-reaching environmental implications of South Africa's JET through climate-resilient development, information and knowledge relevant to the various JET processes that are either planned, or underway, typically fall within this all-encompassing definition of environmental information. Therefore, **public access to this category of information through proactive publication and maximum disclosure by information holders should be recognised as a prerequisite for the just imperative that forms part of the JET through climate-resilient development under the Presidential Climate Commission's proposed model for inclusive and collective decisionmaking**.

In demonstrating this overriding principle, the **first part** of this report describes international binding and non-binding instruments promoting general access to information rights and duties and consolidates best practice guidelines identified by special procedures of the United Nations and the African Union. It also focuses on public access to environmental information, specifically, highlighting best practice guidelines developed by the United Nation's Environment Programme, some of which are binding procedural obligations in international treaties regulating climate change and children's rights. These intersectional issues are reviewed through advisory reports published by the United Nation's Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment. In addition, expert actors operating within the United Nations and African Union systems promote the free flow of environmental information and confirm that access to information and effective participation, as basic human rights, are vital for the realisation of the universal right to a clean, healthy, and sustainable environment, in addition to other human rights that depend on the preservation of the environment for present and future generations. This analysis provides the basis for the following best practices and conclusions, among others:

- **The widespread recognition of the right of access to information reflects its importance as a safeguard for principles of international human rights law**. The respect, protection, and fulfilment of this right is recognised as being indispensable for the development of the human person and nurturing democratic societies.
- As demonstrated by several countries and regions across the world, **environmental**

information should be treated as special category of information. This is considered as an absolute value, as well as in the role it plays in meaningful participation and contributing to public debate on a wide range of issues, including climate change.

- States should **encourage and facilitate the proactive publication and maximum disclosure of information in the public interest**. States have a positive obligation to put information in the public domain that is necessary to comply with international human rights law and to address the needs of specific groups that are more vulnerable to environmental harm. Analysis shows that the more environmental information there is in the public sphere using modern technologies, like electronic information systems, the less need there is for specific information requests.
- Building the capacity of public authorities is essential for promoting compliance with the right of access to information. Perhaps the biggest obstacle to access is the lack of understanding of public authorities and a poor attitude towards cooperation with the public or respect for basic rights. **Public authorities can fall under the phenomenon of regulatory capture in which they come under the influence of the regulated community and become more responsive to those in positions of power and influence**, while discounting the interests of the public.

In the context of international norms and standards and the central role of access to information for the promotion and protection of South Africa's constitutional democracy, the **second part** of this research provides an overview of South Africa's current access to information law, the Promotion of Access to Information Act 2 of 2000 ("PAIA"), and an analysis of trends and challenges in its implementation. This is largely based on annual reports from the South African Human Rights Commission, as the outgoing mandate holder for monitoring the fulfilment of access to information rights in South Africa. This mandate has subsequently been transferred to the Information Regulator of South Africa. **Seven case studies are also provided to demonstrate the experiences of various information requestors in support of the need for the specific reforms called for by the South African Human Right's Commission over the last decade**.

The South African Human Right's Commission's annual assessments identify systematic challenges in the implementation of PAIA and that non-compliance remains endemic. Based on its general findings and conclusions, the South African Human Rights Commission has reiterated that although PAIA itself is a comprehensive piece of legislation that provides for access to information held by both public and private bodies, members of the public continue to struggle to access information. Among other factors, this is because PAIA has not been amended to keep up with today's information age, as well as a lack of political will to understand and implement this regime. Through the selected case studies provided, this report delves into some of the specific implementation challenges and calls for legislative and policy reform, which offer constructive principles for access to information in the JET context.

One of the key observations that is drawn out from this critical analysis is that, in general, the need for an access to information request in terms of PAIA should be the last resort, not the default position of information holders. This is especially so where information and records are capable of storage, access, and dissemination through electronic platforms. As the various case studies show, once a requestor is directed to rely on PAIA, its strictures can in many instances undermine swift, inexpensive, and effortless access to information, contrary to its Preamble and objects. It is also evident that it is not uncommon for both public and private information holders to use the provisions in PAIA to obstruct access to records that should be disclosed without resistance.

In **conclusion**, South Africa's PAIA regime and the intertwined transitions making up its JET through climate-resilient development have, respectively, arrived at crucially important junctures that will determine the degree to which each system is enabled to ensure justice

and serve the public interest. This defining JET phase of the just transition in South Africa presents an opportunity for holders of the categories of JET information and knowledge to implement the following fundamental information governance principles and initiatives in the renewed spirit of fostering a culture of transparency and accountability:

- **A JET that embraces environmental democracy**, and access to information as a fundamental right guaranteed by section 32 of the Constitution and relevant international and foreign law instruments.
- As a special category of information, **there is an inherent public interest in the information held by the Presidential Climate Commission that drives the JET, information held by other actors involved in implementing the JET, and information held by actors that enables or hinders the JET**. Public access to JET information is therefore important as an absolute value, as well as in the role it plays in meaningful participation and contributing to public debate on a wide range of current issues in the JET context.
- **Automatic access to JET information – including through proactive publication – should be considered an essential governance practice for public and private actors directly and indirectly involved in JET processes**. A proactive environmental information policy that regularly compiles, updates, and disseminates information may include decisions, authorisations, plans, agreements, compliance and expenditure reports, and studies that inform decisions and plans. Emitters should be required to publicly disclose their emission data, emission reduction plans, climate vulnerability, and the risk of stranded assets.
- The realisation of a JET through climate-resilient development will depend, among other key factors, on **overcoming regulatory capture where public authorities are more responsive to the regulated community and those in positions of power, while discounting access to information needs of the public**. In the course of modernising access to information governance and improving corporate transparency in the JET context, the general functions, powers, and resources of the Information Regulator should be considered.

On the basis that the proactive publication and dissemination of relevant JET information and knowledge through accessible and appropriate platforms is an essential part of the just imperative at the centre of the JET through climate-resilient development, **the next phase of this exploratory research will scope and collate the electronic sources of information and knowledge that currently exist to serve transition-affected communities**. These sources will be conveyed through a publicly accessible website, which will include user-friendly notes and a description of pending information requests. This process will also identify key JET information and knowledge gaps that transition-affected communities need to vindicate their rights and advance their priorities.

ENDS.

1. INTRODUCTION

1. South Africa's Presidential Climate Commission ("PCC" or the "Commission"),[1] tasked with facilitating a just and equitable transition towards a low-carbon and climate-resilient economy, adopted the Just Transition Framework ("Framework Report") in May 2022.[2] In general terms, **a just transition involves a vision-led, unifying, and place-based set of principles, processes, and practices that build economic and political power to shift from an extractive economy to a regenerative one**.[3]

2. Building on research, policies, stakeholder consultations, and international best practice guidelines, the Framework Report sets out a shared vision for South Africa's broad and transformative just transition that aims to achieve a quality life for all South Africans. This is in the context of fostering climate-resilience and reaching net-zero greenhouse gas ("GHG") emissions by 2050.[4] The implementation of the Framework Report through various plans and mechanisms seeks to benefit all social partners, across all sectors. It is envisaged that social partners in South Africa will need to design their own policies and programmes in line with their specific conditions, responsibilities, and realms of influence, based on the vision, principles, and interventions proposed in the Framework Report.[5]

3. Rooted in South Africa's Constitution, there are three fundamental principles described in the Framework Report that will underpin the just transition toward a low-carbon and climate-resilient society in South Africa – distributive justice, restorative justice, and procedural justice.[6] Importantly, the Framework Report also cites the set of binding environmental management principles that apply to the actions of all organs of state that may significantly affect the environment, listed in section 2 of the National Environmental Management Act[7] ("NEMA"). This legal provision domesticates a body of principles recognised in international environmental and human rights law instruments, related to access to information, participatory processes, and open democracy, all with a bearing on both renewable and non-renewable resources.

4. Complementary implementation principles promoted in the Framework Report, in the spirit of collective action, include a shared commitment towards fostering transparency, openness, impartiality and consensus, as well as finding ways to better integrate children, the youth, and women into policymaking for the just transition.[8]

5. The democratic principles that are reaffirmed in the Framework Report are in stark contrast to the system of government in South Africa before 27 April 1994, which instilled a secretive and unresponsive culture in public and private bodies across all sectors. This culture often led to egregious abuses of power and resultant human rights violations. Despite the access to information rights guaranteed in section 32 of the Constitution and the Promotion of Access to Information Act[9] ("PAIA") which was enacted to give effect to these rights and help redress the injustices of this past system, it is evident in many instances that this legislative regime has still not fostered the overriding culture of transparency and accountability promised in its Preamble.

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1 The PCC was formed by President Cyril Ramaphosa and Cabinet in September 2020. The commissioners were appointed in December 2020 to support the delivery of a just transition in South Africa. The PCC comprises representatives from government, business, labour, civil society and research and academic institutions. Further information is available here.

2 Presidential Climate Commission *A Framework for a Just Transition in South Africa* (June 2022) ("Framework Report"). (Available here.)

3 See the broad definition adopted by the Climate Justice Alliance. (Available here.)

4 Framework Report above n 2 at page 7.

5 *Id* at page 5.

6 See the definitions for each principle *id* at pages 8-9.

7 107 of 1998.

8 Framework Report above n 2 at page 23.

9 2 of 2000.

6. **Entering this new era of a just and equitable transition toward a low-carbon and climateresilient society provides an opportunity – if not a calling – to re-examine and consider ways to potentially reset the governance culture and practices surrounding the proactive publication, accessibility, and dissemination of relevant information, starting with South Africa's just energy transition ("JET")**. This research, the first of three outputs,[10] explores this opportunity with the objective of enhancing access to JETrelated information and knowledge that supports transition-affected communities and stakeholders to defend their rights and advance their priorities.

7. This is based on the rationale that public access to timely and accurate information, particularly sources of relevant information for the management and mitigation of environmental and social impacts in the face of climate change, is central to achieving a JET and a widescale just transition in South Africa. Practically, this research, at the intersection of access to information rights and the JET, seeks to support the PCC's ongoing activities toward building a "new model for inclusive and collective decision-making, incorporating the individuals, workers, and communities that are most impacted by the transition".[11] The PCC's work programme, outlined in section 2, is also the primary reason behind the decision to narrow the scope of this research. The PCC will continue to prioritise elements of the energy transition during the 2023/24 period, along with enhancing South Africa's climate change resilience through the implementation of the National Climate Change Adaptation Strategy.[12]

8. Against this backdrop, this research focuses on:

    8.1. Detailing applicable international law and standards, developments, and best practice guidance that support the flow of JET-related information and knowledge to the public, and challenges identified in the implementation of the PAIA regime. In doing so, it asks: **what should South Africa's JET mean for the proactive publication and maximum disclosure of relevant information held by public and private bodies?**

    8.2. Establishing that the wide and continuous dissemination of relevant information and knowledge through publicly-accessible platforms that are sensitive to diverse social groups, is an essential enabler for an equitable, coherent, and coordinated JET, and determining what electronic sources of information and knowledge currently exist to serve vulnerable communities dependent on the coal-value chain that is "transitioning out", as well as communities dependent on the "transitioning in" of a new renewable energy economy.[13] As part of this enquiry, this research asks: **what are the key JET information and knowledge gaps for transition-affected communities?**

    8.3. Analysing the PAIA regime in the JET context and the identified information and knowledge gaps, including the potential measures and actions that are available to unlock categories of information and knowledge that will advance the JET programme in South Africa. **This final enquiry asks: how can an overriding culture of transparency and accountability in public and private bodies be fostered?**

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10 See section 5 of this report.
11 The Presidential Climate Commission *Second Annual Review* (June 2022) ("Second Annual Review"). (Accessible here.)
12 *Id* at page 21.
13 This research adopts the terms "transitioning out" and "transitioning in" introduced in a report published by Intellidex and commissioned by The African Climate Commission. See Intellidex *Financing South Africa's Just Energy Transition* (November 2022). (Accessible here.)

Analysis of international best practice and South Africa's access to information (ATI) regime

This report is the first of three outputs that will be published through this exploratory research. Outputs 2 and 3 are described in section 5. This initial report provides the following foundational information to support transition affected communities and civil society organisations that seek JET information and knowledge:

1. An overview of the current status of the JET process in South Africa and forthcoming activities under the PCC work programme;
2. A review of the access to information provisions and developments from applicable international and regional environmental and human rights frameworks, including treaties, resolutions, special procedure mechanism reports, soft-law instruments, and comparative case law; and
3. An analysis of the key developments under the PAIA regime in South Africa toward automatic access to information, together with a summary of the implementation challenges and calls for reform that have been identified by civil society actors and mandate holders to modernise the PAIA regime, some of which are illustrated through a selection of case studies.

Information note 1: Analysis of international best practice and South Africa's access to information (ATI) regime

Photo: Daylin Paul

2. SOUTH AFRICA'S JUST TRANSITION TO A CLIMATE-RESILIENT SOCIETY

9. In October 2022, the World Bank published a Country Climate and Development Report ("CCD Report") for South Africa.[14] This CCD Report was produced in close collaboration with the PCC and other stakeholders in the public and private sectors, academia, organised labour, and civil society. Notably, the Framework Report adopted by the South African government in August 2022 is recognised in the CCD Report.[15] In the report, the World Bank proposes that South Africa "incorporates three interconnected transitions in its development paradigm to balance development goals with growing climate risks".[16] These simultaneous transitions are described as:[17]

    9.1. **low-carbon transition from coal as the main source of energy to renewable energy sources** as the cheapest and most immediate solution to increase electricity supply and to reduce the strain on existing generation capacity;

    9.2. **A resilient transition to adapt to climate change** given that South Africa's vulnerability to climate harms undermines the country's ability to achieve its longterm development goals; and

    9.3. **A just transition to protect poor and vulnerable people** by reconciling development and climate goals while addressing inequality and racial and spatial exclusion.

10. The CCD Report concludes with the presentation of five priority policy packages to start implementing these interconnected transitions over the short-term and medium-term. These are:

    10.1. The acceleration of the clean energy transition to end load-shedding and reduce emissions;

    10.2. Managing the shift away from a coal-dependent economy by renewing the social compact;

    10.3. Coordinating investments and policies to build resilience against water scarcity and extreme weather events in the most vulnerable areas;

    10.4. Becoming the regional catalyst for climate innovation and financing; and

    10.5. Utilising local climate change ambitions to mobilise external resources.

11. According to the PCC website, read together with its two annual reviews to date, its priority actions align with the CCD Report's three interconnected transitions and its five priority policy packages. The PCC has structured its work into eight areas, namely, the Just Transition Framework; Just Energy Transition; Climate Finance; Mitigation; Adaptation; Communications and Outreach; Just Energy Transition Investment Plan; and Monitoring, Evaluation and Learning. In terms of communications and outreach, the PCC's quarterly meetings, dialogues, colloquia, and other stakeholder events are broadcast live across its website and social media platforms.[18]

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14 World Bank Group *Country Climate and Development Report – South Africa* (October 2022) ("CCD Report"). (Accessible here.)
15 *Id* at page 1. The World Bank and the PCC hosted a webinar on 1 November 2022 to launch the CCD Report.
16 *Id*.
17 *Id*.
18 PCC *Second Annual Review Report for the period 1 April 2022 – 31 March 2023 Report* at page 11.

2.1 Presidential Climate Commission work programme (2023/24)

12. In its Second Annual Review Report for the period 1 April 2022 – 31 March 2023 ("review period"), the PCC reflects on its key activities, including finalising the transition framework to guide a just and equitable transition. Drawing from the Second Annual Review Report – under the theme of "A Decisive Year: The Presidential Climate Commission in Action" – these current priority actions are further summarised in the following sub-sections.

2.1.1 Building a social compact to support a just transition

13. During 2022, the PCC hosted a series of energy dialogues to address issues in the contested area of electricity planning in South Africa. The PCC concluded the following through the course of the energy dialogues:[19]

    13.1. The energy climate transition will involve **deep systematic change** in our energy governance, broader economy, and society, and accordingly must be supported by a range of policies and actions;

    13.2. Investments in the electricity sector must **focus on renewable energy, storage, and peaking support**, with significant investment in transmission and distribution infrastructure;

    13.3. Sufficient resources are essential to support the energy transition, which includes public and private finance from domestic and international sources; including through the **Just Energy Transition Investment Plan**;

    13.4. The work at Komati Power Station is starting to **examine what the just energy transition could look like at a coal-fired power plant that is transitioning out**;

    13.5. A just transition requires multiple stakeholders to come together to **develop new economies in transition-affected areas**, such a Mpumalanga; and

    13.6. As an overarching principle of engagement, **open and transparent discourse**, based on evidence and research, is essential for building trust and reaching consensus. Solutions must have the just transition imperative at their core.

2.1.2 Defining a more sustainable electricity mix

14. During the review period, the PCC commenced with analytical work on a sustainable electricity mix that is both compatible with South Africa's climate change mitigation commitments and improves energy security. This is clearly a highly technical area of work, which will pose challenges for communication and disseminating information in simple terms and diverse languages. For now, some of the recommendations highlighted at this stage are that:[20]

    14.1. The updated Integrated Resource Plan[21] (South Africa's national electricity plan) should include a short-term spatial plan that maximises grid usage, **developed in a transparent manner**, that provides realistic information to the public about load-shedding.

19 *Id* at pages 11-2.
20 Second Annual Review Report above n 18 at pages 13-4.
21 Department of Energy *Integrated Resource Plan* (2023). (Accessible here.)

14.2. **Electricity planning should be guided by least cost systems that are sustainable and secure**. The PCC's specific recommendations for the updated Integrated Resource Plan, includes the provision of 50 to 60 gigawatts ("GW") of variable renewable energy by 2030.

14.3. **Jobs should be at the forefront of electricity planning in the country**. While jobs will be lost in the coal value chain, many jobs will be created in alternative energy value chains.

14.4. The government should press on with **reforming governance arrangements** in the electricity sector.

14.5. JET must be **accelerated with economic diversification** efforts in regions in transition.

2.1.3 Enhancing climate-resilience

15. The Second Annual Review emphasises the severe consequences of extreme weather systems in South Africa, with reference to the floods and landslides across KwaZulu-Natal and the Eastern Cape, along with prolonged droughts across parts of South Africa. Events that continue to impact the poorest and most vulnerable members of society and demonstrate the wide-scale damage caused by climate change-induced events.[22]

16. The PCC is investigating solutions to develop South Africa's resilience in response to climate change, including:[23]

16.1. Strengthening climate governance and community-resilience through **awareness and improved access to resources**;

16.2. **Adopting climate-sensitive approaches** to infrastructural investment, support, and planning; and

16.3. **Improving responsiveness** during and immediately after climate change disasters.

2.1.4. Mobilising finance towards a just transition

17. Following the release of South Africa's Just Energy Transition Investment Plan[24] ("JET-IP"), the PCC has advanced its finance mobilisation activities, including the following:

17.1. Developing a project to map climate finance flows through a State of Climate Finance Report, to be produced biennially for public dissemination and consideration; and

17.2. Developing a Just Transition Financing Mechanism to serve as a policy-aligned national platform to scale up and finance the just transition. This is in addition to the preparation of recommendations to improve financial flows to drive the just transition.

22 Second Annual Review Report above n 18 at page 15.
23 *Id* at pages 15-6.
24 PCC *South Africa's Just Energy Transition Investment Plan* (2023-2027) ("JET-IP"). (Accessible here.)

2.2 Access to JET information and knowledge

18. It is confirmed in the Second Annual Review that the energy transition will continue to be central to the PCC's work programme during the 2023/2024 period, as the focal point for the intertwined transitions described in the CCD Report. Among other objectives, this will involve the development of an accelerated coal-fired power station decommissioning schedule, together with targeted financing mechanisms, an electricity transition plan, embedding climate and social resilience through the implementation of the National Climate Change Adaptation Strategy[25] and climate-resilient development,[26] the creation of employment and skills development to equip communities for the future, and tracking the flow of climate finance towards just transition objectives.[27]

19. The priority areas and initiatives outlined in the PCC work programme are the result of its ongoing consultations and information-sharing platforms involving a variety of stakeholders, particularly in relation to the JET-IP referred to above. These consultation outcomes also informed the preparation of the South Africa's JET Implementation Plan (2023 – 2027) subsequently published in November 2023 ("JET Implementation Plan").[28] Focused on nine "portfolios", the JET Implementation Plan provides a roadmap based on short-and-medium-term actions to enable South Africa's decarbonisation commitments in a manner that will deliver just outcomes for transition-affected communities, whilst ensuring "inclusive economic growth, energy security, and employment".[29] It also outlines multi-stakeholder governance and institutional arrangements to steer the JET Implementation Plan and oversee the allocation, monitoring, and evaluation of financial flows.[30]

20. The JET Implementation Plan clearly serves as one of key organisational instruments for the coherent and transparent investment of JET resources toward the realisation of the vision in the Framework Report. At this stage, we go no further than introducing the JET Implementation Plan for the purposes of guiding the initial categorisation of JET information and knowledge; however, we intend to further engage with its content and state of implementation during the next phases of this exploratory research.

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25 Department of Forestry, Fisheries, and the Environment *National Climate Change Adaptation Strategy* (August 2000). (Accessible here.)
26 Climate-resilient development involves development trajectories "stretching out into multiple possible futures, made up of sequences of interventions to create work opportunities, build and maintain infrastructure and conserve ecosystems that reduce inequality, climate impacts and greenhouse gas emissions proactively as conditions change". The PCC commissioned technical research into putting climate-resilient development pathways into practice in South Africa. These technical reports were launched in November 2022.
27 Second Annual Review Report above n 18 at pages 21-2.
28 The Presidency of the Republic of South Africa *Just Energy Transition Implementation Plan* (November 2023) ("JET Implementation Plan"). (Accessible here.)
29 *Id* at pages 28-9.
30 *Id* at pages 54-7.

General categories of JET information and knowledge

It is proposed that the initial categorisation of JET information and knowledge aligns with the priority actions in the PCC work programme for the 2023/2024 period, cognisant of the portfolios under the JET Implementation Plan. This is not intended to unnecessarily restrict the sources of information and knowledge that could potentially fall within the JET realm, and in time, the broader just transition, but it provides a useful lens for the progression of this work. This will include the collation of existing digital resources that are publicly accessible. Considering the cross-cutting nature of the PCC's work programme and the JET Implementation Plan, the general sub-categories of JET information and knowledge are understood to be the following:

1. Information and knowledge that supports the **low-carbon transition from coal to renewable energy sources**, while **protecting the rights and needs of poor and vulnerable communities**;
2. Information and knowledge that supports South Africa's resilience in response to climate change; and
3. Information and knowledge that **monitors and evaluates financial flows** toward achieving South Africa's JET.

