Chapter 8
Private-Sector Transparency as Development Imperative: An African Inspiration

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Abstract Access to information (ATI) is essential to ethical and efficacious social and economic development. Transparency ensures that human rights are protected and not overwhelmed by profiteering or commercial priorities. Accordingly, ATI has become recognised as a human right that facilitates the realisation of other human rights. But ATI as conceived in Western law has meant only access to the state. In contemporary development, private actors are crucial players, as they work for, with, and outside the state to realise development projects. This investment of public interest in the private sector represents a seismic shift in social, economic, and political power from people to institutions, akin to the twentieth-century creation of the social-democratic state. Contingent on state accountability, Western ATI law has struggled to follow the public interest into the private sector. Western states are stretching ATI law to reach the private sector upon classical rationales for access to the state. In Poland, hotly contested policy initiatives over privatisation and public reinvestment have occasioned this stretching of ATI law in the courts. Meanwhile, in Africa, a new model for ATI has emerged. Since the reconstruction of the South African state after Apartheid, South African ATI law has discarded the public-private divide as prohibitive of access. Rather than focusing on the nature of a private ATI respondent's activity as determinative of access, South African law looks to the demonstrated necessity of access to protect human rights. This chapter examines cases from South Africa that have applied this new ATI model to the private sector in areas with development implications. For comparison, the article then examines the gradually expanding but still more limited Western approach to ATI in the private sector as evidenced in Polish ATI law. This research demonstrates that amid shifting power in key development areas such as energy and communication, Polish courts have been pressing ATI to work more vigorously in the private sector upon theories of attenuated state accountability, namely public ownership, funding, and function. We posit that Poland, and other states in turn, should jettison these artifices of state

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accountability and look instead to the South African model, since replicated elsewhere in Africa, for direct access to the private sector. ATI law should transcend the public-private divide, and the nations of the North and West should recognise human rights as the definitive rationale for ATI in furtherance of responsible development.

Keywords Access to information · Comparative law · Poland · Privatisation · South Africa · Sustainable development

8.1 Introduction

Transparency is a sine qua non of social and economic development. Now enjoying broad recognition as a principle of human rights, access to information—'ATI', also known as freedom of information or the right to know—is the lynchpin of democratic accountability. ATI ensures that resources are developed and managed ethically, for the betterment of people, and not perverted to wasteful, corrupt, or injurious aims. In this capacity, ATI is an ancillary human right, or 'enabler' right. Its indispensable purpose is to facilitate the realisation of core human rights, such as representative government and sustainable development.

However, the contemporary human right of ATI did not spring wholly formed from the head of Zeus. In fact the heritage of ATI tracks the gradual recognition of the core human rights that ATI facilitates. In the twentieth century, ATI law charted a course through the classically, if not fully accurately, conceived evolution of human rights from civic and political life, to social and economic sustenance, and to collective needs. Correspondingly, ATI norms in a given legal system tend to reflect the phase of human rights development that predominated in the system's constitutional design. For example, in the United States, where modern ATI law originated in the early twentieth century under a 1789 Constitution, the federal ATI is largely statutory, applies to a limited range of state action, and focuses to a fault on political participation as its raison d'être for purposes of judicial construction. In contrast, European courts in recent decades have inclined to construe ATI to facilitate the social and economic ideals constituted in pan-European governance.

ATI's legal journey has not ended. Just as Africa is pioneering human rights development in the collective vein, African states also are experimenting with a more robust model of ATI. South Africa developed an ATI model that extends transparency into the purely private sector. Now replicated in other African states, this innovation was born of experience with Apartheid, for which the private sector bore culpability hand in hand with the public sector. In both sectors, transparency is an antidote to the unethical and immoral practices that allowed Apartheid to thrive for so long. In the post-Apartheid constitutional system, the extension of ATI across the public-private threshold is not unlimited, but a function of necessity. Transparency may overcome the presumption of commercial secrecy in economic enterprise when a requester can assert a countervailing need of sufficient magnitude. Thus much better than the Western model, African ATI represents a balance of values.

In this chapter we examine ATI in the private sector as a means to promote ethical practices in sustainable social and economic development. We begin with the balancing test in South Africa, where this innovative application of ATI law was conceived and is beginning to bear fruit. Reflected in case law, recent experience suggests a vast potential for African ATI to promote social and economic development in South Africa and on the continent. Then, for contrast, we examine ATI in the private sector in Poland. We focus on Poland for this study because it is simultaneously an exemplar of contemporary European access norms and of a legal system struggling to maintain trajectories of social and economic development in the wake of the global financial crisis. As a former Soviet state, Poland comes to the table with an experience of radical privatisation already under its belt. Now Poland appears poised to experiment with public reinvestment, further loosening the classical boundary between public and private sectors. The Polish courts have been expansive in construction of ATI law to penetrate the private sector. But the ATI regime remains tied to the classical Western model, which requires a public 'hook', such as public funding or function, to cross the public-private threshold.

We propose that as Western democracies such as Poland increasingly blur the line between public and private sectors in the interest of development, they should take a page from the book of African ATI. Profiteering, waste, and corruption are all capable of thriving in public and private sector alike. South Africa discovered the importance of sunshine as disinfectant in both sectors only upon an untold cost in human suffering. Accordingly, power shifts between public and private sector—whether public-to-private, as in US prisons and Irish water, or private-to-public, as in Polish electricity and Parisian water—demand an ATI system capable of transcending the public-private threshold. This chapter suggests that access should be predicated on requesters' demonstrable human needs rather than on flimsy theories of a respondent's quasi-public role. Such a reenvisioning of ATI would work to bolster ethics and efficacy in sustainable development.

8.2 Access to the Private Sector in South Africa

8.2.1 Advent of a New Rule of Law in Africa

The Apartheid regime in South Africa employed secrecy as a weapon.[1] In response, transparency and accountability were clarion demands of reformers after the regime crumbled in 1991.[2] Because private actors had born equal culpability in perpetrating Apartheid, reformers focused on transparency as a supervening objective, overriding the classical distinction between public and private sectors.[3] That is, ATI must be

[1] Calland [6], Darch and Underwood [8].

[2] Calland, *Illuminating the Politics*, *supra* note 1, at 4–5; Ngabirano [20], Roling [29].

[3] Adeleke [1].

guaranteed both vertically, as against the state, and horizontally, as between private actors, to ensure the realisation of human rights.[4] Previous research has demonstrated the soundness of this approach as a departure from the classical liberal model of ATI.[5] As enabler of human rights attainment, ATI frees a flow of information to level the distribution of power in society—whether between individuals and a burgeoning administrative state, as in the twentieth-century United States, or, for example, between black laborers and corporations that profited from Apartheid.

The 1993 interim constitution in South Africa stepped out timidly with an ATI right only as against the state, and then only 'in so far as such information is required for the exercise or protection of any of his or her rights'.[6] In short order, though, negotiation