This working categorisation combines the PCC's sustainable electricity mix and social compact focus areas as sub-category (1), and it recognises that the achievement of these priority actions is largely underpinned by not only the mobilisation of finance, but also ensuring the rational and transparent allocation of available funds, as a self-standing sub-category (3). Throughout this report, we will collectively refer to this body of information and knowledge as that which is relevant to the "**JET through climate-resilient development**". Within this body of information and knowledge that is relevant to the JET through climate-resilient development, the PCC work programme and JET Implementation Plan also reveal a minimum of three general sources of information and knowledge in the public interest:

- **Information and knowledge held by governance structures that drive the JET through climate-resilient development:** This entails the numerous reports, assessments, plans, memorandums, registers, and databases – among other records – commissioned and maintained by key governance structures described in the JET Implementation Plan, including the PCC Secretariat. Given the mandate and public nature of these institutional bodies, it is essential that they regularly communicate planning and implementation activities and proactively publish all related documentation as widely as possible, with the assistance of civil society organisations and government departments, where applicable.
- **Information and knowledge held by other actors directly involved in implementing the JET through climate-resilient development**: The JET governance structures cooperate with several actors that are developing and gradually implementing plans, studies, and strategies; alternatively, they are contributing financially to South Africa's JET through climate-resilient development. Examples include the International Partner's Group, the National Energy Crisis Committee, Eskom's Just Transition Office working toward Eskom's vision of net-zero carbon emissions by 2050, and the Project Management Unit that will implement South Africa's Renewable Energy Masterplan. It is also fundamentally important that these influential role-players and forums practice openness and transparency through the communication of regular progress updates and the proactive publication of all related documentation.

- **Information and knowledge held by government and private bodies that enables or hinders the JET through climate-resilient development**: The JET Implementation Plan's broader ecosystem of stakeholders includes government departments, state-owned entities and statutory bodies, representatives of private business, organised labour, academia, and civil society. In terms of applicable policies and legislative powers, national departments are in possession of various records and databases, including certification registers, licences, authorisations, rights, permits, applications, compliance reports, and technical advisory reports that have a bearing on the JET through climate-resilient development. Private businesses and state-owned entities that operate – or that are applying for authorisation to operate – regulated activities, trigger specific legal obligations. These entities are also in possession of various management and compliance records that have a bearing on JET processes, and in which there is a clear public interest considering the environmental and social implications.

In accordance with the Framework Report principles highlighted above, public access to these records through proactive publication and maximum disclosure by information holders ought to be recognised as a prerequisite for the just imperative that forms part of the JET through climate-resilient development, under the PCC's proposed model for inclusive and collective decision-making. It is the availability and accessibility of these JET information and knowledge sources that this research explores.

Information note 2: General categories of JET information and knowledge

21. Interestingly, and in returning to the World Bank's CCP Report, the disclosure of information, improving information systems, and increasing participatory mechanisms for communities are notable themes throughout the CCD Report's recommendations. This starts with further analytical work related to climate change and development and that "[t]he climate agenda could become an opportunity to redress historical damages against individuals, communities, and the environment, in line with the [Framework Report] adopted by the government."[31]

22. As part of the analysis of ways in which the intersection of access to information and a JET through climate resilient development could redress historical damages – see restorative justice above – along with giving effect to distributive justice and procedural justice moving forward, the objective of the following section is to inform, or remind, stakeholders of the applicable international context surrounding the proactive publication and maximum disclosure of relevant information in the public interest.

Photo: Daylin Paul

31 CCD Report at above n 14 at page 2.

3. INTERNATIONAL NORMS AND STANDARDS: ACCESS TO INFORMATION PROVISIONS AND BEST PRACTICE GUIDELINES

23. Several international human rights instruments – in the form of binding treaties and voluntary standards – explicitly provide for the right of access to information, including instruments at the intersection of environmental protection and development.

24. The following sections provide an overview of international binding and non-binding instruments promoting access to information rights and duties, in general terms, and consolidate best practice guidelines identified by special procedure mechanisms to the United Nations ("UN") and the African Union ("AU"). They then turn to public access to environmental information, specifically, highlighting best practice guidelines developed by the United Nation's Environment Programme ("UNEP"), some of which are binding procedural obligations in international treaties regulating climate change and children's rights. These intersectional issues are reviewed through advisory reports published by the UN's Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment. These various sources contribute to the basis for the proactive publication and maximum disclosure of environmental information as a special category of information in the public interest.

3.1 General access to information provisions in international law

25. The founding international human rights instrument that makes provision for access to information is the UN Human Rights Declaration ("Human Rights Declaration") adopted by the UN General Assembly in 1948.[32] Although it is a soft law instrument – meaning that it is not legally binding – its principles have been adopted as legally binding standards in international law, introduced below. In terms of access to information, article 19 of the Human Rights Declaration states that:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

26. Recognising that developmental policy should make the human being the main participant and beneficiary of its objectives, the UN General Assembly adopted the United Nation's Declaration on the Right to Development ("Right to Development Declaration") in 1986.[33] Although it does not include an explicit reference to access to information, article 1 does specify that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised. Article 8 goes to require that:

> "1. States should undertake, at the national level, all necessary measures for the realisation of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment, and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.
>
> 2. States should encourage popular participation in all spheres as an important factor in development and in the full realisation of all human rights."

32 United Nations Human Rights Declaration, 10 December 1948. (Accessible here.)
33 United Nations Declaration on the Right to Development, 4 December 1986. (Accessible here.)

27. These provisions are important given the general acceptance that climate change not only poses a threat to individual and societal development through the realisation of a range of interdependent human rights, but it also threatens to erode developmental progress, especially in more vulnerable parts of the world.[34] It is also a reasonable interpretation to understand that the right to seek, receive, and impart information and ideas, is both a necessary measure and essential enabler to encourage popular participation toward the realisation of the right to development.

28. Shifting to legally binding international human rights law instruments, the International Covenant on Civil and Political Rights ("ICCPR") was adopted by the UN General Assembly in 1966, and entered into force in 1976.[35] South Africa is one of the 167 Members States that has ratified this instrument since its inception.[36] Article 19 of the ICCPR mirrors the Human Rights Declaration and guarantees that:

> "1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order, or of public health or morals".

29. Mindful that South Africa's JET not only involves environmental issues, but also various socio-economic issues with profound implications for peoples' livelihoods,[37] the ICCPR's sister Covenant, the International Covenant on Economic, Social, and Cultural Rights ("CESCR"),[38] is relevant. Article 12 provides that:

> "1. The States Parties to the present Covenant recognise **the right of everyone to the enjoyment of the highest attainable standard of physical and mental health**.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
>
> (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
>
> (b) The improvement of all aspects of environmental and industrial hygiene;
>
> (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; and
>
> (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness". (Own emphasis.)

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34 For example, see the relationship between climate change impacts and the accomplishment of the Sustainable Development Goals according to an annual review report prepared by the United Nations Department of Economic and Social Affairs. (Accessible here.)
35 International Covenant on Civil and Political Rights, 16 December 1966. (Accessible here.)
36 Ratified on 10 December 1998. See South Africa's treaty ratification status here.
37 Framework Report above n 2 at page 5.
38 International Covenant on Economic, Social and Cultural Rights, 16 December 1966. (Accessible here). The CESCR entered into force in 1976. South Africa ratified the CESCR on 12 January 2015.

30. Like the Right to Development Declaration above, a reasonable interpretation of article 12 of the CESCR is that the steps taken by Member States would include the right to seek, receive and impart information on relevant studies, plans, processes, and regulated activities, which may threaten the fulfilment or enjoyment of the highest attainable standard of physical, mental, and environmental health.

3.1.1 UN High Commissioner for Human Rights

31. Under the thematic area of freedom of opinion and expression, the UN High Commissioner for Human Rights submitted an advisory report to the UN Human Rights Council in January 2022 ("Good Practice Report").[39] This Good Practice Report presents established practices for developing national normative frameworks that foster access to information held by public entities, informed by various international and regional access to information instruments, reports from special procedures, model laws, and comparative case law.

32. Section II of the Good Practice Report outlines the international human rights instruments above, in addition to other instructive access to information laws, as the basis for a general set of remarks and principles confirming the vital importance of the right of access to information in democratic states.[40] The UN High Commissioner for Human Rights reaffirmed the following:

    32.1. Obligations to give effect to the right of access to information apply to all branches of government. This may include private entities carrying out public functions. The right of access to information applies irrespective of the content of the information and the way in which it is stored.[41]

    32.2. "The widespread recognition of the right of access to information reflects its importance as a safeguard for principles of international human rights law . . . States should promote the principles of openness and transparency in all aspects of the decision-making processes".[42]

    32.3. Access to information is instrumental for the enjoyment of a range of other human rights, such as the right to health. By way of example, the Preamble to the Aarhus Convention is cited in the field of the environment information:

> "[I]mproved access to information and public participation in decisionmaking enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns. The same link has been recognised between access to information and sustainable development in the Sustainable Development Goals".[43]

33. Section III of the Good Practice Report provides critical observations and legally recognised practices, including features in progressive access to information laws, and measures to improve capacity-building. These are further promoted in the recommendations listed at the end of the Good Practice Report. Recognising that South Africa has already enacted access to information legislation that seeks to give effect to section 32 of the Constitution, the following textbox highlights selected extracts from the Good Practice Report for the purposes of this research topic.

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39 Report of the Office of the United Nations High Commissioner for Human Rights *Freedom of Expression* UN Doc A/HRC/49/38 (2022) ("Good Practice Report"). (Accessible here.)

40 Another helpful summary of the international and regional framework instruments that generally promote the right of access to information is provided by civil society organisation, Article 19. (Available here.)

41 Good Practice Report above n 39 at para 4.

42 *Id* at para 10.

43 *Id* at para 13.

Good practices to promote the flow of information

- **Principle of maximum disclosure**: In general, all information held by public bodies should be subject to disclosure and this presumption may be overcome only in very limited circumstances.[44] The obligation to fulfil the right of access to information requires that information is recorded and preserved to facilitate public access.[45] **The use of digital technologies to archive information represents a good practice facilitating access to official documents**.[46] This allows entities to "disclose relevant information to the public proactively and on a timely basis to ensure consistent and usable updates, especially of websites".[47]
- **Proactive publication**: "**States have a positive obligation to put information in the public domain as may be necessary to comply with international human rights obligations, such as information required for the exercise of other human rights**".[48] (Own emphasis.) The Good Practice Report specifically cites the Declaration of Principles on Freedom of Expression and Access to Information in Africa, a soft law instrument that recommends such measures. See section 3.2 below summarising the African Union legal framework.
- **Narrow interpretation of restrictions**: Despite the existence of detailed best practice guidelines, the Good Practice Report found that implementation continues to lag in many respects. A concerning trend is the undue restrictions on the right of access to information, including reliance on overly broad or vaguely formulated national security grounds.[49] "**Where restrictions are necessary for a legitimate purpose, they must be proportionate to the interest protected**".[50] (Own emphasis.)
- **Request procedure**: "The UN Human Rights Committee has held that fees for requests for information should not be such as to constitute an unreasonable impediment to access to information; in some States, access to information is free of charge".[51] The procedure for making requests should be simple and readily understandable. **There should be no requirement for requestors to justify their requests for information or records.**[52]
- **Independent oversight**: A general theme across human rights instruments and mechanisms is that oversight functions must be based on the principles of independence and autonomy.[53] "**Oversight bodies must be granted the competencies and powers necessary to monitor compliance with access to information regulations** and must receive sufficient budgetary allocations to be able to conduct such monitoring effectively".[54] (Own emphasis.)

44 *Id* at para 20.
45 *Id* at para 22.
46 *Id*.
47 *Id*. States reported to use online databases include India, Norway, and Estonia.
48 *Id* at para 24.
49 *Id* at para 54.
50 *Id* at para 19.
51 *Id* at para 28.
52 *Id* at para 30.
53 *Id* at para 36.
54 *Id*.

- **Promoting access to information via the Internet**: The Human Rights Council has noted that the "**Internet provides the means for making information available to societies in ways that are unprecedented and for greatly facilitating searches and requests for information through the development of appropriate platforms**".[55] (Own emphasis.) However, it is acknowledged the major challenges that remain in this area, including the gender digital divide that undermines women's and girls' full enjoyment of human rights.[56]
- **Strengthening civil service**: "Building the capacity of public authorities is essential for promoting compliance with the right of access to information".[57] Among other practices, this includes **fostering a culture of openness and transparency within the public sector through political commitment and training**, and providing an enabling environment for individuals, civil society representatives, and journalists to exercise their information rights.[58] (Own emphasis.)
- **Strengthening civil society**: The Good Practice Report emphasises that the "**roles of journalists, media outlets, and human rights defenders are crucial to access to information**".[59] (Own emphasis.) States are encouraged to carry out awarenessraising and capacity-building campaigns focused on civil society, indigenous peoples, and local communities, especially related to the availability and relevance of information online.[60]

Information note 3: Good practices to promote the flow of information

34. Two of the prominent regional instruments that the Good Practice Report refers to in multiple instances throughout its findings and recommendations are the Declaration of Principles of Freedom of Expression and Access to Information in Africa, and the Model Law on Access to Information for Africa, which are referred to below.[61] At this stage, it is not necessary to present these soft law instruments in detail; however, given South African's regional obligations it is important to introduce the African Union context as it relates to access to information rights.

55 *Id* at paras 37-8.
56 *Id*.
57 *Id* at para 41.
58 *Id*. Para 43 *id* provides various examples of training initiatives.
59 *Id* at para 44.
60 *Id* at para 45.
61 For example, see footnotes 22, 27, 43 and 76 *id*.

3.2 African Union legal framework on information rights

35. Article 9 of the African Charter on Human and Peoples' Rights[62] (the "African Charter") guarantees the right to receive information and the right to expression and dissemination of opinions, within the law. Given the intersectional focus of this research, it should also be noted that article 22 provides the right to economic, social, and cultural development with due regard to the common heritage of mankind, and article 24 provides the right to a general satisfactory environment favourable to one's development.

36. The African Commission on Human and Peoples' Rights ("African Commission") is – among other duties – mandated to promote, protect, and interpret the rights in the African Charter. Accordingly, the African Commission has had an active role in relation to two particularly important soft law instruments to guide State Parties, including South Africa, in the development and implementation of domestic laws that give effect to Article 9 of the African Charter.[63] These instruments are the Declaration of Principles of Freedom of Expression and Access to Information in Africa ("African ATI Declaration"),[64] and the Model Law on Access to Information for Africa ("African ATI Model Law").[65]

37. The African ATI Declaration was prepared by the Special Rapporteur on Freedom of Expression and Access to Information in Africa and adopted by the African Commission in 2019. The African ATI Model Law was developed by the African Commission and adopted in 2013. It is notable that the Special Rapporteur on Freedom of Expression and Access to Information in Africa, at the time of the adoption of the African ATI Model Law, was Advocate Pansy Tlakula, who currently serves as South Africa's Information Regulator. (See section 4.1 below.)

3.2.1 African ATI Declaration

38. The African ATI Declaration replaced the Declaration of Principles on Freedom of Expression in Africa, previously adopted by the African Commission in 2002. In response to key developments in the access to information and freedom of expression context, the African ATI Declaration consolidates both hard law and soft law standards drawn from African and international human rights instruments and standards, including the jurisprudence of African judicial bodies.[66] In effect it captures the regional position on current and aspirant access to information obligations, principles, and practices and therefore offers an instructive lens for this report.

39. The textbox below presents commitments and principles that are specific to the right of access to information, particularly those that strengthen or expand the findings and recommendations in the Good Practice Report.

62 African Charter on Human and Peoples' Rights, 27 June 1981. (Available here.)
63 South Africa ratified the African Charter in June 1994. See the ratification table here.
64 African Commission *Declaration of Principles of Freedom of Expression and Access to Information in Africa* (10 November 2019) ("African ATI Declaration"). (Accessible here.)
65 African Commission *Model Law on Access to Information for Africa* (13 February 2013) ("African ATI Model Law") (Available here.)
66 African ATI Declaration above n 64 at pages 3-4.

African ATI Declaration[67] overview

Preamble

- The fundamental importance of access to information as an individual human right, a cornerstone for democracy, and a means to ensure respect for other human rights;
- Article 9 of the African Charter, and access to information rights in other binding instruments, including the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, the African Youth Charter, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa;
- The African Model Law, the Universal Declaration of Human Rights, and the Covenant on Civil and Political Rights; and
- The free flow of information, greater respect for the right of access to information, and the role of **new digital technologies and open government data in fostering transparency, efficiency, and innovation**.

General principles

- **Principle 1:** Access to information is a fundamental right protected under the African Charter and the respect, protection, and fulfilment of **this right is indispensable for the free development of the human person**, and nurturing of democratic societies. State Parties to the African Charter shall create an enabling environment for the exercise of access to information.
- **Principle 4**: Where a conflict arises between any domestic and international human rights law, **the most favourable provision for the full exercise of the right of access to information shall prevail**.
- **Principle 5**: **The exercise of the right of access to information shall be protected from interference both online and offline**, and States shall interpret and implement the protection of these rights in this Declaration and other relevant international standards accordingly.
- **Principles 7 and 8**: **States shall take specific measures to address the needs of marginalised groups in a manner that guarantees the full enjoyment of their right of access to information**. This includes women, children, persons with disabilities, older persons, refugees, internally displaced persons, migrants, and ethnic, religious, sexual or gender minorities. The best interest of the child shall be a primary consideration.

67 See above n 64.

Specific principles

- **Principle 26**: Every person has the right to access information held by public bodies expeditiously and inexpensively. **Every person has the right to access information of private bodies that may assist in the exercise or protection of any right expeditiously and inexpensively.**
- **Principle 27**: **Access to information laws shall take precedence** over any other laws that prohibit or restrict the disclosure of information.
- **Principle 28**: The right of access to information shall be guided by the principle of maximum disclosure. **Access to information may only be limited by narrowly defined exemptions**, which shall be provided by law and shall comply strictly with international human rights law and standards.
- **Principle 29**: **Public bodies and relevant private bodies shall be required, even in the absence of a specific request, to proactively publish information of public interest**, including information about their decisions, budgets, expenditure, and other information relating to their activities. Proactive disclosure by relevant private bodies shall apply to activities for which public funds are utilised or public functions or services are performed. Information required to be proactively disclosed shall be disseminated through all available mediums, including digital technologies.
- **Principle 30:** Public bodies and private bodies shall **create, keep, organise, and maintain information** in a manner that facilitates the exercise of the right of access to information.
- **Principle 31**: Access to information shall be granted as expeditiously and inexpensively as possible. **No one shall be required to demonstrate a specific legal or personal interest in the information requested or to provide justification for a request**. No fees shall be payable other than the reasonable reproduction cost of the requested information. Any refusal to disclose information shall be provided timeously and in writing, and it shall be wellreasoned and premised on international law and standards.
- **Principle 33: Information may only be legitimately withheld where the harm to the interest protected under the relevant exemption demonstrably outweighs the public interest in disclosure of the information**. Where a portion of a document containing requested information is exempted from disclosure, the exempted portion shall be severed or redacted, and access granted to the remainder of the document.
- **Principle 34**: **An independent and impartial oversight mechanism shall be established by law to monitor, promote, and protect the right of access to information** and resolve disputes on access to information. Public bodies and relevant private bodies shall recognise decisions of the oversight mechanism as formally and legally binding in all matters relating to access to information.

Implementation

- **Principle 43:** States shall adopt legislative, administrative, judicial, and other measures to give effect to this Declaration and facilitate its dissemination. When States review or adopt legislation on access to information, they shall be further guided by the [African ATI Model Law]. (Own emphasis throughout.)

Information note 4: African ATI Declaration overview

3.3 Access to environmental information: Rio Declaration and Bali Guidelines

40. The Rio Declaration was adopted 1992 at the UN Conference on Environment and Development.[68] Referred to as the Earth Summit, this global conference brought together political leaders, diplomats, scientists, representatives of the media, and civil society organisations ("CSOs") from 179 countries to focus on the impact of human socio-economic activities on the environment.[69] Notably, the UN Framework Convention on Climate Change ("UNFCCC") and the UN Convention on Biological Diversity – both legally binding treaties – were opened for signature at this pivotal multilateral conference.[70] We return to the access to information obligations contained in the UNFCCC in **section 3.4.1** below.

41. The current context provides a timely moment to recall all 27 principles set out in the Rio Declaration, as not only South Africa, but the world, embraces this new just transition era and the need for climate-resilient development. Principle 10 in the Rio Declaration ("Rio Principle 10") is dedicated to access to information concerning the environment:

> "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, **each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes**. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." (Own emphasis.)

42. Rio Principle 10 promotes the respective roles of access to information, participation, and justice to achieve environmentally sustainable development. Its framework text has served as the origin for the development of national standards and laws for access to information in environmental matters; some commentators have described it as the instrument for environmental democracy.[71] The three pillars that make up Rio Principle 10 have been defined as:[72]

    42.1. **Information:** this enables members of the public to participate meaningfully in public affairs and to make informed decisions about their lives. Access to environmental information is important in its own right as an absolute value, in addition to the role it plays in facilitating and enabling meaningful participation.

    42.2. **Participation**: the public must realise its potential to take part in public affairs, while it also improves the outcomes of policy and decision-making by bringing information, analysis, and consideration to bear. Meaningful participation can improve the quality of decisions and the likelihood that decisions will be implemented with the support and participation of affected public.

    42.3. **Remedy and redress**: this entails the promotion of accountability and the rule of law. The achievement of sustainable development depends upon the judicious use of fair and impartial administrative and judicial mechanisms to establish enforceable norms. Access to justice ensures that standards related to the access to information and participation will be fostered and upheld in a fair, judicious, and effective manner.

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68 Report of the United Nations Conference on Environment and Development, Rio de Janeiro. UN Doc A/CONF.151/26/Rev.1 (Vol. I) (1993). (Available here.)
69 For further information on the Earth Summit, please refer to the UN website.
70 South Africa has ratified both Conventions. See South Africa's treaty ratification status here.
71 United Nations Environment Programme *Putting Rio Principle 10 Into Action - An Implementation Guide* (October 2015), page 12. (the "Implementation Guide") (Available here).
72 Same as above.

43. In 2010, UNEP's Governing Council unanimously adopted the Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the "Bali Guidelines").[73] A voluntary instrument, the Bali Guidelines assist countries in filling possible gaps in relevant national legislation to facilitate broad access to information.[74] The Bali Guidelines consist of 26 Guidelines divided across the three pillars in Rio Principle 10.

44. In an effort to further support countries in filling possible gaps and to promote the effective implementation of national legislation, UNEP went on to publish an Implementation Guide for the Bali Guidelines in 2015 (the "Implementation Guide").[75] The Implementation Guide was prepared with the assistance of an expert advisory group drawing from a range of sources, including national legislation, relevant international and regional legal instruments, jurisprudence, and academic literature.[76] The document provides analysis and best practice examples toward the effective implementation of each of the three pillars.

45. Importantly, the Implementation Guide does explain that while the Bali Guidelines are separated into three distinct sections, the user must—

> "take into account the interdependence of the Guidelines regardless of which component they relate to. The free flow of relevant information is critical to enabling the public to participate actively and effectively. The outcomes of public participation can build good practice in public administration that in turn promotes greater access to information and a better understanding of the importance of access to justice."

46. Considering the principles in the Framework Report[77] introduced at the beginning of this report, it is self-evident that all 26 Bali Guidelines are of relevance to South Africa's JET through climate-resilient development. However, given that the Implementation Guide is an extensive document, we are unable to analyse and present all the findings and recommendations within the scope of this research. In the following section, we highlight principles and illustrative examples under Guidelines 1-7 that are specific to access to information in environmental matters and that illustrate the recommendations in the Good Practice Report.[78]

3.3.1 Bali Guidelines 1-7: Access to environmental information

47. To set the stage for the following summary of Guidelines 1-7, it is necessary to consider the definition of environmental information in its broadest terms. The textbox below proposes working definitions for the "environment" and "environmental information", together with key principles promoting the free flow of environmental information.

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73 United Nations Environment Programme *Guidelines for the Development of National Legislation on Access to information, Public Participation and Access to Justice in Environmental Matters* (November 2011). (the "Bali Guidelines"). (Available here.)
74 Implementation Guide above n 71 page 6.
75 *Id.*
76 *Id* at page 7.
77 See above n 2.
78 See above n 39.

Defining environmental information

The definition of "environment" in NEMA – see the reference to NEMA's binding principles in the Framework Report[79] above – is the "surroundings within which humans exist and that are made up of the land, water and atmosphere of the earth, micro-organisms, plant, and animal life, and the physical and chemical conditions that influence human health and well-being".[80] Chile's environmental statute provides a comparative example of the wide definition of environmental information that is consistent with the all-encompassing character of the environment under NEMA:

> "Environmental information means any information held by the Public Administration on the state of elements of the environment, such as air and atmosphere, water, land, landscape, protected areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements; and factors, such as substances, energy, noise, radiation and residues, including radioactive waste, emissions, spills and other releases to the environment, affecting or likely to affect the elements of the environment".[81]

Considering the far-reaching environmental implications of South Africa's JET through climate-resilient development, a general understanding is that information and knowledge relevant to the various JET processes that are either planned, or underway, would typically fall within this broad definition of environmental information. In other words, **the provisions in the Bali Guidelines and the Implementation Guide focused on access to environmental information offer instructive value and ought to be considered in the South Africa's JET context**.

Overarching principles

The Implementation Guide provides general principles and observations based on modern-day practices promoting the flow of environmental information. The following text stand out in the Implementation Guide:[82]

- "It is increasingly recognised that public authorities need to have essential information at their disposal to be able to carry out their responsibilities . . . and that the public needs to have access to this information in a structured, cost-effective, and user-friendly way in order to make use of it".
- "The more environmental information there is in the public sphere, the less need there is for specific information requests. Thus, a proactive environmental information policy that regularly compiles and disseminates information in a user-friendly way may reduce administrative burdens and make it easier for public authorities to carry out their responsibilities. Making information available electronically can vastly increase capacities to disseminate information".
- "It is generally considered good practice today for private entities dealing with environmental information to put mechanisms in place for public information, consultation, and awareness. Private entities may even work in cooperation with[CSOs] that undertake a watchdog function towards polluters".

79 See above n 2.
80 See the definitions section in the National Environmental Management Act 107 of 1998. (Accessible here.)
81 Implementation Guide above n 71 at page 34. See, also, Chile's Basic Act on the Environment No. 20.417 from 2010.
82 Implementation Guide above n 71, see extracts from pages 23-5.

- "The Bali Guidelines draw upon the practice that has developed worldwide to define when it is proper to withhold certain information from disclosure. The general rule is that disclosure is the preferred option. When a legitimate [and recognised] interest is at stake, and where that interest can demonstrably be adversely affected, a public authority may be permitted under national law to restrict access to information".

Information note 5: Defining environmental information

48. With a reminder of the overall objective of this research – to enhance access to JET-related information that supports transition-affected communities and stakeholders to defend their rights and advance their priorities – the following subsections summarise selected findings and relevant best practice principles under Guidelines 1-7 in order to establish a basis for this objective.

Guideline 1: Effective and timely access to environmental information held by public authorities upon request without having to prove a legal or other interest.

49. Public authorities are finding it increasingly practical to place environmental information on the internet, including in open data formats to facilitate use. The Implementation Guide confirms that where information is requested, the request should not be rejected based on the absence of an interest in the information.[83]

50. Access to information is for everyone, regardless of citizenship or residency. In addition, the Implementation Guide notes that some States have implemented measures to protect the identity of information requesters by allowing for anonymous information requests.[84]

51. Access fees should not discourage requests and should only account for material costs and not administrative time or ancillary costs. **There may also be a waiver of costs for those who are unable to pay; alternatively, environmental information requests may have a special, less-costly regime because of the special interest in encouraging public involvement in finding solutions for environmental problems.** The Implementation Guide refers to Ireland's Freedom of Information Act 30 of 2014 as an example of requests for environmental information free from any charges, in accordance European law.[85]

52. Brazil's access to information law provides an example of using integrated systems to process requests for information overseen by the federal government. This includes environmental information. Use of the information system is free of charge, and it is designed to facilitate the exercise of citizens' constitutional right of access to public information.[86]

83 *Id* at pages 28-30.
84 *Id*.
85 *Id* at page 29. See, also, Ireland's Freedom of Information Act (available here).
86 *Id* at page 32.

Photo: Daylin Paul

Guideline 2: Environmental information in the public domain should include information about environmental quality, environmental impacts on health, legislation and policy, and advice about how to obtain information.

53. Guideline 2 highlights the need for public authorities to hold and to **actively disseminate specific categories of environmental information in the public interest**. Environmental information can consist of both processed information and raw data.[87]

54. Guideline 2 also refers to environmental impacts on health and factors that influence them, such as **substances, energy, noise, radiation, and activities or measures, including administrative measures, environmental agreements, policies and legislation, and cost-benefit or other economic analyses used in environmental decision-making**.[88]

55. The Implementation Guide emphasises that information provided by public authorities should not only be reliable, accurate and up to date, but should be available in different forms including **"**electronic systems, websites, community meetings and other traditional forms, and broadcast media including television, radio, and social media." International best practice also recognises that environmental information should be available in all languages in countries with multilingual communities.[89]

56. In terms of public awareness around information on pollution causing public health threats, the Implementation Guide refers to China's open, real time, online pollution platform. Among other information, this discloses the allocation of emission quotas and permits, environmental emergency plans, and information on companies that are violating standards or are culpable for major pollution accidents.[90]

87 *Id* at pages 33-4.
88 *Id* at page 35.
89 *Id* at page 36.
90 *Id* at page 37.

Guideline 3: States should clearly define in their law the specific grounds on which a request for environmental information can be refused. The grounds for refusal are to be interpreted narrowly, taking into account the public interest served by disclosure.

57. The Implementation Guide reaffirms that public authorities hold information on behalf of and in service to the public. Based on the value of the broadest possible access to information, refusals to provide requested information should be well-grounded and strictly limited.[91] **Laws should allow for the application of a public interest test that could override such legitimate interests in particular cases**.[92]

58. The principle of severability – or separation of information – also should be clearly stated in law to encourage the maximum amount of information to be disclosed. Only information that is strictly subject to the grounds for refusal may be redacted.[93]

59. The Implementation Guide confirms that international good practice has determined that it is insufficient for a legally protected interest to merely exist. **The interest must also be adversely affected. This involves an inquiry as to whether there will be any actual harm to the holder of the interest in the case of disclosure**.[94] The Implementation Guide refers to Article 4 of the European Union Directive on Public Access to Environmental Information as a comparative authority for grounds of refusal that require the subject to show that the disclosure of information would adversely affect their particular right or interest.[95] The Implementation Guide goes further:

> "[T]he finding of harm to a legally recognised interest does not end the inquiry, as the interest in the public disclosure of the information should be balanced against the harm to the holder of the interest. Access to information advocates have pointed to certain categories of the public interest which presumably would always override private interests in the information, such as information about violations of human rights, corruption, or crimes against humanity."[96]

60. The Implementation Guide cites the Aarhus Convention,[97] as an example of a regional instrument with a public interest override test to be applied to multiple provisions in the Convention. **In fact, the Aarhus Convention establishes an entire category of information that is subject to the public interest override and must be disclosed – information that relates to emissions to the environment**. "This is based on the principle that an emitter loses any proprietary interest over substances once they enter the environment and leave the area of the emitter's effective control".[98]

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91 *Id* at page 38.
92 *Id* at page 39. See, also, South Africa's Promotion of Access to Information Act, which is provided as an example of an exhaustive list of grounds that can justify non-disclosure.
93 *Id* at page 41.
94 *Id* at page 42.
95 European Parliament, Directive 2003/4/EC (28 January 2003). (Available here.)
96 Implementation Guide above n 71 at page 42.
97 The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25 June 1998 under the United Nations Economic Commission for Europe. Together with its Protocol on Pollutant Release and Transfer Registers, it protects every person's right to live in an environment adequate to his or her health and well-being. (Accessible here.)
98 Implementation Guide above n 71 at page 43. See, also, Article 4(4)(d) of the Aarhus Convention.

61. The Implementation Guide refers to the definition of emissions from the European Union's Integrated Emissions Directive 2010/ 75/EU, which is a "direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into the air, water, or land".[99] The case of *Stichting Greenpeace Nederland and PAN Europe* is also referred to, in which the European Court of Justice ruled that an institution is obliged to disclose documents relating to emissions into the environment, even if such disclosure is liable to undermine the protection of the commercial interests of a particular natural or legal person, including that person's intellectual property.[100]

Guideline 4: States should ensure that their competent public authorities regularly collect and update relevant environmental information, including information on environmental performance and compliance by operators of activities potentially affecting the environment. States should establish relevant systems to ensure an adequate flow of information about proposed and existing activities that may significantly affect the environment.

62. The Implementation Guide found that public authorities are increasingly meeting the obligation to **provide active environmental information through environmental information systems**. Environmental information systems serve broader purposes in terms of the full range of environmental responsibilities of public officials and enable the use of the information by the public.[101]

63. Establishing systems for information flow will help governments to ensure that public authorities possess and update relevant information. **This implies the establishment of reliable systems for collecting information and reliable systems for storing information, including through publicly accessible lists, registers, and files**.[102]

64. The Implementation Guide notes various examples of existing integrated environmental information systems from around the world, including:[103]

    64.1. Chile's National Environmental Information System, which hosts the administrative authorisations associated with activities that may have a significant effect on the environment.

    64.2. The United States Environmental Protection Agency's information tools, such as the AirNow website – providing the public with easy access to real-time air quality information,[104] and eGRID – an emissions and generation resource database for the environmental characteristics of almost all electric power generated in the United States.[105]

    64.3. 122 stationary and 3 mobile airmonitoring stations in Turkey. The data are disclosed in hourly average values and made instantly available through internet and mobile phone applications.

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99 *Id.*
100 *Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe) v The European Commission* No. T-545/11, paragraph 46. A case summary is available here.
101 Implementation Guide above n 71 at page 44.
102 *Id.* An indicative list of the kinds of information that could be included in environmental information systems: air & water (surface and groundwater) quality information; soil and land monitoring data; protected areas and biodiversity information, including forests; emissions from point sources; presence, handling, disposal and storage of wastes, toxics and hazardous substances; noise and radiation exposure; licenses and permits including planning decisions; enforcement and compliance data sets; and environmental impact assessments.
103 *Id* at pages 46-7.
104 Airnow can be accessed here.
105 eGrid can be accessed here.

Guideline 5: States should periodically prepare and disseminate at reasonable intervals up-to-date information on the state of the environment, including information on its quality and pressures on the environment.

65. Linked to Guideline 4, the Implementation Guide reaffirms that proactive publication promotes the flow of information without the necessity of handling requests for information.[106] **By making information available in detailed forms, research institutions and civil society can use the information in ways that vastly multiply the resource capacities of the authorities**. This will contribute to public debate on a wide range of social and environmental issues.[107]

Guideline 6: In the event of an imminent threat of harm to human health or the environment, States should ensure that all information that would enable the public to take measures to prevent such harm is disseminated immediately.

66. The Implementation Guide confirms that this requirement to disseminate information is **triggered by any imminent threat of harm to human health or the environment**. **This means that actual harm does not have to occur for the immediate dissemination of information to be needed**. The Implementation Guide does not draw a distinction between threats caused by human activities or by natural causes.[108]

67. An example provided in the Implementation Guide is the improvements to Bangladesh's early warning system in connection with floods. Bangladesh's Meteorological Department and Flood Forecasting and Warning Centre further developed its seasonal forecasting, flash flood early warning, extreme weather event forecasting, and storm surge modelling.[109]

68. In order to implement legislation related to Guideline 6, States should designate the public authorities responsible for the dissemination of information in particular circumstances and should require public authorities, especially local government, to develop emergency preparedness plans. **It is acknowledged that local authorities are best placed to distribute some types of information, including through various media such as radio, television, public warning systems, and the Internet**.[110]

Guideline 7: States should provide means for and encourage effective capacity-building, both among public authorities and the public, to facilitate effective access to environmental information.

69. The Guidelines recognise that **environmental education and awareness-raising are important foundations for the implementation of Rio Principle 10**.[111] Electronic information tools, such as user-friendly websites, are efficient means to assist the public to gain information on how to exercise their rights under national legislation implementing Rio Principle 10. As with other aspects under Rio Principle 10, governments may need

106 Implementation Guide above n 71 page 53.
107 *Id*.
108 *Id* at page 53.
109 *Id* at page 56.
110 *Id* at page 55.
111 *Id* at page 56.

to make special provisions for certain populations such as the indigenous, ethnic, or religious minorities. In this regard, the Implementation Guide refers to the network of centres established in different locations under the Aarhus Convention to support the implementation of its requirements and provide members of the public with practical resources to exercise their environmental rights under the Aarhus Convention. By providing a venue where members of the public can meet to discuss environmental concerns, the Aarhus Centres strengthen environmental governance.[112]

70. In terms of the implementation of access to information laws, the Implementation Guide concludes with a crucially important observation:

> "Perhaps the biggest obstacle to access is the lack of understanding of public authorities and a poor attitude towards cooperation with the public or respect for basic rights. **Public authorities can fall under the phenomenon of 'regulatory capture' in which they come under the influence of the regulated community and become more responsive to those in positions of power and influence, while automatically discounting the interests of the general public. They may even take on a protective attitude towards the interests of the establishment.** The problem of regulatory capture can act as a barrier to the public obtaining access to information held by the regulator."[113] (Own emphasis.)

71. It is apparent from the findings in the Good Practice Report that this phenomenon of regulatory capture undermining broad access to information is a common issue regardless of the nature of the information sought. From the perspective of promoting the right to seek, receive and impart environmental information, the question remains as to whether the JET through climate-resilient development could provide the impetus to overcome this systematic barrier toward proactive publication and maximum disclosure of relevant information and knowledge that is in the public interest.

72. In an effort to secure procedural and substantive environmental rights worldwide, recent regional framework developments and declarations from UN bodies have further reinforced the fundamental need for the free flow of relevant information to ensure justice in the energy transition context. These developments, most of which directly cite or seek to codify Rio Principle 10 and the Bali Guidelines, are summarised in the following sections.

3.4 Escazu Agreement: Latin America and the Caribbean

73. The provisions in the Aarhus Convention, which is governed by the United Nations Economic Commission for Europe ("UNECE"), are referred to multiple times in the Implementation Guide as best practice examples. Since its adoption in 1998, the Aarhus Convention existed as the only legally binding instrument that embodies Rio Principle 10, internationally. This was until the Economic Commission for Latin America and the Caribbean adopted the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (the "Escazu Agreement") in 2018.[114]

112 *Id* at page 58. Further information on the Aarhus Centre's is available here.
113 *Id* at page 59.
114 Economic Commission for Latin America and the Caribbean, Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, 4 March 2018. (the "Escazu Agreement"). (Available here.)

74. The Escazu Agreement is open to the 33 countries within its regional jurisdiction. In comparison, the Aarhus Convention is open to accession by non-UNECE countries, subject to approval by the Member States. This wider eligibility is worth noting as Guinea-Bissau acceded to the Aarhus Convention in April 2023 – the first country outside the panEuropean region to do so. It is believed that this may open "new opportunities to enhance environmental democracy in the country and to share experience with other countries in Africa and worldwide".[115]

75. The Escazu Agreement is the region's first treaty on environmental matters and the world's first to include provisions on human rights defenders in environmental matters.[116] This instrument holds foreign comparative value for South Africa as there are similarities between the Organization of American States system and the African Union legal framework, including important questions at the intersection of access to information obligations, developmental objectives, and vulnerability to climate change impacts. These are highlighted in the following textbox.

Escazu Agreement: Environmental information systems

Article 6 of the Escazu Agreement requires Member States to generate, collect, publicise, and disseminate environmental information relevant to their functions in a **systematic, proactive, timely, regular, accessible and comprehensible manner**, and to periodically update this information and encourage the disaggregation and decentralisation of environmental information at the subnational and local levels.[117]

Member States environmental information systems must remain up-to-date and may include the following:[118]

- **A list of polluted areas, by type of pollutant and location**;
- Information on the use and conservation of natural resources and ecosystem services;
- **Scientific or technological reports, studies and information on environmental matters** produced by academic and research institutions, whether public or private, national, or foreign;
- **Climate change sources** aimed at building national capacities;
- Information on environmental impact assessment processes and on other environmental management instruments, where applicable, and **environmental licences or permits granted by the public authorities**; and
- Information on the imposition of administrative sanctions in environmental matters.

Member States are also required to establish a pollutant release and transfer register covering air, water, soil and subsoil pollutants, akin to the Protocol on Pollutant Release and Transfer Registers under the Aarhus Convention.[119] In addition, reflecting Bali Guideline 6, Member States shall guarantee that **in the case of an imminent threat to public health or the environment**, the relevant competent authority shall immediately disclose and disseminate all pertinent information in its possession that could help the public take measures to prevent or limit potential damage. This includes early warning systems.[120]

115 See the press release here.
116 Escazu Agreement above n 114 at page 5.
117 *Id* at Article 6(1).
118 *Id* at Article 6(3).
119 UNECE, Kyiv Protocol on Pollutant Release and Transfer Registers, 8 October 2009. (Available here.)
120 Escazu Agreement above n 114 Article 6(5).

Inter-American Court of Human Rights: Advisory Opinion request

The rapidly declining state of the global environment is raising numerous rights-based considerations, including public access to information. This is addressed further in the following section on the universal right to a healthy environment. From a Latin-American and Caribbean perspective, access to environmental information in the context of the climate change is one of the enquiries in **a request for an advisory opinion on the climate emergency and human rights pending before the Inter-American Court of Human Rights** (the "IAC Request").[121] To preserve the right to life and survival, and with reference to Articles 5 and 6 in the Escazu Agreement, the Court is asked to consider the scope of States obligations in relation to:

- **Environmental information for every individual and community**, including such information related to the climate emergency;
- Climate adaptation and mitigation measures to be adopted to respond to the climate emergency and the impacts of such measures, including specific **"just transition" policies for groups and individuals who are particularly vulnerable to the effects of global warming**;
- Responses to prevent, minimize and address economic and noneconomic damage and losses associated with the adverse effects of climate change; and
- **Production of information and access to information on GHG emissions**, **air pollution, deforestation, and short-lived climate forces; and analysis of activities and sectors that contribute to emissions**.

These salient questions are on point with the considerations at the centre of this research and lean toward increasing the scope of public access to environmental information, especially for the benefit of vulnerable groups in the just transition context. This includes information from GHG emitting facilities, either private or state-owned.

Information note 6: Escazu Agreement: Environmental information systems

3.5 Information access toward the universal right to a healthy environment

76. In July 2022, the UN General Assembly adopted a resolution declaring the universal human right to a clean, healthy, and sustainable environment (the "Environmental Right Declaration").[122] This landmark resolution recognises that all human rights are universal, indivisible, interdependent and interrelated. It recalls States' commitments and obligations detailed in the outcome of the UN Conference on Sustainable Development in 2012, which reaffirmed the principles of the Rio Declaration on Environment and Development.

121 Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the InterAmerican Court of Human Rights by the Republic of Colombia and the Republic of Chile, 9 January 2023. (the "IAC Request").(Available here.)
122 Resolution on the Human Right to a Clean, Healthy and Sustainable Environment GA Res 76/300 UN Doc A/RES/76/300 (2022). (Available here.)

77. Accordingly, among other key rights and principles in established under international law, the Environmental Right Declaration recognises that:

> "The exercise of human rights, including the rights to seek, receive and impart information, to participate effectively in the conduct of government and public affairs and to an effective remedy, is vital to the protection of a clean, healthy and sustainable environment".[123]

78. The UN Human Rights Council has welcomed the Environmental Right Declaration in a subsequent resolution (the "Human Rights Council Resolution").[124] This reflects the same text as the Environmental Right Declaration regarding access to information and effective participation as being vital for the protection of this new universal right. In addition, the Human Rights Council Resolution called upon States to:

    78.1. Adopt and implement strong laws ensuring, among other things, the rights to participation, access to information and to justice, including to an effective remedy, in environmental matters; and

    78.2. Facilitate public awareness and participation in environmental decision-making, including of civil society, women, children, youth, Indigenous Peoples, local communities, older persons, persons with disabilities and others who depend directly on biodiversity and ecosystem services, by protecting all human rights, including the rights to freedom of expression and to freedom of peaceful assembly and association.

79. This inclusive language is significant and ties back to the Environmental Right Declaration recalling the "Future We Want" outcome document from the UN Sustainable Development Conference in 2012.[125] This overarching question remains pertinent in the JET context and the need to secure sustainable development for present and future generations. It is therefore useful to reaffirm the relevant excerpts from the Future We Want outcome document, which are also annexed to the Bali Implementation Guideline:[126]

> "We underscore that broad public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development. Sustainable development requires the meaningful involvement and active participation of regional, national, and sub-national legislatures and judiciaries, and all Major Groups . . .
>
> **We acknowledge the role of civil society and the importance of enabling all members of civil society to be actively engaged in sustainable development. We recognize that improved participation of civil society depends upon, inter alia, strengthening access to information, building civil society capacity as well as an enabling environment**. We recognize that information and communication technology (ICT) is facilitating the flow of information between governments and the public". (Own emphasis.)

123 See the Preamble *Id*.
124 Resolution on the Human Right to a Clean, Healthy and Sustainable Environment HRC Res 56 UN Doc A/HRC/52/L.7 (2023). (Available here.)
125 Report of the United Nations Conference on Sustainable Development, Rio de Janeiro. UN Doc A/CONF.216/L.1 (2012). (Available here.)
126 *Id* at paras 43-4 and 99.

80. These procedural elements that are essential to enabling the sustainable future we want are re-enforced through good practice examples in a 2019 report by the United Nation's Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment ("Special Rapporteur for Human Rights and the Environment").[127] This report to the Human Rights Council presents a range of good practices to realise the right to a healthy environment, including access to information as a widely recognised human right that has been demonstrated to be essential for people to protect themselves from potentially harmful environmental impacts.[128] Key findings and conclusions from the Special Rapporteur on Human Rights and Environment are summarised in the textbox below.

UN Special Rapporteur report 1 – A healthy environment

In relation to access to information as one of the fundamental procedural elements required to give effect to the right to a clean, healthy, and sustainable environment, the Special Rapporteur identified the following themes:

- At least 20 States have put in place **laws, policies, and programmes that enhance access to environmental information**, such as Albania, Argentina, Azerbaijan, Belarus, the Plurinational State of Bolivia, Brazil, Czechia, France, Norway, and Ukraine; according to their respective constitutions which guarantee the right of access to environmental information.[129]
- "Other States have enacted **legislation specifically authorising affordable access to environmental information**. For example, in Norway, the Environmental Information Act recognises every person's right to obtain a broad range of environmental information from public and private entities, subject to specified exceptions that are to be narrowly interpreted".[130]
- "A growing number of States have created **websites that offer comprehensive information relating to the environment**".[131] The Report cites examples from Uruguay, El Salvador, Hungary, France, North Macedonia, Norway, and Sweden.
- The Protocol on Pollutant Release and Transfer Registers to the Aarhus Convention is also provided as an example, which requires Member States to **collect and publish information on pollution from industrial facilities, covering 86 pollutants**.[132]

This 2019 report is backed by another report by the Special Rapporteur for Human Rights and the Environment, which presented the framework principles on human rights and the environment.[133] Framework principle 7 is focused on public access to environmental information based on the Bali Guidelines.[134]

Information note 7: UN Special Rapporteur report 1 – A healthy environment

127 *Right to a healthy environment: good practices*. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment UN Doc A/HRC/43/53 (2019). ("Healthy Environment Report".)
128 *Id* at para 14.
129 *Id*.
130 *Id* at para 15.
131 *Id* at para 16.
132 *Id* at para 19.
133 *Framework Principles on Human Rights and Environment*. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment UN Doc A/HRC/37/59 (2018).
134 See fn 1 *id*.

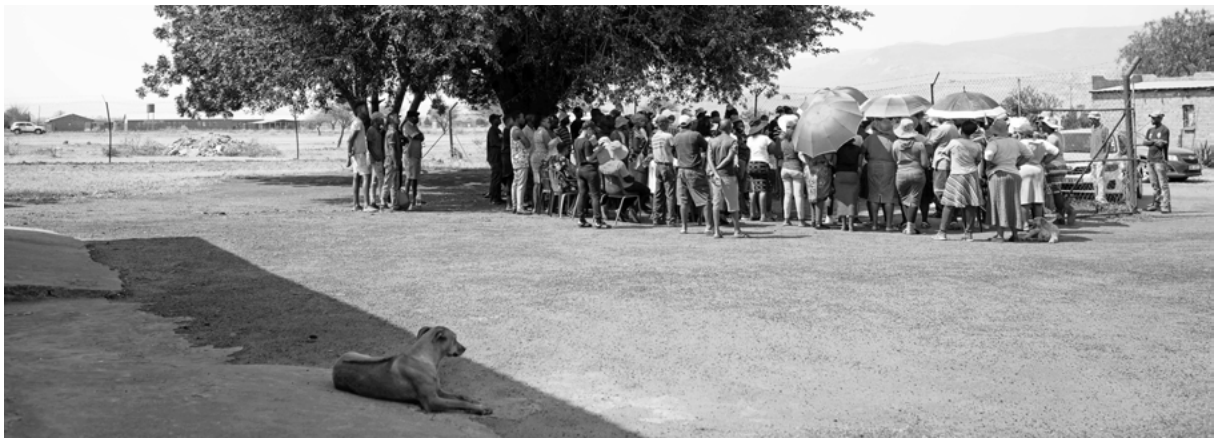

Photo: Daylin Paul

81. The Environmental Right Declaration also recalls States' obligations and commitments under multilateral environmental instruments and agreements, including the UN Framework Convention on Climate Change, which we initially referred to at the beginning of this section on access to environmental information. It is generally recognised that a stable climate is a prerequisite to achieve the right to a clean, healthy, and sustainable environment and it is essential to human life and well-being. It is for this reason that securing climate-resilient development is one of the core objectives in South Africa's JET process. This intersectional issue is further addressed in the following section from an access to information perspective.

3.5.1 United Nations Framework Convention on Climate Change

82. A 2019 report by the Special Rapporteur for Human Rights and Environment on the need for action to ensure a safe climate for humanity (the "Safe Climate Report") captures the stark reality of human-induced climate change:

> "We are in the midst of an unprecedented environmental crisis. Human activities are causing pollution, extinction, and climate change. Air pollution causes millions of premature deaths annually, including hundreds of thousands of children aged five and under. Wildlife populations are in free fall and one million species are at risk of extinction. The most pressing environmental risk is climate change, which not only exacerbates air pollution and biodiversity loss, but multiplies a broad range of risks . . . leading to negative impacts on billions of people. A growing number of States, including Canada, France, and the United Kingdom of Great Britain and Northern Ireland, have declared a global climate emergency."[135]

83. The Intergovernmental Panel on Climate Change ("IPCC") – a body of climate scientists from around the world – prepares and publishes comprehensive Assessment Reports about the state of scientific, technical, and socio-economic knowledge on climate change and methods to address its impacts. Its sixth assessment cycle concluded in March 2023 with the publication of a Synthesis Report ("IPCC Synthesis Report").[136] The 18 headline statements are all equally important, starting with the confirmation that human activities have unequivocally caused climate change and that this has led to adverse impacts and related losses and damages to nature and people.[137]

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135 *Action to Ensure a Safe Climate for Humanity*. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment UN Doc A/74/161 (2019). ("Safe Climate Report".)

136 H. Lee and J. Romero (eds.) *IPCC, 2023: Climate Change 2023: Synthesis Report* Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change IPCC. Geneva, Switzerland. (Available here.)

137 See Headline Statement A1 and A2. (Available here.)

84. The IPCC Synthesis Report concludes that:

> "Climate change is a threat to human well-being and planetary health (very high confidence). There is a rapidly closing window of opportunity to secure a livable and sustainable future for all (very high confidence). Climate resilient development integrates adaptation and mitigation to advance sustainable development for all . . . (high confidence). The choices and actions implemented in this decade will have impacts now and for thousands of years (high confidence)."[138]

85. Considering the gravity and urgency of this situation there is clearly an inherent public interest in the proactive publication and widespread dissemination of information and knowledge that provides the current and projected impacts from climate change-induced events, details related to GHG emitting facilities, and mitigation and adaptation actions and progress against these actions. The need for access to such information is one of the focus areas in the Safe Climate Report, presented in the textbox below.

UN Special Rapporteur report 2 – A safe climate

In the Safe Climate Report, the Special Rapporteur on Human Rights and Environment considers the effects of climate change on several rights, including life, health, food, a healthy environment, water and sanitation, and the needs of a child. **As part of States procedural obligations under international law to protect these human rights from harm, the following measures are required**:[139]

- Provide the public with **accessible, affordable, and understandable information regarding the causes and consequences of the global climate crisis**, including incorporating climate change into the educational curriculum at all levels;
- Ensure an **inclusive, equitable and gender-based approach to public participation in all climate-related actions, with a particular emphasis on empowering the most affected populations**, namely women, children, young people, indigenous peoples and local communities, persons living in poverty, persons with disabilities, older persons, migrants, displaced people, and other potentially at-risk communities; and
- Assess the **potential climate change and human rights impacts of all plans, policies, and proposals**, including both upstream and downstream effects (i.e., both production- and consumption-related emissions).

In terms of the role of private businesses, the Safe Climate Report lists the following principal responsibilities specifically related to climate change:[140]

- Businesses should **support public policies intended to effectively address climate change**, rather than seek ways to oppose such policies;
- Businesses should **reduce GHG emissions from their products and services**, including subsidiaries and along supply chains;
- Businesses **should publicly disclose their emissions**, climate vulnerability and the risk of stranded assets; and
- Businesses should ensure that **people affected by business-related human rights violations have access to effective remedies**.

Information note 8: UN Special Rapporteur report 2 – A safe climate

138 See Headline Statement C1.
139 Safe Climate Report above n 135 at para 64.
140 *Id* at paras 71-2.

86. Access to climate change information and inclusive public participation are promoted in the UNFCCC and the Paris Agreement under the UNFCCC. South Africa has ratified both legally binding instruments.[141]

87. The UNFCCC entered into force in 1994 and has 198 Member States. Its overall objective is to stabilise GHG concentrations at a level that would prevent dangerous levels of human-induced climate change.[142] The UNFCCC Secretariat has indicated that it is the IPCC's Assessment Reports referred to above that provide a science-based understanding of the levels of human-induced climate change that are considered to be dangerous to humankind and nature, and how these levels can be mitigated.[143]

88. The Paris Agreement was adopted by 196 Parties under the UNFCCC in December 2015 and entered into force in November 2016.[144] The overall objective of the Paris Agreement is to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels.[145] The intention is for this global goal to be achieved through the implementation of Member States national climate action plans, called nationally determined contributions ("NDCs"). Given the context of this exploratory research it is also notable that the Preamble in the Paris Agreement recognises the imperative of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities.

89. Both of these binding multilateral treaties contain access to information obligations under the title "Education, Training, and Public Awareness". The textbox below outlines these obligations.

Photo: Daylin Paul

141 The UNFCCC was ratified on 29 August 1997 (Available here); the Paris Agreement was ratified on 1 November 2016. (Available here.)
142 United Nations Framework Convention on Climate Change, 21 March 1994. (Available here.) See Article 2.
143 See the Secretariat's description of the UNFCCC available here.
144 See the Secretariat's description of the Paris Agreement available here.
145 Paris Agreement, 12 December 2015. (Available here.) See Article 2(a).

Climate change: Education, training, and public awareness

Article 6 in the UNFCCC requires that:

> "In carrying out their commitments under Article 4, paragraph 1(i), the Parties shall:
>
> (a) Promote and facilitate at the national and, as appropriate, subregional, and regional levels, and in accordance with national laws and regulations, and within their respective capacities:
>
> (i) The development and implementation of educational and public awareness programmes on climate change and its effects;
>
> (ii) Public access to information on climate change and its effects;
>
> (iii) Public participation in addressing climate change and its effects and developing adequate responses; and
>
> (iv) Training of scientific, technical, and managerial personnel."

Article 12 in the Paris Agreement requires Member States to:

> "[C]ooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement."

Action for Climate Empowerment

The body of work that is focused on the implementation of Article 6 and Article 12 is referred to as Action for Climate Empowerment ("ACE"). The goal of ACE is to empower all members of society to engage in climate action, through six elements:[146]

- Education;
- Public awareness;
- Training;
- Public participation;
- Public access to information; and
- International cooperation on these issues.

ACE initiatives started with the eight-year Doha Work Programme adopted at the 12th Conference of the Parties under the UNFCCC, which confirms that the implementation of all elements of Article 6 will contribute to meeting the objective of the UNFCCC, and that all Parties are responsible for the implementation of Article 6.[147] The Doha Work Programme encourages Parties to undertake activities to this end, including:

> "Facilitat[ing] public access to data and information, by providing information on climate change initiatives, policies and results of actions that is needed by the public and other stakeholders to understand, address, and respond to climate change. This should take into account such factors as quality of Internet access, literacy and language issues".[148]

146 See the UNFCCC Secretariat overview available here.
147 The Doha Work Programme. UN Doc FCCC/SBI/2012/L.47 (2012). (Available here.)
148 *Id* at para 19.

ACE initiatives are currently being progressed through the four-year action plan under the Glasgow Work Programme adopted at the 27th Conference of the Parties in 2022.[149] Among the priority actions are the identification of good practices for integrating the six ACE elements into the work of the UNFCCC constituted bodies, and for integration into national climate change policies, action plans, and strategies. As one of the drivers behind these initiatives, Member States have designated national ACE Focal Points; South Africa's ACE Focal Point is the Department of Environment, Forestry, and Fisheries.[150]

Information note 9: Climate change education, training, and public awareness

90. A Cambridge University Press publication has considered how Article 6 in the Paris Agreement echoes Principle 10 of the Rio Declaration, as far as the access to information pillar is concerned.[151] This commentary points out that unlike the soft-law status of the Rio Declaration, the Paris Agreement is a hard-law instrument based on multilateral consensus, leading to the question as to whether the "international community is now set on the path towards globalising some of the democratic requirements that are inherent to Principle 10 of the Rio Declaration", and hence whether "Article 12 is the hidden human rights touch of the Paris Agreement that could potentially evolve towards something much more substantial in the mid-term future?".[152]

91. This poses important questions in the context of this exploratory research; for now, the following key points are noted:

    91.1. In terms of their international commitments, including obligations under the UNFCCC and Paris Agreement, Member States must facilitate public access to climate change data and information, such as climate change initiatives and progress reports needed to understand and respond to climate change.

    91.2. There is a dedicated international multilateral work programme to support the implementation of these initiatives at various levels in the recognition that public participation through awareness and access to information and knowledge are fundamental to achieve the objectives of the UNFCCC and Paris Agreement.

    91.3. To enhance action under the UNFCCC and Paris Agreement, public access to information and participation processes should implement the good practice recommendations presented in the Bali Guidelines, in the spirit of environmental democracy, including the publication of businesses' GHG emissions, their vulnerability to climate change, and potential stranded asset risks.

    91.4. Although it is important for everyone to be empowered to participate in the transition to a low-emission, climate-resilient world, children, and the youth are identified as unique interest groups and role-players in multiple sources introduced above. This particular intersection between access to information through appropriate platforms and children's rights is outlined in the following subsection.

149 The Glasgow Work Programme is available here.
150 Contact details for the responsible official at the Department of Environment, Forestry, and Fisheries are available here.
151 Misdone "Access to Information, the Hidden Human Rights Touch of the Paris Agreement?" in Jendroska and Bar (eds) *Procedural Environmental Rights: Principle X in Theory and Practice* (Intersentia, Cambridge University Press, 2017). An accessible version is available here.
152 *Id* at pages 466-7.

3.5.2 Convention on the Rights of the Child

92. It is generally acknowledged that environmental harm interferes with the full enjoyment of the rights of children due to their vulnerability to various sources of pollution.[153] The UN Human Rights Council has highlighted the effects of climate change on the rights of children, severely impacting their enjoyment of the highest attainable standard of physical and mental health, access to education, adequate food, adequate housing, and safe drinking water and sanitation.[154]

93. The particular relationship between children's rights, including their best interests, and environmental health is presented in a 2018 report by the Special Rapporteur for Human Rights and the Environment (the "Children's Rights Report").[155] It explores the aggravated effects of environmental harm on children due to air pollution, water pollution, climate change, chemicals, toxic substances, waste, and loss of biodiversity.[156] The Children's Rights Report cites a United Nations Children's Fund ("UNICEF") assessment, which observes that "there may be no greater, growing threat facing the world's children . . . than climate change". A more recent UNICEF study – the Children's Climate Risk Index (the "UNICEF Index") – confirms that existing climate change impacts are creating a range of child-oriented crisis, including a water crisis, health crisis, and social protection crisis.[157]

94. Considering the heightened obligation owed to children due to their more vulnerable status, both the Children's Rights Report and the UNICEF Index describe the specific obligations upon States, in particular those obligations set out in the UN Convention on the Rights of the Child ("CRD").[158] South Africa is a Member State following its ratification of the CRD in 1995.[159] These include procedural obligations related to access to information and child-rights impact assessments. These obligations are set out in the textbox below, strengthened by a General Comment recently published by the UN Committee on the Rights of the Child.

153 *Children's Rights and Environmental Protection*. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment UN Doc A/HRC/37/58 (2018), paragraph 7. ("Children's Rights Report".)
154 *Id* at para 10.
155 *Id*.
156 *Id*. Refer to paragraphs 15-30.
157 United Nations Children's Fund *The Climate Crisis is a Child Rights Crisis: Introducing the Children's Climate Risk Index* (August 2021). (Available here.)
158 The Convention on the Rights of the Child, 20 November 1989. (Available here.) Article 13 provides that a child's right to freedom of expression "shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice".
159 See above n 63.

UN Special Rapporteur report 3 – Children's rights

The Special Rapporteur on Human Rights and Environment identified the following needs and recommendations in the Children's Rights Report:[160]

- **Right of access to environmental information:** Public access to environmental information enables individuals to understand the effect of environmental harm on their rights, including their rights to life and health, and **supports the exercise of other rights, such as freedom of expression, participation, and remedial action**.
- **Access to environmental information has two dimensions**: States should **regularly collect, update, and disseminate** environmental information, and they should **provide affordable, effective, and timely access** to environmental information held by public authorities. This includes immediate dissemination of information related to imminent threats.
- **Publicly available information**: Much more must be done to collect information about sources of environmental harm to children and to make it publicly available and accessible. The Committee on the Rights of the Child has stressed that **information relevant to children should be provided in a manner appropriate to their age and capacities**.
- **Best interests of the child principle**: Most environmental impact assessment procedures do not address the rights of children, either by taking into account their greater vulnerability to harm or by providing for their participation. **The best interests of the child should be a primary consideration in the development and implementation of policies and projects** that may affect children.

UN Committee on the Rights of the Child

Building on States heightened obligations in this context, the UN Committee on the Rights of the Child recently published a General Comment on children's rights with a special focus on climate change ("General Comment 26").[161] Among other contributions, General Comment 26 is informed by 16,331 contributions from children, from 121 countries, reporting on the negative impacts of environmental degradation and climate change on their lives. General Comment 26 also promotes the best interests of the child as a primary consideration in the context of climate change.[162] In relation to the implementation of Articles 13 and 17, specifically, the UN Committee on the Rights of the Child affirms that:[163]

- Children have the right of access to accurate and reliable environmental information, including about the causes and effects of climate and environmental harm. **This includes actual and potential sources of GHG emissions and environmental pollution, relevant climate and environmental legislation, regulations, plans, and polices, and findings from climate and environmental impact assessments**; such information empowers children and provides learning opportunities.
- **States have a positive obligation to make environmental information available**. Dissemination methods should be appropriate to children's ages and capacities and aimed at overcoming obstacles, such as illiteracy, disability, language barriers, distance, and limited access to information and communications technology.

Information note 10: UN Special Rapporteur report 3 – Children's rights

160 Children's Rights Report above n 153 at paras 42-6.
161 Committee on the Rights of the Child General Comment No. 26 on Children's Rights and the Environment, with a Special focus on Climate Change UN Doc CRC/C/GC/26 (2023). ("General Comment 26").
162 *Id* at para 16.
163 *Id* at paras 33-4.

Photo: Daylin Paul

95. As the best practice guidelines illustrate in the sections above, it is not only special mandate holders in relation to children's rights that advocate for these specific measures. Publication and dissemination of categories of information that address the needs of more vulnerable groups in a manner that guarantees the full enjoyment of their right of access is a noticeable theme throughout this international norms and standards section. These overarching principles and thematic recommendations are summarised below, leading into the next part of this research report that examines South Africa's access to information regime.

3.6 Summary: A basis for proactive publication and maximum disclosure

96. Expert actors and central bodies operating within the UN and AU systems have confirmed that access to information and effective participation, as basic human rights, are vital for the realisation of the universal right to a clean, healthy, and sustainable environment, in addition to other human rights that depend on the preservation of the environment for present and future generations.

97. As a reference point for the next part of this report, the following textbox consolidates the international norms and standards that encourage the automatic disclosure and free flow of environmental information in the context of South Africa's JET through climate-resilient development.

Promoting the free flow of environmental information

- **Participatory democracy**: The widespread recognition of the right of access to information reflects its importance as a safeguard for principles of international human rights law. Access to information is a fundamental right protected under the African Charter. The respect, protection, and fulfilment of this right is recognised as being indispensable for the development of the human person and nurturing democratic societies. States should promote the principles of openness and transparency in all aspects of decision-making processes. The free flow of relevant information is critical to enabling the public to participate actively and effectively. Where a conflict arises between any domestic and international human rights law, the most favourable provision for the full exercise of the right of access to information should prevail.
- **Environmental information as a special category**: The right of access to information is particularly important in relation to environmental issues. Public access to environmental information enables individuals to understand the effect of environmental harm on their rights, including their rights to life and health, and supports the exercise of other rights. Access to environmental information is therefore important as an absolute value, as well as in the role it plays in meaningful participation and contributing to public debate on a wide range of issues, including climate change. Access to environmental information is considered essential to the good functioning of environmental authorities. States have dedicated measures to publish and disseminate a broad range of environmental information as a special category carrying an inherent public interest.
- **Proactive publication**: States should encourage and facilitate the proactive disclosure of information in the public interest. States have a positive obligation to put information in the public domain that is necessary to comply with international human rights law. It is generally considered good practice today for private entities dealing with environmental information to put mechanisms in place to publicise information, consult, and raise awareness. Analysis shows that the more environmental information there is in the public sphere using modern technologies, like electronic information systems, the less need there is for specific information requests. A proactive environmental information policy that regularly compiles, updates, and disseminates information may reduce administrative burdens and make it easier for public authorities to carry out their responsibilities. As a safe climate is a prerequisite to achieve the right to a healthy environment and is essential to human life and well-being, States should facilitate access to relevant data and information to enable the public to understand and readily respond to the existing and projected impacts caused by climate change.
- **Heightened obligations toward specific groups**: Broad public participation and access to information are essential to the promotion of sustainable development; however, the meaningful involvement and active participation of special status groups recognised by international human rights law is particularly important. This is due to their unique vulnerability to the impacts and threats associated with environmental pollution and climate change. These groups include women, children, youth, indigenous peoples and affected communities, older persons, persons with disabilities, and persons living in poverty. Considering the best interests of the child, additional resources are required to share environmental information through appropriate platforms. The important role of civil society in enabling the public to actively engage in sustainable development processes has been acknowledged and encouraged by special mandate-holders.

- **Maximum disclosure**: Access to environmental formation should be guided by the principle of maximum disclosure. Where an information request is required in law, the presumption that disclosure is the preferred option may be overcome, but only in very limited and clearly prescribed circumstances. These limitations should not be overly broad or vaguely formulated and should comply strictly with international human rights law. This includes the international norm that it is not sufficient for the legally protected interest to merely exist; only when an interest is legitimately at stake and where that interest can be demonstrated to be adversely affected, may an information holder be permitted to restrict access to information.
- **Public interest override**: A finding of harm to a legally-recognised interest does not end the enquiry, as the interest in the public disclosure of the information should be balanced against the harm to the information holder. There are examples in European law where emissions to the environment must be automatically disclosed in the public interest. This is based on the principle that an emitter loses any proprietary interest over substances once they enter the environment and leave the area of the emitter's effective control.
- **Information access requirements**: Fees for requests for information should not discourage requests or constitute an unreasonable impediment to access to information. In some States, access to information is free of charge. Environmental information requests may have a special, less-costly regime because of the special interest in encouraging public involvement in the solution of environmental problems. A requester should not be required to demonstrate a specific legal or personal interest in the information requested or to provide justification for a request.
- **Strengthening civil service:** Building the capacity of public authorities is essential for promoting compliance with the right of access to information. This means fostering a culture of openness and transparency within the public sector and taking measures to enable individuals, civil society representatives and journalists to exercise the right of access to information and other related rights. Perhaps the biggest obstacle to access is the lack of understanding of public authorities and a poor attitude towards cooperation with the public or respect for basic rights. Public authorities can fall under the phenomenon of regulatory capture in which they come under the influence of the regulated community and become more responsive to those in positions of power and influence, while discounting the interests of the public.
- **Oversight mechanism**: An independent, impartial, and adequately resourced oversight mechanism shall be established by law to monitor, promote, and protect the right of access to information and resolve related disputes. Public bodies and relevant private bodies shall recognise decisions of the oversight mechanism as formally and legally binding in all matters within its jurisdiction.

Information note 11: Promoting the free flow of environmental information

4. SOUTH AFRICA'S PROMOTION OF ACCESS TO INFORMATION ACT: REFLECTIONS AND OPPORTUNITIES

> "In a society plagued by lack of transparency, accountability. and high levels of corruption, the right of access to information is of paramount importance to counter such deficiencies in South Africa's democratic dispensation. The right of access to information forms the bedrock of the realisation of a number of rights, and more importantly for a government 'in the sun', by limiting secrecy and strengthening the means through which the public may both meaningfully participate in decision-making, and to hold government accountable."[164]

98. In the context of the international norms and standards framework and the central role of access to information for the promotion and protection of South Africa's constitutional democracy, this section of the report provides an overview of the current access to information law and an analysis of trends and challenges in its implementation. This is largely based on annual reports from the South African Human Rights Commission, as the outgoing mandate holder for monitoring the fulfillment of access to information rights in South Africa. This mandate has been transferred to the Information Regulator of South Africa, introduced below as the new independent oversight mechanism. Seven case studies are also provided to demonstrate the experiences of various information requestors, in support of the need for the specific reforms called for by the South African Human Right's Commission over the last decade.

4.1 Overview of the access to information scheme and recent developments

99. Section 32 in the Bill of Rights is among many domestic constitutions, worldwide, that guarantees the right of access to information. It provides that:

"(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.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state".

100. PAIA[165] came into operation in March 2001 in order to give effect to the constitutional right of access to any information held by the State and any information held by another person that is required for the exercise or protection of any rights.

164 The South African Human Rights Commission *Promotion of Access to Information Act Annual Report* (2020/2021) at page 10. (Available here.) ("2021 PAIA Report").
165 See above n 9.

101. In addition to citing section 32 of the Constitution, the Preamble reminds us of the important rationale behind PAIA and the historical context it seeks to redress, which is paraphrased below:

> "[T]he system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations;
>
> The State must respect, protect, promote, and fulfil, at least, all the rights in the Bill of Rights which is the cornerstone of democracy in South Africa;
>
> The right of access to any information held by a public or private body may be limited to the extent that the limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom;
>
> Reasonable legislative measures may, in terms of section 32 (2) of the Constitution, be provided to alleviate the administrative and financial burden on the State in giving effect to its obligation to promote and fulfil the right of access to information; and
>
> The State must foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights".

102. The contents of PAIA are set out in seven parts containing chapters and sections. The textbox below presents the introductory provisions and outlines the content in PAIA. This is not a comprehensive explanation of the provisions in PAIA and how to use the Act. Further sections, detailed below, introduce the establishment of the Information Regulator and refer to practical guidance instruments on the implementation of PAIA. They also elaborate on challenges surrounding key provisions in PAIA through informative case studies.

Outline of South Africa's Promotion of Access to Information Act[166]

Part 1: Introductory provisions

- **Section 2**: when interpreting a provision in PAIA, every court must prefer any reasonable interpretation of the provision that is consistent with the objects of PAIA over any alternative interpretation that is inconsistent with those objects.

General application (sections 3-8)

- **Section 3**: PAIA applies regardless of when the record requested came into existence.
- **Section 4**: A record held by an official or independent contractor of a public or private body is regarded as being a record of that public body or private body.
- **Section 5**: PAIA applies to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record of a public body or private body, and is materially inconsistent with PAIA.
- **Section 6**: PAIA does not prevent access to a record through the application of other legislation listed in the Schedule to the Act. **Notably, section 31 of NEMA is cited in the Schedule, providing for access to environmental information and protection of whistle-blowers.**

166 PAIA should be read together with the updated set of regulations relating to its implementation, published on 27 August 2021 in GN 757 *GG* 45057. (Available here.)

General Introductory Provisions (sections 9-10)

- **Section 9**: To give effect to section 32 of the Constitution, the objects of PAIA include establishing **voluntary and mandatory mechanisms or procedures to give effect to that right in a manner which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively, and effortlessly as reasonably possible**, and to promote transparency, accountability, and effective governance of all public and private bodies.
- **Section 10**: The institutional mandate holder responsible for monitoring the implementation of the Act and enforcing its provisions is required to a publish a guide on how to use PAIA. This guide must be available in each official language.

Part 2: Access to records of public bodies (sections 11-49)

This part of PAIA makes provision for the automatic availability of certain records, the procedural requirements to lodge a request for access to records held by public bodies, and the obligations and powers of a designated information officer in responding to requests. **A public body is any state department at any level of government, or another body that exercises a power or performs a duty in terms of the Constitution or legislation**. Notable sections include the following:

- **Section 14** requires a PAIA manual to be published by a public body in three official languages, describing the information in its possession and how to request access to records. PAIA manuals must be updated annually.
- **Section 15** requires a description of the **categories of records of a public body that are automatically available** to the public.
- **Section 18** and **section 20** set out the requirements for a request to access records held by a public body, using Form 2, and the prescribed request fee.[167]
- **Sections 19 – 31** set out an information officer's obligations and powers upon receipt of an access to information request. **Section 25** requires an information officer to grant or refuse a request within 30-days of receiving the request. If the request is refused there must be adequate reasons based on the provisions in PAIA.
- **Sections 33 – 45** provide grounds of refusal for access to records. There are **eight mandatory grounds of refusal** where the information officer *must* not release the record, subject to the application of the respective subsections.[168] There are also **four discretionary grounds of refusal** where the information officer *may* refuse to release a record, subject to the application of the respective subsections.[169]

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167 Form 2 is available on the website of the Information Regulator of South Africa. In terms of the exemptions published in GN 991 *GG* 28107 on 14 October 2005, a person does not have to pay the prescribed fee if their annual income is less than R14,712.00.

168 These include: protection of privacy of third party who is natural person; protection of certain records of South African Revenue Service; protection of commercial information of a third party; protection of certain confidential information of a third party; protection of safety of individuals, and protection of property; protection of police dockets in bail proceedings, law enforcement, and legal proceedings; protection of records privileged from production in legal proceedings; and protection of research information of a third party and research information of a public body.

169 These include: if disclosure of a record could reasonably prejudice defence, security, and international relations of the Republic; if disclosure of the record would likely materially jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy effectively in the best interests of the Republic; if the record contains certain content related to the operations of a public body; or if the request is manifestly frivolous, vexatious, or a substantial and unreasonable diversion of resources.

- **Section 46** provides that despite the application of specific grounds of refusal, the information officer of a public body must disclose the record if it would reveal evidence of: a substantial contravention of, or failure to comply with, the law; or an imminent and serious public safety or environmental risk; and the **public interest in the disclosure of the record clearly outweighs** the harm contemplated in the relevant provision.
- **Sections 47 – 49** set out circumstances in which an information officer must take all reasonable steps to notify a third party of a request for information and invite representations.

Part 3: Access to records of private bodies (sections 50-73)

This part of PAIA makes provision for automatic availability of certain records, the procedural requirements to lodge a request for access to records held by private bodies, and the obligations and powers of a designated information officer in responding to requests. **A private body is a natural person who carries or has carried on any trade, business, or profession; a partnership which carries or has carried on any trade, business, or profession; any former or existing juristic person; or a political party**. Notable sections include the following:

- **Section 51** requires a PAIA manual to be published by a private body, describing the information in its possession and how to request access to records. PAIA manuals must be updated on a regular basis.
- **Section 52** requires a description of the categories of records of a private body that are automatically available to the public.
- **Section 52A** is a recent amendment to PAIA requiring the recording, preservation, and disclosure of records on private funding of political parties – see the *My Vote Counts* case summary below.
- **Sections 53 – 54** set out the requirements for a request to access records held by a private body, using Form 2, and the prescribed request fee.
- **Sections 55 – 61** set out the information officer's obligations and powers upon receipt of an access to information request. **Section 56** requires an information officer to grant or refuse a request within 30-days of receiving the request. If the request is refused there must be adequate reasons based the provisions in PAIA.
- **Sections 62 – 69** provide grounds of refusal for access to records. There are **six mandatory grounds of refusal** where the information officer *must* not release the record, subject to the application of the respective subsections.[170] There is also **one discretionary ground of refusal** where the information officer *may* refuse to release a record, subject to the application of the respective subsections.[171]
- **Section 70** stipulates the same public interest override provision in section 49.
- **Sections 71 – 73** set out circumstances in which an information officer must take all reasonable steps to notify a third party of a request for information and invite representations.

170 These include: protection of privacy of a third party who is natural person; protection of commercial information of a third party; protection of certain confidential information of a third party; protection of safety of individuals and protection of property; protection of records privileged from production in legal proceedings; and protection of research information of a third party and protection of research information of a private body.
171 This relates to the protection of commercial information of a private body.

Part 4: Appeals and reviews of PAIA decisions

- **Sections 74 – 77**: If a requester is aggrieved by the decision of an information officer of a public body, the requester has the right to lodge an internal appeal within 60-days of the receiving the decision, using Form 4.[172] This right of an internal appeal does not apply to private bodies; however, a requestor is able to submit a compliant to the Information Regulator if aggrieved by the decision of a private body – see the functions of the Information Regulator below.
- **Sections 78 – 82**: If a requestor is unsuccessful with an internal appeal to the relevant authority of a public body, or is aggrieved by the decision of an information officer of a private body, the requestor may apply to a court for appropriate relief within 180-days of receiving the decision. An application may be filed with either the High Court or Magistrate Court.

Information note 12: Outline of South Africa's Promotion of Access to Information Act

103. Since its commencement in 2001, PAIA has been amended multiple times, predominantly through amendments to other legislation such as the Financial Intelligence Centre Act 38 of 2001 and the Judicial Matters Amendment Act 42 of 2001. There have been two recent sets of amendments through the Promotion of Access to Information Amendment Act (the "2019 Amendment Act"),[173] and the Protection of Personal Information Act ("POPIA"),[174] which are particularly significant. Relevant amendments are summarised in the following subsections.

4.1.1 The 2019 Amendment Act

104. The 2019 Amendment Act came into effect on 1 April 2021. Its amendments include the insertion of "political party" under the PAIA definition of a private body and section 52A that requires the head of a political parts to create and keep records of any donation received that exceeds R100 000, including the identity of the person or entities who / that made the donation. These records must be available on a quarterly basis and kept for a minimum of five years after creation.

105. The 2019 Amendment Act was a consequence of a Constitutional Court case between CSO, My Vote Counts, and the Minister of Justice and Correctional Services. In this landmark decision, the Constitutional Court found that private funding of political parties and independent candidates – as a category of information – is essential for the effective exercise of the section 19 right to make political choices and to participate in the elections.[175] The Court ordered Parliament to develop legislative measures requiring political parties and independent candidates to record, preserve and facilitate reasonable access to such information. Selected extracts from the judgment are highlighted below, indicative of the potential for other categories of public interest information that ought to be proactively recorded, maintained, and accessible for the exercise of a particular right, or set of rights, in the Constitution.

172 See above n 166.
173 31 of 2019.
174 4 of 2013.
175 *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17; 2018 (5) SA 380 (CC). ("*My Vote Counts judgment*"). (Available here.)

My Vote Counts NPC v Minister of Justice and Correctional Services (2018)

Background

My Vote Counts wanted to obtain information relating to private funding from some political parties. It used section 32 of the Constitution read with the relevant provisions of PAIA. Some political parties successfully used the grounds of refusal provided in PAIA to avoid disclosing that information. This resulted in an application to the High Court, Western Cape Division, Cape Town, that challenged the constitutional validity of PAIA on several grounds, including the claim that PAIA was deficient because it failed to provide for access to information on the private funding of political parties and independent candidates. My Vote Counts argued that part of PAIA's deficiency was the onerous requirements for access to information, in general, and related to private funding, including the requirement to pay a fee.

The High Court found that PAIA's failure to provide access to information on private funding is a deficiency that rendered PAIA inconsistent with the provisions of sections 32, 7(2) and 19 of the Constitution; however, the High Court dismissed My Vote Counts request for the order to provide for a "continuous and systematic" recordal and disclosure of information on private funding as this would encroach on the exclusive domain of Parliament.[176]

In terms of section 167(5) of the Constitution, the Constitutional Court had to decide whether to confirm the High Court's order of invalidity before it could have any force. The Minister of Justice and Correctional Services opposed the confirmation of the order.[177]

Constitutional Court judgment

In its assessment of the PAIA regime, the majority judgment considered that "[t]he Constitution might, in relation to certain provisions, like the right to vote, have to be read as requiring of all persons to record or hold and preserve information in a way that would render it capable of being reasonably accessible or disclosable."[178] The majority judgment affirmed that there is a vital connection between the proper exercise of the right to vote and the right of access to information, especially in a democratic society,[179] and that "[t]he centrality of information to this process cannot be over-emphasised".[180] For this reason, it was determined that all information necessary to enlighten the electorate about those seeking public office must not only be captured and preserved but also made reasonably accessible.[181] This is part of the State's obligation to do everything reasonably possible to give practical and meaningful expression to the right of access to information and the right to vote.[182]

176 *Id* at paras 18 and 6 – 9.
177 *Id* at paras 10 – 2.
178 *Id* at para 2.
179 *Id* at para 35, citing *President of the Republic of South Africa v M & G Media Limited* [2011] ZACC 32; 2012 (2) SA 50 (CC) at para 10.
180 *My Vote Counts judgment* above n 175 at para 38.
181 *Id* at para 39.
182 *Id* at para 43.

The majority judgment addressed the need for access by all key players and that the predictable hurdles to the free flow of information on private funding to the broader public must be removed. The judgment acknowledged that "contestants ought to have virtually unrestrained access to information on the private funding of one another. . . and [s]imilarly, the extensive reliance on the media by those seeking public office and the voting public, demands that information on private funding also be availed . . .".[183] In terms of section 16(1)(b) of the Constitution, the majority judgment concluded that "[a]ll of them including NGOs, the media and academia need to 'receive' information relevant to voting to in turn be able to 'impart' and cause others to 'receive' processed information from them."[184]

The majority judgment found that sections 18 and 53 of PAIA did not pass constitutional muster in this case as they prescribe a form to be completed with laborious particularity, a fee must be paid, and the request process is generally cumbersome. Furthermore, information might be withheld on the basis that it is likely to harm commercial or financial interests.[185] According to the Court, this highlights PAIA's inconsistency with the constitutional obligation to avail information on private funding to all who need it in a reasonable manner, and no compelling reasons exist to justify these limitations.[186]

Outcome

Based on the above reasoning, the Constitutional Court concluded that reasonable access should be institutionalised to be free-flowing and to avoid the exercise of ministerial discretion. For broader purposes, the majority judgment does caution that section 32 does not confer an:

> "absolute or blanket entitlement to seekers of any information required from whomsoever for the exercise or protection of all rights. The ease with which it is made accessible ought to depend on the nature of the right whose exercise or protection is sought to be facilitated. If that right self-evidently requires particular information to be properly exercisable, then a person or entity in need of it does not always have to explain the need."[187]

In this case, the majority judgment decided in favour of My Vote Counts, but left it to Parliament to determine how best to fulfill the obligation of political parties and independent candidates to record, preserve and disclose information.[188] Although the Constitutional Court confirmed the order of invalidity, it dismissed the application for leave to appeal against the High Court's exclusion of the words "continuous and systematic recordal" on the basis that voters will get all they need based on the appropriately modified High Court order.

Case study 1: My Vote Counts NPC v Minister of Justice and Correctional Services (2018)

183 *Id* at para 54.
184 *Id* at para 58.
185 *Id* at para 66.
186 *Id* at para 67.
187 *Id* at para 71.
188 *Id* at paras 74-6.

4.1.2 Information Regulator

106. Sections of POPIA commenced in 2014 in order to promote the protection of personal information processed by public and private bodies. Section 39 of POPIA established the office of the Information Regulator, an independent body, subject only to the Constitution and to the law, which is required to perform its functions and exercise its powers without fear, favour, or prejudice.

107. The Information Regulator has replaced the South African Human Rights Commission ("Human Rights Commission") as the statutory mandate holder responsible for the protection, monitoring, and promotion of section 32 of the Constitution through the implementation of PAIA – see the subsection to follow on the transfer of this mandate. In terms of PAIA, the enforcement powers of the Information Regulator came into effect on 30 June 2021. The textbox below summarises the general functions of the Information Regulator and the specific complaint mechanisms under PAIA, including the power to issue an enforcement notice.

Photo: Derick Anies

General functions of the Information Regulator

In terms of **section 83 of the PAIA**:

The Information Regulator must-

- Compile and make available a **guide on how to use this Act** as contemplated in section 10.[189]
- Submit reports to the National Assembly as contemplated in section 84 of PAIA.
- Develop and **conduct educational programmes to advance the understanding of the public**, in particular of disadvantaged communities, including how to exercise the rights contemplated in PAIA.
- Promote timely and effective dissemination of accurate information by public bodies about their activities.

The Information Regulator may-

- **Make recommendations for the development, improvement, modernisation, reform** or amendment of this Act or other legislation or common law, and procedures in terms of which public and private bodies make information electronically available;
- Monitor the implementation of this Act.
- If reasonably possible, on request, assist any person wishing to exercise a right contemplated in this Act.
- **Recommend to a public or private body that the body make such changes** in the manner in which it administers this Act as the Information Regulator considers advisable.
- Train information officers and deputy information officers of public bodies.
- **Consult with and receive reports or proposals from public** and private bodies on the problems encountered in complying with this Act.
- Generally, inquire into any matter, including any legislation, the common law and any practice and procedure, connected with the objects of PAIA.

Complaints to the Information Regulator

Following the June 2021 amendments, **sections 77A – 77K in PAIA** set out the complaint procedure for a requestor or third party. These provisions are summarised below from the perspective of a requestor.

Complaint submission

- A requester may submit a complaint to the Information Regulator after exhausting the internal appeal procedure **against a decision of the information officer of a public body**; a requestor can also submit a **complaint against a decision by a private body** to refuse a request for access, taken in terms of section 54, 57 (1) or 60 of PAIA.
- The complaint must be **submitted in writing within 180-days.**
- The Information Regulator must give reasonable assistance to enable a requestor to submit a complaint.

189 The Information Regulator has published the guide on how to use PAIA, updated in October 2021. (Available here.)

Duties on receipt of a complaint

- The Information Regulator, after receipt of a complaint made in terms of section 77A, **must investigate the complaint in the prescribed manner, refer the complaint to the Enforcement Committee, or decide to take no further action in due to late submission, or if the complaint is frivolous, vexatious or in bad faith**.
- If the Information Regulator investigates the complaint, it may act as a conciliator in the prescribed manner.
- The Information Regulator must, as soon as is reasonably practicable, **advise the complainant and the relevant information officer of the course of action** that the Information Regulator will take in response to the complaint.
- If it appears from a complaint, or any written response made in relation to a complaint, that it may be possible to secure a settlement between the parties concerned, the **Information Regulator may use its best endeavour to secure such a settlement**.

Investigation procedure

- Before proceeding to investigate any matter, the **Information Regulator must inform the complainant and the relevant information officer** of the Information Regulator's intention to do so.
- For the purposes of the investigation of a complaint the **Information Regulator has powers similar to those of the High Court** relating to the disclosure of records to it and nondisclosure of records by it.
- The **Information Regulator also has powers to** summon a person to appear before it, receive and accept any evidence and other information by affidavit, enter and search any premises occupied by a responsible party, or conduct a private interview with any person in any premises entered.
- For the purposes of the investigation of a complaint the Information Regulator **may serve the information officer or head of a private body with an information notice** requiring information to be submitted within a specific time period.

Enforcement notice

- After having considered the recommendation of the Enforcement Committee, the Information Regulator may serve the relevant information officer with an **enforcement notice confirming, amending, or setting aside the decision,** which is the subject of the complaint, or **requiring the information holder to take such action or to refrain from taking specific actions.**
- An enforcement notice must be **accompanied by reasons for the notice** and particulars of the right to make an application to court in terms of PAIA.
- An **information officer who refuses to comply with an enforcement notice referred to in section is guilty of an offence** and liable upon conviction to fine or to imprisonment for a period not exceeding three years or to both such a fine and such imprisonment.

Compliance assessment

In addition to the compliant mechanism, section 77H of PAIA empowers the Information Regulator to conduct **an assessment of whether a public or private body generally complies with the provisions in PAIA**, in terms of its policies and implementation procedures. Such an assessment may be initiated by the Information Regulator at the request of an information officer, or – importantly – any other person. In determining whether or not to proceed with an assessment the Information Regulator must consider whether the request raises a matter of substance and it must be satisfied that the request is not frivolous or vexatious or could be addressed through a PAIA request.

Information note 13: General functions of the Information Regulator

4.1.3 Access to information laws: South Africa's global rating

108. Access!NFO and the Centre for Law and Democracy have developed a rating tool – the RTI Rating – to assess the strength of national legal frameworks for access to information held by public authorities. The RTI Rating is used by inter-governmental organisations, advocates, governments, legislators, lawyers, and academics, among other actors.[190] The methodology is derived from international standards, as well as best practices at national level.[191]

109. The RTI Rating presents a comparative map with a total score, per country, out of a maximum 150 points. The following general observations are noted by the independent assessors, both of which are relevant to South Africa's situation in terms of its PAIA regime:

> "The results demonstrate that more recent laws achieve better scores. Only two of the countries in the top 25 positions first adopted laws before 2000 and both of these countries (Albania and Ukraine) substantially overhauled their laws recently.
>
> In a similar vein, not one of the more established democracies makes it into the top 25. While this is partly a reflection of their (generally) older laws, it also points to the fact that they are not updating their laws to take into account evolving international standards."

110. As of July 2023, PAIA received a score of 118 out of 150 points, ranking South Africa at 16 at of 138 countries.[192] Interestingly, out of the top 20 countries, South Africa has the second oldest access to information law, behind Ukraine's 1992 law, which is ranked 19 out of 138 countries; however, as highlighted by the RTI Rating tool, Ukraine has substantively reformed its access to information laws.[193] The RTI Rating's critique of the provisions in PAIA includes the following:

    110.1. The definition of a public body excludes Cabinet and members of parliament, and it is not clear that it covers all subordinate bodies;[194]

    110.2. A request in terms of section 18 (public body) and 52 (private body) must comply with a prescribed form;[195]

190 A link to the the RTI Rating website is available here. ("RTI Rating")
191 A further explanation of the methodology is available on the website.
192 South Africa's rating is available here.
193 Law of Ukraine on Access to Public Information of 1992. As amended by No. 4652-VI of 2012; No. 4711- VI of 2012; No. 224-VII of 2013.
194 RTI Rating above n 190 at item 7.
195 *Id* at item 15.

110.3. The timeframe for an information officer to respond to a request exceeds 20-working days;[196]

110.4. An access to information request is generally subject to a fee;[197]

110.5. The grounds of refusal under section 43 (third party research), and section 44 (internal information) are overly broad.[198] Section 35 (tax records) and section 41 (defence, security, and international relations) are not subject to a harms test;[199]

110.6. The mandatory public interest override in terms of section 46 (public body) and section 70 (private body) apply to most provisions, but not all, and the override clause is only triggered by certain categories in the public interest (illegal acts, public safety, or environmental issues);[200]

110.7. An internal appeal mechanism exists for public body requests, but it is not free of a charge;[201]

110.8. There is no mechanism for redressing the problem of public authorities which systematically fail to disclose information or underperform;[202] and

110.9. The Information Regulator of South Africa may impose training programs for officials, but it is not mandatory.[203]

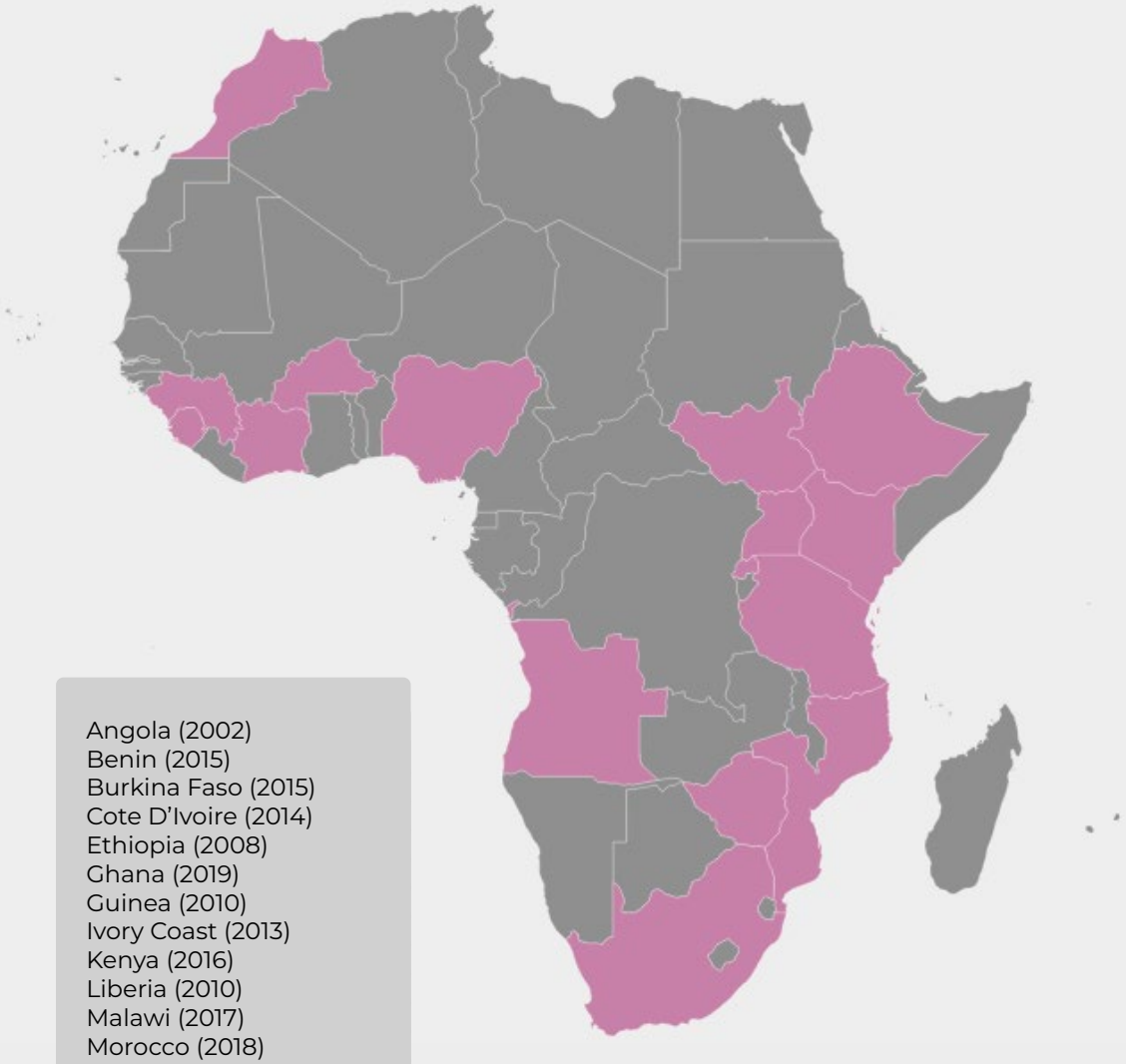
111. Despite the ranking in the top 20 of the national laws assessed, to date, the practical challenges associated many of the features or omissions from the Act that are identified in the RTI Rating tool are also highlighted by the Constitutional Court in the *My Vote Counts* judgment and the additional case studies to follow.

112. Given the regional context of this research that is introduced in the first part of this report, the RTI Rating tool's assessment of the African Model Law should also be noted; out of 14 international and subnational access to information instruments assessed, the African Model Law is ranked second behind the Model Inter-American Law on Access to Information.[204]

113. It is also important to refer to the African Model Law at this point as it sets a best practice benchmark in the African context that the Human Rights Commission has promoted in its recommendations to improve PAIA.[205] In the following sections, we touch on the handover between the Human Rights Commission to the Information Regulator, and reflect on the relevant findings, conclusions, and recommendations submitted by the Human Rights Commission during the execution of its mandate.

196 *Id* at item 22.
197 *Id* at items 24-5 and 27.
198 *Id* at item 29.
199 *Id* at item 30.
200 *Id* at item 31.
201 *Id* at item 36.
202 *Id* at item 51.
203 *Id* at item 59.
204 The RTI Rating ranking table is available here.
205 For example, see the South African Human Rights Commission *Promotion of Access to Information Act Annual Report* (2015-2017) at page 18. (Available here). ("2017 PAIA Report".)

African states with ATI laws



Angola (2002)
Benin (2015)
Burkina Faso (2015)
Cote D'Ivoire (2014)
Ethiopia (2008)
Ghana (2019)
Guinea (2010)
Ivory Coast (2013)
Kenya (2016)
Liberia (2010)
Malawi (2017)
Morocco (2018)
Mozambique (2015)
Niger (2011)
Nigeria (2011)
Rwanda (2013)
Seychelles (2018)
Sierra Leone (2013)
South Africa (2000)
South Sudan (2013)
Sudan (2013)
Tanzania (2016)
Togo (2016)
Tunisia (2016)
Uganda (2005)
Zimbabwe (2002)

Graphic: https://africanplatform.org/

4.1.4 Mandate hand over to the Information Regulator

114. Since the establishment of the Information Regulator and the June 2021 amendments to PAIA, the Human Rights Commission and the Information Regulator have been engaged in a gradual handover process in terms of a Memorandum of Cooperation ("MoU"). According to the Human Rights Commission's latest annual report on the implementation of PAIA, this MoU and Plan of Action were signed by the parties in May 2021.[206]

115. Among other commitments, the Human Rights Commission and the Information Regulator agreed that:[207]

    115.1. The Human Rights Commission would handle complaints already before it until finalisation. All complaints to the Human Rights Commission received after June 2021 would be referred to the Information Regulator.

    115.2. Both parties undertook to jointly inform the public about the mandate of the Information Regulator and the complaints process. Material developed by the Human Rights Commission, such as the section 10 PAIA Guide, toolkits, templates, guides, and notices have been shared with the Information Regulator.

    115.3. The Human Rights Commission was obliged, in accordance with PAIA, to continue to collate section 32 reports from public bodies for the 2020/2021 financial year for submission to Parliament. These transitional obligations concluded at the end of September 2021.

116. This changing of the guard provides a moment to take stock of Human Rights Commission's experience during its tenure as mandate holder, as a way of verifying whether the RTI Rating's critique of PAIA's provisions is justified in practice. The Human Rights Commission's annual reports covering the period 2019 - 2021 provide the basis for the following analysis.

4.2 General review: Systematic trends and challenges

117. The Human Rights Commission's Promotion of Access to Information Act Annual Report for 2020/21 ("2021 PAIA Report") was its final report in accordance with sections 83 and 84 of PAIA. It holds valuable insights for the purposes of this exploratory research at the intersection with South Africa's JET to a climate-resilient society, as the 2021 PAIA Report offers "broad reflections on the 20 years of PAIA and how the [Human Rights Commission] as the sole custodian of access to information has responded to its mandate to protect, monitor and promote this fundamental right enshrined in the South African Constitution".[208] These broad reflections build on findings and conclusions in the Human Rights Commission's Promotion of Access to Information Act Annual Report for 2019/2020 ("2020 PAIA Report"),[209] among its other annual reports dating back to 2012.

118. The following textbox summarises systematic challenges surrounding the implementation of PAIA that the Human Rights Commission has pinpointed through its monitoring and reporting duties.[210]

---

206 2021 PAIA Report above n 164 at page 31.
207 *Id.*
208 *Id* at page 9.
209 The South African Human Rights Commission *Promotion of Access to Information Act Annual Report* (2019/2020). ("2020 PAIA Report".) (Available here.)
210 The bulk of these systematic challenges are drawn from section 7 in the 2021 PAIA Report above n 164. Page references in other Human Rights Commission annual reports are provided.

PAIA compliance: Systematic challenges

- Based on trends identified in section 32 reports submitted by public bodies and PAIA complaints lodged with the Human Rights Commission, the 2020 PAIA Report found that **non-implementation of PAIA remained endemic**. In order for South Africa to cultivate a culture of transparency, it is necessary for all information holders to have earnest regard to the crucial importance of a free flow of information.[211]
- **Compliance across the three spheres of government remains very low in terms of the compilation of section 14 PAIA manuals**. A related challenge observed by the Human Rights Commission is that certain public institutions do not regularly update their section 14 manuals.[212]
- **Private entities are also obliged to submit section 51 manuals, but many failed to comply with this requirement**. Basic audits of websites indicated that PAIA manuals have not been published, whilst others had uploaded seemingly outdated PAIA manuals. The Human Rights Commission found that this trend suggested that the penalty provisions in law were not an effective deterrence.[213]
- The limited nature of the information required from public bodies in terms of section 32 of PAIA prevents a substantive analysis of the levels of compliance. Given that it is one of the duty-bound role-players to ensure a JET through climate-resilient development, it is notable that **the Department of Energy and the Department of Mineral Resources did not submit section 32 reports during the 2019-2020 and the 2020-2021 periods**.[214]
- The Human Rights Commission's **limited resources had serious implications for the reach of its work on PAIA,** including consistent training programmes. The Human Rights Commission has noted that the issue of inadequate resources should be resolved by the Information Regulator coming into operation.
- The absence of specific policies on the implementation of PAIA in public bodies has been highlighted. Some public bodies have not established records management policies and many have not designated deputy information officers. Based on these trends, the 2020 PAIA Report concluded that **there appeared to be little political will in respect of PAIA implementation and compliance.**[215]
- Public bodies have not consistently relied on grounds for refusal set out in PAIA. This constituted an incorrect application of the Act, according to the Human Rights Commission, especially in the light of the fact that the **grounds for refusal must be narrowly construed so that disclosure is the rule**.
- In relation to private bodies, the Human Rights Commission has also observed **that requesters struggle to demonstrate that information sought is necessary for the exercise or protection of any right**. The difficulty in meeting this evidential requirement seems to be exacerbated by the power imbalance that often exists between requesters and large corporate entities.[216]
- Considering local governments vital service delivery role and its general constitutional mandate, the Human Rights Commission has expressed its concern at the continued **failure of municipalities to ostensibly make any attempts to comply with the PAIA.** It is observed that if the Human Rights Commission is unable to source basic PAIA information in respect of municipalities, the prospects for an ordinary member of the public are slim.[217]

Information note 14: PAIA compliance: Systematic challenges

211 2020 PAIA Report above n 209 at page 20.
212 2021 PAIA Report above n 164 at page 25.
213 *Id* at page 27.
214 See 2020 PAIA Report above n 209 at page 37 and *id* at page 50.
215 *Id* at page 12.
216 *Id* at page 20.
217 *Id*.

119. Importantly, the Human Rights Commission has also noted that despite reports alerting Parliament to the low levels of compliance with PAIA, there has been no significant improvement in compliance rates. The Parliamentary Portfolio Committee on Justice and Correctional Services has previously requested that the Human Rights Commission submit a list of departments and municipalities that were non-compliant over the period 20172020. This list was duly submitted in October 2020, but at the time of publishing the 2021 PAIA Report, the Human Rights Commission had not been advised of the corrective steps taken by Parliament.[218]

120. These general findings and conclusions resulted in the following concluding paragraph in the 2020 PAIA Report:

> "The PAIA itself is comprehensive legislation that provides for access to information held by both public and private bodies. However, despite gains made by the [Human Right's] Commission and a legislative framework in which to realise the constitutional right, people continue to struggle to access information. This may be ascribed to a combination of factors, including the technicality of the PAIA, the fact that the PAIA has not been amended to keep up with today's information society, and a lack of political will to understand and implement the PAIA. The [Human Rights] Commission hopes that a process of legislative reform will be undertaken to simplify and update the PAIA as South Africa gears up for the Fourth Industrial Revolution. Handover of the PAIA function to the Information Regulator in 2021 will hopefully also improve compliance, in the light of the investigative and enforcement powers that the Information Regulator will wield under the amended PAIA."

121. Since 2011, the Human Rights Commission has submitted, and reiterated, specific recommendations to reform PAIA to ensure that the Act is effective in "today's information society". Like the 2019 amendments outlined above, these recommendations have been expressed through various channels, including parliamentary submissions related to legislative amendments and section 84 reports to the National Assembly.[219] In the following sections, we focus on some of these specific recommendations and present illustrative case studies that offer constructive principles for access to information in the JET context.

4.3 Proactive disclosure of information and records

122. In its 2020 PAIA Report, the Human Rights Commission provides an update on international and regional developments relevant to access to information. This includes the African ATI Declaration – **see section 3.2.1 above**. The Human Rights Commission has stated that "the [African ATI] Declaration serves as a lodestar for PAIA reform in South Africa, in an effort to ensure that the PAIA remains fit for purpose in today's information age".[220]

123. The Human Rights Commission has specifically referred to Principle 29, which calls for proactive disclosure (automatic access) in respect of public bodies, in addition to private bodies that are publicly funded or perform a public service.[221] The Human Rights Commission also specifically notes that although the African ATI Declaration proposes a duty to create records, PAIA does not create any such duty.[222]

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218 2021 PAIA Report above n 164 at page 38.
219 These recommendations are summarised in the 2020 PAIA Report above n 209 and the 2017 PAIA Report above n 205.
220 2020 PAIA Report above n 209 at page 17.
221 *Id*.
222 *Id*. See. also, Principle 30 of the African ATI Declaration above n 61.

124. Consistent with the African ATI Declaration and international best practice, and to reform South Africa's information access regime to remain fit for purpose, the Human Rights Commission has previously made submissions on both the need for proactive disclosure, and it has repeated its recommendation for government to establish an open data portal where all proactively disclosed information can be accessed by the public.[223]

125. The following case studies and textbox show the importance of automatic disclosure and publication of environmental information in South Africa, and that there are instances where this is already practiced by public bodies using open data portals to inform affected communities and interested members of the public. According to the Information Regulator, providing access to electronic records to those who need them can improve transparency and accountability, compliance with legislation, and administrative efficiency.

Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others (2020)

Background

This application in the High Court, Gauteng Division, Pretoria, concerned the rights of the interested and affected community members (the "applicants") to access the mining right application of Transworld Energy and Mineral Resources Pty Ltd ("TEM"). The application was made in terms of section 22 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the "MPRDA") over land on which the applicants resided and worked.[224] TEM provided a copy of the mining right application, excluding confidential information, but only after the application was issued and served. The only relief that remained in dispute related to whether interested and affected parties are, on request, entitled to a copy of an application for a mining right in terms of sections 10(1) and 22(4) of the MPRDA.[225] TEM argued that the applicants are not entitled to the mining right application in terms of the MPRDA and should rather utilise procedures under PAIA as the statute that governs the right of access to information.[226] The government respondents from the Eastern Cape Department of Mineral Resources and the National Department of Mineral Resources ("DMR") filed a 'Notice to Abide' by the decision. Notably, the Centre for Applied Legal Studies ("CALS") was admitted as an *amicus curiae (friend of the court)*.

High Court judgment

Makhubele J commenced with the factual background leading to the application. Although it does not need to be repeated here, what is evident is that the applicants, and their attorneys, requested a copy of the mining right application from both TEM representatives and the Regional Manager on several occasions, without success.[227] After outlining the applicable legislative framework, including the MPRDA, NEMA, PAIA, and relevant constitutional rights, the High Court summarised the submissions before it.[228]

223 2020 PAIA Report above n 209 at page 23.
224 *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* [2020] ZAGPPHC 485; [2020] 4 All SA 374 (GP) at para 3. (Available here.) ("*Baleni judgment*").
225 *Id* at paras 8-10.
226 *Id* at para 11.
227 *Id* at para 15.
228 An overview of the legislative framework is provided from paras 17-43 *id*.

The applicants argued that on the proper interpretation of section 10 and 22(4) of the MPRDA, interested and affected parties should obtain a copy of a mining right application automatically upon request from the Regional Manager to enable them to engage in consultations. The MPRDA sets out specific timelines for the exercise of the communities' rights, which are truncated, meaning that if the community was required to make an application to access the application, they would simply not be able to exercise their rights to consultation. The applicants also opposed TEM's argument that the DMR PAIA manual provides that the community will automatically get the mining rights application upon request, as this is republished annually and is subject to change.[229]

CALS submissions primarily revolved around research from the Centre for Environmental Rights, which tracked PAIA applications that were made to three departments, namely, the DMR, Water and Sanitation and Environmental Affairs. This demonstrated the low success rate of the PAIA applications across all three departments and confirmed that it is impossible to comply with the 30-day objection period. If an internal appeal in terms of PAIA is unsuccessful, the only remedy would be to approach a court and most affected communities do not have the resources to make these applications.[230]

TEM did not dispute the fact that the applicants must be given access to the documents but argued that the correct procedure was provided in PAIA. TEM added that the 2014 DMR PAIA manual had been amended by 2017; except for confidential information, everything could be obtained by way of a PAIA application.[231]

Based on a reading of all the relevant statutory provisions, the High Court found that persons in the position of the applicants cannot be treated like ordinary members of the public. The information that is in the mining right application is required for a specific purpose, by persons or group of persons in the position of the applicants.[232] The applicants, unlike the general public, will be directly affected by the environmental impacts of the mining operations.[233]

The High Court determined that this matter was not about the deficiencies in the DMR PAIA manual, except for noting the complaint that the process is lengthy and following it may result in a failure to comment or object timeously.[234] The High Court held that the manner in which the applicants obtain a copy of the mining right should not be restricted to the request processes in terms of PAIA as they should be engaged directly in the determination of the fate of the mining right application.[235] The High Court went further and observed that:

> "I would have thought that taking into account the developments in the various legislation, the persons in the position of the applicants would be entitled to a copy of the application as and when it is submitted to the Regional Manager, even before they ask for it. That is not the relief sought though."

229 See the Applicants' arguments from paras 45-58 *id*.
230 See CALS submissions from paras 59-70 *id*.
231 See TEM's arguments from paras 71-8 *id*.
232 *Id* at para 84.
233 *Id* at para 86.
234 *Id* at para 87.
235 *Id* at para 91.

Outcome

The High Court concluded that the dispute around the applicants' access to a copy of the mining right application was not moot and therefore decided that the applicants were entitled to the relief sought in prayer 1 of the Notice of Motion. It was also concluded that the statistical evidence submitted by CALS confirmed the applicants' anxieties and their stance that their rights cannot be realised by following the PAIA processes.[236] TEM was ordered to pay the costs of both the applicants and CALS.

Case study 2: Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others (2020)

126. In the *Baleni judgment*, DMR's manual in terms of section 14 of PAIA was scrutinised. One of the reasons that the accessibility of a current manual is so important is that it contains the latest notice, in terms of section 15(2) of PAIA, listing the categories of records of the body which are available without the need for a PAIA request. The automatic availability of records is a key measure contributing to the proactive disclosure of information, in accordance with best international practice. As the *Baleni judgment* illustrates, these records should include authorisations, and / or records related to applications for authorisations, in terms of relevant legislation falling under the purview of a public body. This is particularly so where such applications affect natural resources that belong to the people and the State serves as a custodian holding the environment in public trust.[237]

127. In terms of the automatic availability of information, the case study below on the Department of Environment, Forestry, and Fisheries ("DFFE") provides a useful example of what is available through a data portal and where information gaps and access challenges remain.

Automatic availability of certain environmental records

DFFE's latest PAIA manual in terms of section 14 of PAIA and section 17 of POPIA is available on its website.[238] It appears that it was last updated in April 2021. Section 6 of the PAIA manual presents the information that is available through the DFFE website in terms of section 15 of PAIA. This includes:

- Maps and graphics;
- Geographic information system ("GIS") data sets;
- Projects and programmes;
- Register of all rights of access, other rights, permits, and licences granted or issued in terms of the Marine Living Resources Act No. 18 of 1998);
- Policy and legislation; and
- Information relating to the following specific statutory bodies.

236 *Id* at para 114.
237 See the Preamble in the Mineral and Petroleum Resources Development Act 28 of 2002, as amended, and section 2(4)(o) in NEMA.
238 The webpage is available here.

Though the list is limited to forms of authorisation related to the Marine Living Resources Act 18 of 1998, the DFFE is also custodian of the Renewable Energy EIA Application Database ("RE database"), which is updated on a quarterly basis and available to the public.[239] The RE database contains spatial data for renewable energy projects that have received environmental authorisation, as well as those with environmental authorisation applications that are still in progress or cancelled.

The RE database covers environmental authorisations linked to the development of facilities that will generate electricity from a renewable resource i.e., solar, wind, hydropower, wave power. This raises the question as to whether the same database is available for environmental authorisations linked to the development of facilities that will generate electricity from non-renewable resources, such as coal and natural gas?

Centre for Environmental Rights PAIA request

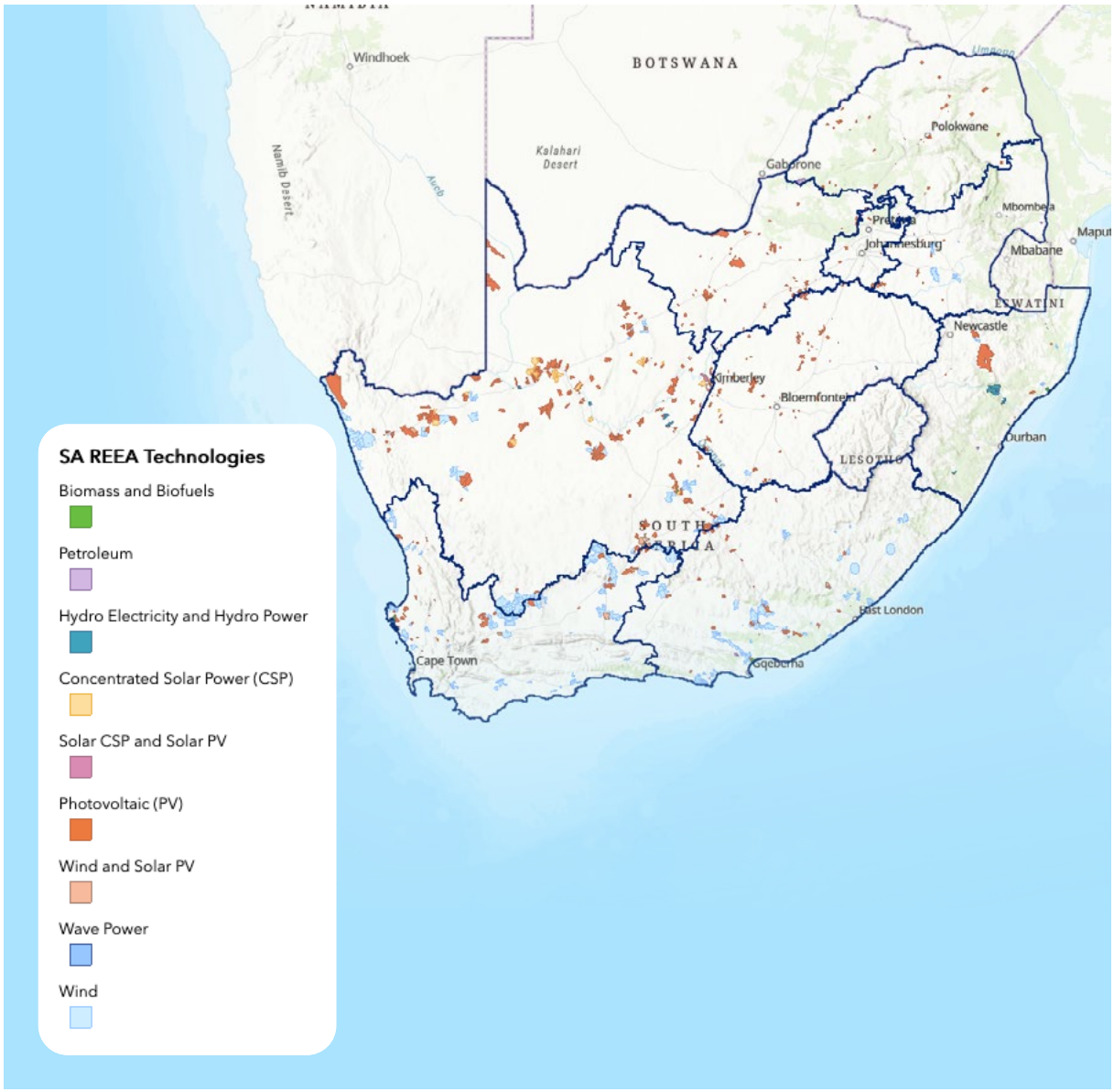
On 18 January 2021, in terms of PAIA, the Centre for Environmental Rights submitted a request for a list of all the entities and/or persons that have applied for, and/or have been granted, environmental authorisations, in terms of the Environmental Impact Assessment Regulations, for the development and operation of facilities for the generation of electricity from non-renewable resources – coal and gas.[240]

The PAIA request was restricted to applications for coal-fired and gas-fired power generation facilities with an electricity output of 20 megawatts ("MW") and above, during the period of January 2016 to date of the PAIA response. The DFFE provided a response on 25 March 2021 – two-months later – granting the request in the form of an Excel spreadsheet. The spreadsheet includes details such as the applicant and project description, the responsible environmental assessment practitioner, the planned capacity and location of the project, key application dates, and the status of the application at the time of sharing the records.

Despite the extended period that DFFE required to grant the request, this PAIA engagement successfully produced the information sought. The problem, however, is that the details provided in the Excel spreadsheet were fixed in time and only covered a particular period (January 2016 – to the date of the PAIA submission). This means that the content of the Excel spreadsheet subsequently became outdated. The result is an impractical and unreasonable administrative burden upon an NGO, like the Centre for Environmental Rights in this case, to make successive PAIA requests on a regular basis to ensure that such information, in the public interest, remains current and accurate.

Case study 3: Automatic availability of certain environmental records

239 The RE database is available here.
240 A description of this request and relevant documents is available here. This case study is included in this research report with the written consent of the Centre for Environmental Rights.



Graphic: https://egis.environment.gov.za/renewable_energy

128. To promote sound record keeping systems and to promote automatic access to records swiftly, inexpensively, and effortlessly, the Information Regulator has published Procedures for Making Information Electronically Available ("Electronic Information Guidelines").[241] This document was prepared by the Information Regulator, in terms of section 83(3)(a)(ii) of PAIA – **referred to in textbox 13**. The Electronic Information Guidelines define an electronic record as:

> "Any information that is recorded in machine readable form. Electronic records include numeric, graphic, audio, video, and textual information which is recorded or transmitted in analogue or digital form such as electronic spread sheets, word processing files, databases, electronic mail, instant messages, scanned images, digital photographs, and multimedia files".[242]

129. The textbox below provides an overview of the key objectives that the Electronic Information Guidelines seek to achieve.

241 Information Regulator of South Africa *Procedures for Making Information Electronically Available* (March 2022). (Available here.) ("Electronic Information Guidelines".)
242 See the definitions section *id*.

Electronic Information Guidelines

It is recommended in the Electronic Information Guidelines that in support of the **continuous flow of information, compliance with the regulatory environment, and to promote transparency, accountability, and effective governance of all public and private bodies**, organisations should create and maintain authentic, reliable and usable records.[243] Organisations should also protect the integrity of electronic records for as long as required.[244]

In accordance with the statutory obligations and applicable best practice standards issued by the International Organisation for Standardization ("ISO")[245] – as summarised in section 6 of the Guidelines – the overarching objective of the Electronic Information Guidelines is to ensure the following:[246]

- An efficient and systematic control of the creation, receipt, maintenance, management, use and disposition of records in an electronic environment, based on international standards ISO 15489;
- Electronic records can be managed in order to make information readily available to users, and authentic and reliable electronic records are protected for the long term; and
- The reliability, usability, authenticity, and integrity of records.

According to the Electronic Information Guidelines, where evidence of business is created, captured, managed, and made accessible to those who need it, it enables the following:

- Improved **transparency and accountability**;
- Effective policy formation;
- Informed decision-making;
- Continuity in the event of disaster;
- The **protection of rights and obligations of organisations and individuals**;
- Protection and support in litigation;
- Compliance with legislation and regulations;
- Improved ability to demonstrate corporate responsibility, **including meeting sustainability goals**; and
- Reduction of costs through greater **business efficiency**.

Although the Electronic Information Guidelines are not binding, the publication and promotion of these procedures are an important initiative from the Information Officer to ensure that the PAIA remains fit for purpose in today's information age. As such, this development was reported to Parliament in the Information Officer's Annual Report 2021/22.[247]

Information note 15: Electronic Information Guidelines

243 Electronic Information Guidelines above n 241 at para 3.4.
244 *Id*.
245 The Information Regulator has adopted three ISO standards for the implementation of the procedures: ISO 15489 - Records Management; ISO/IEC 27001 - Information Security Management Systems; ISO 30300:2011 - Management Systems for Records (Fundamentals and Vocabulary).
246 Electronic Information Guidelines above n 241 at para 5.1.
247 Information Regulator of South Africa *Annual Report 2021/22* (September 2022) at pages 82-3. ("Annual Report 21/22".)

130. The concluding point here is that, in general, **the need for an access to information request in terms of PAIA should be the last resort**, **not the default position of information holders**. This is especially so in today's information age where information and records are capable of storage, access, and dissemination through electronic platforms. As the *Baleni judgment* and the case studies to follow show, once a requestor is directed to rely on PAIA, its strictures can in many instances undermine swift, inexpensive, and effortless access to information, contrary to the Preamble and objects in the Act. What will become evident below is that it is not uncommon for both public and private information holders to use the provisions in PAIA to obstruct access to records that should be disclosed without resistance.

4.4 Exercising or protecting a right: A procedural and substantive burden

131. In contrast to Principle 31 in the African ATI Declaration, the Human Rights Commission has cautioned that PAIA requires that a requester for information held by a private body must demonstrate that the information is reasonably required for the exercise or protection of any right. This requirement "can constitute an insurmountable burden when requesters are ignorant of the content of requested records".[248]

132. This observation is corroborated by the Access to Information Network ("ATI Network"), made up of several South African civil society organisations that support the constitutionally protected right of access to information through their work.249 Established in 2008, the ATI Network has published nine annual shadow reports recording the organisational members experience of PAIA. Among other challenges and trends, the 2019 Shadow Report notes that:

> "PAIA requests to private bodies are rarely made. This is due, in large part, to the additional burden of having to prove that the information is "required for the exercise or protection of any rights" in terms of section 50 of PAIA. In addition to the records being 'required for the exercise or protection' of rights, the legal test developed by our courts is that information must be reasonably required and a substantial advantage, or an element of need, on the requester's part should exist. While this test does not appear to be overly burdensome, particularly given the multitude of constitutional rights that often require information in order to effectively exercise those rights, we still find that private bodies in South Africa view requests for information with suspicion, seeking to rebuff the request on the basis that "an element of need" has not been established".[250]

133. As the next case study demonstrates, this requirement has proven to be a burden even where requestors, or, in this instance, their legal representatives, have an indication of the record content and an understanding of the implicated right or set of rights.

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248 2020 PAIA Report above n 209 at page 17.
249 ATI Network member organisations include: Africa Check, amaBhungane Centre for Investigative Journalism ("amaBhungane"), Centre for Applied Legal Studies ("CALS"), Centre for Environmental Rights ("CER"), Corruption Watch ("CW"), Equal Education Law Centre ("EELC"), Open Democracy Advice Centre ("ODAC"), Oxpeckers Center for Investigative Environmental Journalism ("Oxpeckers"), Public Service Accountability Monitor ("PSAM"), Right2Know Campaign ("R2K"), South African History Archive ("SAHA") and Wits Justice Project.
250 Access to Information Network *Promotion of Access to Information Act 9th Shadow Report* (September 2019). ("2019 Shadow Report".) (Available here.)

Arcelormittal South Africa v Vaal Environmental Justice Alliance (2014)

Background

This case involved the submission of a PAIA requests by Vaal Environmental Justice Alliance ("VEJA") to ArcelorMittal ("AMSA") for access to a copy of its Environmental Master Plan, and records related to its Vaal Disposal Site. AMSA refused the requests on the basis that VEJA had not sufficiently demonstrated that it required the information to protect its rights. VEJA challenged AMSA's decision to refuse access to the documents in the High Court, Gauteng Local Division, Johannesburg. Carstensen AJ found that AMSA's refusal was unlawful and directed AMSA to supply VEJA with copies of the requested records within fourteen days of the order.[251] AMSA appealed against this decision.

Supreme Court of Appeal judgment

The Supreme Court of Appeal ("SCA") delivered a unanimous judgment in November 2014, against the backdrop – as observed by the Court – of increasing ecological sensitivity around the world, together with citizens in democracies growing alert to the dangers of a culture of secrecy and unresponsiveness in respect of governments and corporations.[252]

The SCA summarised section 50 of PAIA and the nature and context of the Environmental Master Plan and disposal site records, together with the main arguments submitted by the parties. This included AMSA's stance that VEJA had not set out grounds which demonstrated its entitlement to the records requested, and that VEJA was setting itself up as a parallel regulating authority in relation to the environment, which applicable legislation did not allow.[253] The SCA also noted that VEJA had attempted to obtain the records in question from the regulatory authorities without success.[254]

In terms of the PAIA rights threshold requirement, the SCA endorsed the High Court judgment and the interpretation that the word 'required' in section 50(1)(a) of PAIA should be construed as 'reasonably required' in the prevailing circumstances.[255] The SCA confirmed that, beyond the PAIA request itself, it was also entitled to consider evidence adduced by the parties, including AMSA's history of operational impact as this had an "effect on persons and communities in the immediate vicinity and is ultimately of importance to the country as a whole". . . as "matters of public importance and interest."[256]

The SCA highlighted that VEJA also relied on three statutes which it described as being part of the relevant governing legislation, namely NEMA, the National Environmental Management: Waste Act 59 of 2008 ("NEMWA") and the National Water Act 36 of 1998 ("NWA"). The judgment outlined provisions in these statutes, which continue to be applicable today, including the section 2 binding principles under NEMA – **see the introduction section of this report**. The judgment also cites Principle 10 of the Rio Declaration – **see section 3.3 of this report**.[257]

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251 *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*, unreported judgment of the Gauteng Local Division, Johannesburg, Case No. 39646/12 (10 September 2013). (Available here.)
252 *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance* [2014] ZASCA 18; [2015] 1 All SA 26 at para 1. (Available here.) ("*VEJA judgment*".)
253 *Id* at paras 15 and 38.
254 *Id* at para 37.
255 *VEJA judgment*, paragraphs 39 and 50; *Clutchco (Pty) Ltd v Davis* [2005] ZASCA 16; [2005] 2 All SA 225 (SCA); *Unitas Hospital v Van Wyk and Another* [2006] ZASCA 34; [2006] 4 All SA 231 (SCA).
256 *VEJA judgment* above n 249 at paras 51-2.
257 *Id* at para 62-70 and fn 6.

The Court found that in accordance with international trends, constitutional values, and norms in the field of environmental protection, our legislature has recognised the importance of consultation and interaction with the public.[258] It concluded that "[a]fter all, environmental degradation affects us all".[259] On this basis, the SCA determined that VEJA was entitled to have relied on the statutes referred to above in requesting the information and, in doing so, met the threshold requirement for obtaining the requested information.[260] The SCA rejected the argument from AMSA that PAIA distinguished between private and public body obligations and that in this case it was excluded from having to accede to VEJA's request.[261] The SCA cautioned that:

> "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."[262]

Outcome

The SCA therefore dismissed AMSA's appeal and upheld the High Court judgment and order. The legal principles and obligations that are clarified and reaffirmed are of profound importance for the work of environmental advocacy organisations and public access to environmental records held by private bodies. In its 2015 Shadow Report, the ATI Network rightly regarded this SCA ruling as "one of the most significant access to information judgments in democratic South Africa".[263]

Case study 4: Arcelormittal South Africa v Vaal Environmental Justice Alliance (2014)

134. Understandably, there appeared to be an expectation from many environmental justice and access to information organisations that this precedent-setting judgment could be a catalyst for corporate transparency and the proactive disclosure of environmental information, including current and historical data, especially from private bodies associated with extensive environmental and health impacts. The trends presented in ATI Shadow Reports and the Human Rights Commission's PAIA Reports in subsequent years suggest that such a watershed moment has not yet materalised.

4.5 Grounds of refusal without justification

135. With reference to the Human Rights Commission's general finding that when refusing requests, public bodies incorrectly rely on grounds for refusal set out in PAIA and undermine the overarching principle that disclosure should be the rule and refusal is the exception. The experience of the ATI Network in its 2019 Shadow Report supports this general observation, flagging that the "regular failure to cite any, or adequate, reasons for refusing access to records frustrates the objectives of PAIA and demonstrates poor recordkeeping and a lack of accountability on the part of the relevant public body."[264]

136. The two case studies below, both involving information held by public bodies, not only demonstrate that disclosure was evidently not the preferred option in accordance with the principle of maximum disclosure, but both are examples of a false reliance on grounds of refusal without adequate reasons.

258 *Id* at para 71.
259 *Id*.
260 *Id* at para 74.
261 *Id* at para 76.
262 *Id* at para 82.
263 Promotion of Access to Information Civil Society Network *2015 Shadow Report* (February 2015), pages 15-6. (Available here).
264 2019 Shadow Report above n 250 at page 4.

The Health Justice Initiative v The Minister of Health (2023)

Background

The matter involved a PAIA request by The Health Justice Initiative ("HJI") for access to copies of documents relating to the negotiation and conclusion of agreements for the supply of the Covid19 vaccines.[265] It is helpful to understand this matter in the context of the Human Rights Commission's 2021 PAIA Report, which, unsurprisingly, found that the majority of the PAIA requests received at the national level related to investigations on corruption followed by requests relating to government's efforts to fight the spread of the Covid-19.[266]

In this case, HJI submitted a request in July 2021 to the National Department of Health ("NDOH") for access to Covid-19 contracts and copies of all Covid-19 vaccine negotiation meeting outcomes and/or minutes, and correspondence, including with specific parties listed in the request. These were mainly representatives of the pharmaceutical manufacturers approved to supply vaccines for use in South Africa.[267]

Despite an agreement to extend the timeframe for a response to the PAIA request, HJI had still not received any information by 13 September 2021. On 15 September 2021, HJI submitted an internal appeal to the NDOH on the grounds of a deemed refusal. No response was received to the internal appeal. HJI also sent letters to the pharmaceutical manufacturers requesting a South African address for service. Only Pfizer SA replied by email, informing HJI that the information was confidential and protected from disclosure. In January 2022, NDOH subsequently communicated that as the agreements were confidential it was not at liberty to divulge such information. HJI approached the High Court, Gauteng Division, Pretoria, to challenge this refusal.[268]

High Court judgment

In the High Court judgment, Millar J, noted that there was a blanket refusal with no basis laid for it other than the repeated referral to "confidentiality" and "non-disclosure". This is despite section 25(3)(a) of PAIA, which requires a party refusing access to state adequate reasons for the refusal, including the provisions of the Act relied upon. In its answer the question of what constitutes adequate reasons, the judgment cites three authorities, including the case of *President of the Republic of South Africa and Others v M & G Media Ltd*, which held that:

> "The affidavits that have been filed by the appellants are reminiscent of affidavits that were customarily filed in cases of that kind [during apartheid]. In the main they assert conclusions that have been reached by the deponents, with no evidential basis to support them, in the apparent expectation that their conclusions put an end to the matter. That is not how things work under the Act. The Act requires a court to be satisfied that secrecy is justified and that calls for a proper evidential basis to justify the secrecy."[269]

265 *Health Justice Initiative v Minister of Health and Another* [2023] ZAGPPHC 689. (Available here.) ("*HJI judgment*".)
266 2021 PAIA Report above n 164 at page 37.
267 *HJI judgment* above n 265 at para 7.
268 *Id* at paras 8-11.
269 *Id* at para 16.

There were four issues for the Court to consider, including the potential exemption as a result of the confidentiality clauses, and whether the disclosure would prejudice future procurement or commercial interests.

The NDOH argued that the refusal to grant access to the records and the requested information was justifiable under the circumstances as the purpose of the confidentiality clause in the agreements was to protect the interests of the parties involved.[270] The High Court disagreed and found that while the NDOH had contracted with commercial entities, it is not open to the NDOH to conclude agreements which include a confidentiality clause and then seek to rely on the confidentiality clause to circumvent its obligations of accountability and transparency.[271] In the context of public procurement and citing *De Lange and Another v Eskom Holdings Ltd and Others*,[272] the High Court held that mere reliance on a confidentiality clause is not sufficient. More information is needed to justify the refusal.[273] The NDOH was unable to show that there would be any adverse consequence if the information was disclosed and it was therefore concluded that the records sought did not fall within the ambit of section 37(1)(a) of PAIA.[274]

On the issue of potential prejudice to future engagements, the NDOH argued that the disclosure of the information sought would cause harm to the commercial interests of the Republic as manufacturers and suppliers would be reluctant to engage with the South African government in confidence.[275] The High Court held that while it would be permissible to withhold information in the event that it would put a third party at a disadvantage or would cause prejudice in commercial competition, the NDOH was required to show that disclosure would in fact result in a disadvantage or some other prejudice in the course of commercial competition. The High Court also rejected this ground of refusal.[276]

Outcome

As a result, the High Court found that there was no merit in any of the grounds of refusal raised by the NDOH. The refusal to grant access to the records was set aside and the NDOH was directed to supply the records to HJI within ten days of the service of the order.

Case study 5: The Health Justice Initiative v The Minister of Health (2023)

137. The *HJI judgment* provides recent case law confirming that the reliance on legitimate interest in the form of ground of refusal is not enough. The information holder bears the onus of justifying the refusal by showing that adverse consequences would occur if the request were granted. This is in accordance with international law and best practice. One of the authorities referred to in the *HJI judgment* in relation to the legal test for adequate reasons in justifying a ground of refusal is further summarised below.[277]

270 *Id* at paras 28-30.
271 *Id* at paras 32-5.
272 *Id* at para 36.
273 *Id*.
274 *Id* at para 37.
275 *Id* at paras 39-41.
276 *Id* at paras 42-3.
277 *The South African History Archive Trust v The South African Reserve Bank and Another* [2020] ZASCA 56; [2020] 3 All SA 380 (SCA) at para 17. ("*SAHA judgment*".) (Available here.)

The South African History Archive Trust v The South African Reserve Bank and Another (2020)

Background

This case involved a PAIA request by the South African History Archive Trust ("SAHA") for access to records held by the South African Reserve Bank (the "SARB"), in relation to evidence obtained by the bank as part of investigations into certain offences committed by individuals during the apartheid era. After it failed to respond timeously, the SARB refused access to the records. It stated that it was unable to locate any records for five of the named individuals and refused access to the records in relation to three other individuals.[278] SAHA approached the High Court, Gauteng Local Division, Johannesburg, for an order to declare that the refusal to grant access was unlawful to direct the records for the three individuals to be provided within fifteen days of the order. The High Court dismissed the application with costs; however, it granted leave to appeal to the SCA.[279]

SCA judgment

The issues before the SCA on appeal were limited to those records related to three of the individuals in question. The SARB's opposition was two-fold. It argued that two of the individuals should have been joined in the High Court application, and that the SARB was justified in its refusal to provide the records sought.[280] Part of this consideration was whether the SARB complied with the third-party obligations set out in section 47 of PAIA.

The SCA held that the SARB did not take all reasonable steps to inform two of the named individuals about the request, in accordance with PAIA. Consequently, the SARB was not empowered to make any decision under section 49(2) of PAIA and the decision to refuse access to the documents concerning two of the individuals was legally invalid and should have been set side.[281] On the issue of joinder, the SCA found that as the application did not reach the point where any relief granted could have a prejudicial effect on the individuals, joinder was unnecessary.[282]

It was then left to the SCA to decide whether the grounds of refusal relied on by the SARB were justified. It is important to highlight that in reference to PAIA earlier in the judgment, the SCA endorsed two Constitutional Court judgments – including *My Vote Counts* above – reaffirming the default position that disclosure of information is the rule and exemption from disclosure is the exception, and when access is sought to information in the possession of the State it must be readily availed.[283]

278 *Id* at paras 2-3.
279 *Id* at para 4.
280 *Id* at para 5.
281 *Id* at para 27. See the SCA's discussion on the third-party notification requirements from paras 8-26.
282 *Id* at para 31.
283 *Id* at para 6. See, also, *President of the Republic of South Africa and Others v M & G Media Ltd* [2011] ZACC 32; 2012 (2) SA 50 (CC) at para 9 and *My Vote Counts judgment* above n 175 at para 23.

It is here that the SCA found that—

> "the answering affirmation is long on stock phrases which merely repeat parts of this chapter of PAIA. The affirmation falls woefully short on fact, detail, or proper application of the provisions of PAIA. It must be borne in mind that, under s[ection] 47, the test was whether the records to which access was requested 'might' fall within one of the exclusionary sections of PAIA. At the stage of deciding whether or not to actually refuse access, however, the test is totally different. The SARB had to establish that the records did meet the criteria to refuse access on one of the grounds set out in PAIA."[284]

The SARB was unable to establish that the records met the criteria for refusal in relation to personal information or commercial information. As was the case in the *HJI judgment* above, there was no assertion that the disclosure would be likely to cause harm to the commercial or financial interests of the company, let alone facts put up in support of such an assertion.[285] The SARB also relied on section 42(1) of PAIA claiming that disclosure would be likely to materially jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy. Again, it was unable to provide evidence to justify this reliance.[286]

Outcome

On these grounds, the SCA upheld SAHA's appeal with costs and directed the records to be provided within ten days of the order.

Case study 6: The South African History Archive Trust v The South African Reserve Bank and Another (2020)

138. The *HJI judgment* and *SAHA judgment* offer important examples of the application of some of the grounds of refusal under PAIA, especially in the context of records with public interest considerations. In addition, they highlight the administrative burden, delay, and litigation costs imposed upon the respective requestors to obtain records that should have initially been disclosed in compliance with PAIA and prevailing case law. Most notably, the period between SAHA's PAIA request and the SCA order to the release the records was almost six years.

4.6 Mandatory disclosure in the public interest

139. Section 46 (public body) and section 70 (private body) provide for mandatory disclosure if the record would reveal evidence of a substantial contravention of the law, or an imminent and serious public safety or environmental risk, and the public interest in the disclosure of the record clearly outweighs the harm contemplated in the ground of refusal.

140. These public override provisions are among those critiqued by the RTI Rating on the basis that these clauses do not apply to all grounds of refusal and they are only triggered by specific categories in the public interest. In addition, the Human Right's Commission has pointed out that the "emphatic language" sets a high threshold that is difficult to establish, and it has therefore recommended that "and" between subsections (a) and (b) is substituted with "or" to reduce this burden and broaden its application.[287]

284 *SAHA judgment* above n 277 at para 36.
285 *Id* at para 38.
286 *Id* at para 44.
287 2020 PAIA Report above n 209 at page 25.

141. The case study below provides a recent example of a successful court challenge that has extended the scope of the public interest override clause in relation to a public body. Prior to this Constitutional Court decision, section 46 did not apply to section 35 of PAIA – mandatory protection of tax records held by the South African Revenue Service; however, the substantive and procedural thresholds in section 46 would still need to be satisfied by the requestor in relation to third party tax records. This includes the onus to demonstrate that the public interest in disclosure clearly and quantitatively outweighs the harm that the provision contemplates.

Arena Holdings (Pty) Ltd t/a Financial Mail v South African Revenue Service (2023)

Background

This matter concerned the constitutionality of sections 67 and 69 of the Tax Administration Act 28 of 2011 ("TAA") and sections 35 and 46 of PAIA.[288] In 2019, Warren Thompson submitted a PAIA request to SARS to gain access to former President Jacob Zuma's ("Mr Zuma") tax records.[289] The request was refused, and the subsequent internal appeal dismissed, on the basis that Mr Zuma was entitled to confidentiality under sections 34(1) and 35(1) of PAIA and section 69(1) of the TAA.[290] The applicants approached the High Court, Gauteng Division, Pretoria, to challenge the constitutional validity of the prohibition of the disclosure of tax information held by SARS, where such a disclosure would reveal evidence of a substantial contravention of the law and would be in the public interest.[291] The applicants' argued that the prohibition is an unjustifiable limitation of their constitutional right to freedom of expression and access to information.[292] The High Court did not agree with SARS' argument that tax compliance is heavily reliant on the secrecy of taxpayer information,[293] and held that their reliance on privacy did not satisfy the limitation clause in section 36 of the Constitution.[294]

The High Court therefore found that the applicants' argument that public interest overrides the taxpayer confidentiality was justified. The Court held that the blanket prohibitions of disclosure of taxpayer information contained in section 35 of PAIA and section 69 of the TAA unjustifiably limited the right of access to information provided for in section 32 of the Constitution.[295]

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288 *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and* Others [2023] ZACC 13; 2023 (5) SA 319 (CC), paragraph 1. ("*Arena Holdings judgment*".) (Available here.)
289 *Id* at para 6.
290 *Id* at para 7.
291 *Id* at para 8.
292 *Id* at para 10.
293 *Id* at para 12.
294 *Id* at para 14.
295 *Id*.

Constitutional Court judgment

The majority judgment handed down by the Court confirmed the decision made by the High Court. It found that the provisions of PAIA and the TAA did not satisfy section 36 of the Constitution.[296] According to the majority judgment, Chapter 4 of PAIA does two things. First, it creates a framework for the mandatory or discretionary protection of records that which generally deserve it, based on various considerations. Second, it moderates this framework by including a public interest override in section 46.[297] Section 46 sets a high bar for lifting confidentiality – the withholding of information generally worth protection from disclosure must be balanced with the mandatory disclosure of information in the public interest.[298]

The majority judgment set out the substantive and procedural hurdles that a PAIA requester would need to overcome for section 46 to be engaged. In summary, it observed that the public interest override is one that is narrowly constructed, incorporating deliberately high substantive and procedural bars.[299] An information officer must be satisfied that the requested record reveals evidence of a substantial contravention of the law, or an imminent or serious public safety or environmental risk.[300] Procedurally, any third party must be informed where disclosure of a record relating to them is considered. If they are dissatisfied with the decision made by an information officer in terms of the application of section 46, there are various appeal and complaint procedures available.[301] All of these procedures would need to be exhausted before the record is finally disclosed or withheld in terms of section 46.[302]

The majority judgment emphasised that section 46 requires that the public interest in disclosure must clearly and quantitatively outweigh the harm that the provision contemplates. The bias in favour of non-disclosure substantially retains claims to confidentiality. [303] Thus, the public interest override maintains a high level of confidentiality, while still providing a "carefully crafted, limited, restrained and relatively onerous basis for the lifting of confidentiality in the public interest".[304]

Outcome

The Constitutional Court declared sections 35 and 46 of PAIA unconstitutional to extent that they preclude access to tax records, by a person other than the taxpayer, in circumstances where requirements of section 46 are met.[305] Sections 67 and 69 of the TAA were also declared unconstitutional.[306] The order of invalidity was suspended for 24 months in order to allow Parliament to address the unconstitutionality of these sections.[307] In the interim, it was ordered that certain provisions be read into the legislation in order to make it constitutionally compliant.[308]

Case study 7: Arena Holdings (Pty) Ltd t/a Financial Mail v South African Revenue Service (2023)

296 *Id* at para 125.
297 *Id* at para 137.
298 *Id* at para 139.
299 *Id* at para 181.
300 *Id* at para 140.
301 *Id.*
302 *Id.*
303 *Id* at para 143.
304 *Id* at para 144.
305 *Id* at paras 196-202.
306 *Id.*
307 *Id* at para 197.
308 *Id* at para 205.

142. Considering that the focus of this research is on public access to environmental information in the context of South Africa's JET through climate-resilient development, it is acknowledged that one of the specific categories in sections 46 and 70 is an imminent and serious public safety or environmental risk. "Imminent and serious" remains a significant bar to overcome in terms of environmental harm, and again, public interest in the disclosure must also clearly outweigh the harm to other interests in question. This onus is at odds with international best practice instruments that prioritise information relating to emissions to the environment as a category of information that is automatically subject to the public interest override, irrespective of whether disclosure would undermine the protection of commercial interests, and the positive duty to immediately disclose and disseminate information about an imminent threat to public health or the environment.

4.7 Risk of an adverse cost order against obstructive information holders

143. In a number of the case studies summarised above, the courts justifiably criticised the conduct of the information holder, both public and private, in what transpired to be unnecessary, time-consuming litigation. Courts have also considered punitive cost orders as a way of demonstrating their displeasure. The following examples are notable:

143.1.1 In the *VEJA judgment*, the SCA reflected on AMSA's approach leading up to and including the litigation proceedings. It was found that AMSA was disingenuous in feigning ignorance of the existence of its own Masterplan and that "[f]rom a purely public relations perspective it ought to have considered more carefully the consequences for its image".[309] The SCA concluded that AMSA should not have espoused a commitment to environmental sensitivity and a collaboration, only to "assume an obstructive and contrived approach to a request for information which can only assist that collaborative effort."[310] AMSA was ordered to pay VEJA's costs. This case also cited the matter of *Claase v Information Officer of South African Airways (Pty) Ltd*, in which it was reaffirmed that where a record of information is requested and a public body or private person or institution unreasonably refuses to furnish it in circumstances where it obviously should have, the court may make a punitive award of costs to mark its displeasure.[311]

143.2. In the *Baleni judgment*, the High Court found that there was no apparent reason for the continued opposition that was mounted by the mining company, TEM. The controversies around the PAIA manual of the DMR are issues that were not relevant for the declaratory relief.[312] The High Court indicated that it would have ordered the DMR to pay the costs of the application, however, it was constrained by DMR's stance to abide by the decision.313 As a result, TEM was ordered to pay the costs of both the applicants and the friend of the court intervention from CALS.

309 *VEJA judgment* above n 252 at para 81.
310 *Id* at para 83.
311 [2006] ZASCA 134; 2007 (5) SA 469 (SCA) at para 10.
312 *Baleni judgment* above n 224 at para 113.
313 *Id* at para 115.

143.3. In the SAHA judgment, the SCA concluded that "the blanket refusal by the SARB on entirely spurious grounds which do not even assert the elements entitling them to withhold access supports a costs order being made against it."314 It went further to observe that SARB's response "bordered on the obstructive and is certainly not in keeping with the purpose of PAIA in its outworking of the provisions of the Constitution to promote openness and transparency". It went further by noting that "the approach was redolent of the dark days of apartheid, where secrecy was routinely weaponised against a defenceless population".[315] The SCA ordered SARB to pay the costs of the application.

143.4. Finally, in the most recent judgment among the case studies, the High Court in the HJI judgment reiterated that it is customary for the costs of litigation to follow the result unless argument to the contrary is presented. In this case it was not. In fact, the High Court went on to indicate that "on a consideration of the matter as a whole, had HJI sought a special order for costs, I would have granted it."316 A special costs order can be interpreted to mean a punitive costs order against the DOH as one of the respondents in this instance.

144. Although the requestors' right of access to information was ultimately vindicated in each of these case studies and costs were recovered, they were forced to resort to prolonged, costly, litigation proceedings; remedial action that is not an option for many interested and affected parties in South Africa. Such a barrier undermines the object of PAIA to enable persons to obtain access to records of public and private bodies as swiftly, inexpensively, and effortlessly as reasonably possible.

314 *SAHA judgment* above n 277 at para 48.
315 *Id*.
316 *HJI judgment* above n 265 at para 52.

5. CONCLUSION AND NEXT STEPS

145. The overarching consideration for this analysis report – the first of three outputs from this exploratory research – is what should South Africa's JET through climate-resilient development mean for the proactive publication and maximum disclosure of relevant information held by public and private bodies, in accordance with applicable international ATI provisions and best practice.

146. Based on the above analysis, it is apparent that South Africa's PAIA regime and the intertwined transitions making up its JET through climate-resilient development have, respectively, arrived at crucially important junctures that will determine the degree to which each system is enabled to ensure justice and serve the public interest.

147. Notwithstanding the important developments in case law, the Human Rights Commission as the former mandate holder has justifiably concluded that PAIA requires comprehensive legislative reform in order to remain fit for purpose in today's information society, while enhancing the free flow of information:

> "Only if the legislation is amended and strengthened to meaningfully give effect to the constitutional right of access to information, will a society based on the foundational values of openness, responsiveness and accountability become a real possibility".[317]

148. In response to this call, the Information Officer as the current mandate holder responsible for the improvement, modernisation, and reform of PAIA, is in the process of reviewing six statutes with a bearing on access to information held by public and private bodies, including PAIA and POPIA. It is reported that the Information Regulator shall submit its recommendations to the National Assembly before the end of the 2022/23 financial year.[318]

149. Rooted in the principles of procedural, distributive, and restorative justice, the PCC is in the formative stage of building a new model for inclusive and collective decision-making, as it advances priority actions under the JET work programme in 2024. A prerequisite for the just imperative at the centre of the JET through climate-resilient development is public access to timely, accurate, and reliable JET information and knowledge. International human rights law and the ATI best practice guidelines emphasise that the free flow of relevant information is critical to enabling affected communities to participate actively and effectively. The outcomes of public participation can instill good practice in public and private administration that in turn promotes greater access to information and a better understanding of the importance of access to justice in South Africa's just transition era.

150. In parallel to the forthcoming PAIA reforms to be recommended by the Information Regulator, this defining JET phase of the just transition in South Africa presents an opportunity for holders of the categories of JET information and knowledge in **textbox 2**, to implement the following fundamental information governance principles and initiatives in the renewed spirit of fostering a culture of transparency and accountability.

317 2020 PAIA Report above n 209 at page 25.
318 Annual Report 21/22 above n 247 at page 82.

South Africa's JET – A Catalyst for Access to Information

A JET that embraces environmental democracy: The Framework Report seeks deep systematic change in our energy governance and broader economy. Public authorities hold information on behalf of and in service to the public. Access to information is a fundamental right guaranteed by section 32 of the Constitution, protected under the African Charter, and binding international instruments to which South Africa is a Member State, including the UNFCCC, Paris Agreement, and Convention on the Rights of the Child. The fulfilment of this right must be recognised as being indispensable for the protection of the rights and interests of individuals, nurturing South Africa's democracy, and achieving a just and equitable transition towards a low-carbon and climate-resilient society. This is dependent on direct and indirect actors, both public and private, promoting the principles of openness and transparency in all aspects of decision-making processes associated with the JET through climate-resilient development. Where a conflict arises between South Africa's information laws and international human rights law, the most favourable provision for the full exercise of the right of access to information should prevail.

JET information as a special public interest category: Considering the farreaching environmental and social implications of South Africa's JET through climate-resilient development, there is an inherent public interest in the information held by the PCC that drives the JET, information held by other actors involved in implementing the JET, and information held by actors that enables or hinders the JET. Public access to JET information is therefore important as an absolute value, as well as in the role it plays in meaningful participation and contributing to public debate on a wide range of current issues in the JET context. Automatic access to JET information – including through proactive publication – should be considered an essential governance practice for public and private actors directly and indirectly involved in JET processes.

Proactive publication of JET information: Public bodies have a positive duty to voluntary disclose and disseminate JET information in the public domain that is necessary to comply with international law obligations. It is generally considered good practice today for private bodies in possession of environmental information to put mechanisms in place for public access, consultation, and awareness. The more JET information there is in the public sphere, the less need there is for specific information requests. Public and private bodies should exercise the voluntary procedures, in terms of sections 15 and 52 of PAIA and Electronic Information Guidelines, to enable persons to obtain access to JET information and knowledge as swiftly, inexpensively, and effortlessly as reasonably possible. A proactive environmental information policy that regularly compiles, updates, and disseminates information may include decisions, authorisations, plans, agreements, compliance and expenditure reports, and studies that inform decisions and plans. Emitters should be required to publicly disclose their emission data, emission reduction plans, climate vulnerability. and the risk of stranded assets.

Heightened obligations toward specific groups: Consistent with the Framework Report's commitment to finding ways to better integrate children, the youth, and women into policymaking for the JET, the active participation of these special status groups, among others recognised by international human rights law, must be prioritised. Considering the best interests of the child – enshrined in section 28(2) of the Constitution – additional resources are required to prepare and communicate JET information through appropriate platforms. Civil society organisations and academia are recognised as important role-players and information amplifiers to empower the public to engage in JET processes.

PAIA request as a last resort: Compelling a requestor to submit a Form 2 PAIA request should be a measure of last resort, not the default position for public and private bodies in possession of JET information and knowledge. The analysis in this report has illustrated that once an information seeker is required to rely on PAIA, its strictures can in many instances undermine swift, inexpensive, and effortless access to information, contrary to the Preamble and objects in the Act. A response to an access to information request must adhere to the principle of maximum disclosure and information holders should consider waiving any request fees to encourage public involvement in the JET through climate-resilient development.

Strengthening civil service: The realisation of a JET through climate-resilient development will depend, among other key factors, on overcoming regulatory capture where public authorities are more responsive to the regulated community and those in positions of power, while discounting access to information needs of the public. In the course of modernising access to information governance and improving corporate transparency in the JET context, the general functions, powers, and resources of the Information Regulator should be considered.

Information note 16: South Africa's JET – A Catalyst for Access to Information

151. On the basis that the proactive publication and dissemination of relevant JET information and knowledge through accessible, appropriate, platforms is an essential part of the just imperative at the centre of the JET through climate-resilient development, the next phase of this exploratory research will scope and collate the electronic sources of information and knowledge that currently exist to serve transition-affected communities. These sources will be conveyed through a publicly accessible website, which will include user-friendly notes and a description of pending information requests. This process will also identify key JET information and knowledge gaps that transition affected communities need to vindicate their rights and advance their priorities.

Graphic: https://lifeaftercoal.org.za/

USEFUL RESOURCES

South African legislation

- Mineral and Petroleum Resources Development Act 28 of 2002.
- National Environmental Management Act 107 of 1998.
- Protection of Personal Information Act 4 of 2013.
- Promotion of Access to Information Amendment Act 31 of 2019.
- Regulations relating to the Promotion of Access to Information, GN 757 *GG* 45057, 27 August 2021.

South African case Law

- *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and* Others [2023] ZACC 13; 2023 (5) SA 319 (CC). (Available here.)
- *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* [2020] ZAGPPHC 485; [2020] 4 All SA 374 (GP). (Available here.)
- *Claase v Information Officer of South African Airways (Pty) Ltd* [2006] ZASCA 134; 2007 (5) SA 469 (SCA). (Available here.)
- *Clutchco (Pty) Ltd v Davis* [2005] ZASCA 16; [2005] 2 All SA 225 (SCA). (Available here.)
- *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*, unreported judgment of the Gauteng Local Division, Johannesburg, Case No. 39646/12 (10 September 2013). (Available here.)
- *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance* [2014] ZASCA 18; [2015] 1 All SA 26. (Available here.)
- *De Lange and Another v Eskom Holdings Ltd and Others* [2011] ZAGPJHC 75; [2012] 1 All SA 543 (GSJ). (Available here.)
- *Health Justice Initiative v Minister of Health and Another* [2023] ZAGPPHC 689. (Available here.)
- *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17; 2018 (5) SA 380 (CC). (Available here.)
- *President of the Republic of South Africa and Others v M & G Media Ltd* [2011] ZACC 32; 2012 (2) SA 50 (CC). (Available here.)
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- *The South African History Archive Trust v The South African Reserve Bank and Another* [2020] ZASCA 56; [2020] 3 All SA 380 (SCA). (Available here.)
- *Unitas Hospital v Van Wyk and Another* [2006] ZASCA 34; [2006] 4 All SA 231 (SCA). (Available here.)

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- Access to Information Network *Promotion of Access to Information Act 9th Shadow Report* (September 2019). (Available here.)
- Information Regulator of South Africa, *Guide on how to use the Promotion of Access to Information Act 2 of 2000* (October 2021). (Available here.)
- Information Regulator of South Africa *Procedures for Making Information Electronically Available* (March 2022). (Available here.)
- Information Regulator of South Africa *Annual Report 2021/22* (September 2022). (Available here.)
- Presidential Climate Commission *A Framework for a Just Transition in South Africa* (June 2022). (Available here.)

- Promotion of Access to Information Civil Society Network *2015 Shadow Report* (February 2015). (Available here.)
- The Presidential Climate Commission *Second Annual Review* (June 2022). (Accessible here.)
- The South African Human Rights Commission *Promotion of Access to Information Act Annual Report* (2015-2017). (Available here.)
- The South African Human Rights Commission *Promotion of Access to Information Act Annual Report* (2019/2020). (Available here.)
- The South African Human Rights Commission *Promotion of Access to Information Act Annual Report* (2020/2021). (Available here.)

Multilateral instruments

- Paris Agreement, 12 December 2015. (Available here.)
- International Covenant on Civil and Political Rights, 16 December 1966. (Accessible here.)
- International Covenant on Economic, Social and Cultural Rights, 16 December 1966. (Accessible here.)
- The Convention on the Rights of the Child, 20 November 1989. (Available here.)
- United Nations Declaration on the Right to Development, 4 December 1986. (Accessible here.)
- United Nation's Framework Convention on Climate Change, 21 March 1994. (Available here.)
- United Nations Human Rights Declaration, 10 December 1948. (Accessible here.)

International best practice guidelines and expert reports

- *Action to Ensure a Safe Climate for Humanity*. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment UN Doc A/74/161 (2019). (Available here.)
- *Children's Rights and Environmental Protection*. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment UN Doc A/HRC/37/58 (2018). (Available here.)
- Committee on the Rights of the Child General Comment No. 26 on Children's Rights and the Environment, with a Special focus on Climate Change UN Doc CRC/C/GC/26 (2023). (Available here.)
- *Framework Principles on Human Rights and Environment*. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment UN Doc A/HRC/37/59 (2018). (Available here.)
- H Lee and J Romero (eds.) *IPCC, 2023: Climate Change 2023: Synthesis Report* Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change IPCC. Geneva, Switzerland. (Available here.)
- Report of the Office of the United Nations High Commissioner for Human Rights *Freedom of Expression* UN Doc A/HRC/49/38 (2022). (Accessible here.)
- Report of the United Nations Conference on Environment and Development, Rio de Janeiro. UN Doc A/CONF.151/26/Rev.1 (Vol.I) (1993). (Available here.)
- Report of the United Nations Conference on Sustainable Development, Rio de Janeiro. UN Doc A/CONF.216/L.1 (2012). (Available here.)
- *Right to a healthy environment: good practices*. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment UN Doc A/HRC/43/53 (2019). (Available here.)
- United Nations Children's Fund *The Climate Crisis is a Child Rights Crisis: Introducing the Children's Climate Risk Index* (August 2021). (Available here.)
- United Nations Environment Programme *Guidelines for the Development of National Legislation on Access to information, Public Participation and Access to Justice in*

Environmental Matters (November 2011). (Available here.)
- United Nations Environment Programme *Putting Rio Principle 10 Into Action - An Implementation Guide* (October 2015). (Available here.)
- World Bank Group *Country Climate and Development Report – South Africa* (October 2022). (Accessible here.)

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- African Charter on Human and Peoples' Rights, 27 June 1981. (Available here.)
- African Commission *Declaration of Principles of Freedom of Expression and Access to Information in Africa* 10 November 2019. (Accessible here.)
- African Commission *Model Law on Access to Information for Africa* 13 February 2013. (Available here.)
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- European Parliament, Directive 2003/4/EC (28 January 2003). (Available here.)
- Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998. (Accessible here.)
- Economic Commission for Europe, Kyiv Protocol on Pollutant Release and Transfer Registers, 8 October 2009. (Available here.)

Other resources

- Misonne "Access to Information, the Hidden Human Rights Touch of the Paris Agreement?" in Jendroska and Bar (eds) *Procedural Environmental Rights: Principle X in Theory and Practice* (Intersentia - Cambridge University Press, 2017). (Available here.)
- Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter American Court of Human Rights by the Republic of Colombia and the Republic of Chile, 9 January 2023. (Available here.)
- Resolution on the Human Right to a Clean, Healthy and Sustainable Environment GA Res 76/300 UN Doc A/RES/76/300 (2022). (Available here.)
- Resolution on the Human Right to a Clean, Healthy and Sustainable Environment HRC Res 56 UN Doc A/HRC/52/L.7 (2023). (Available here.)

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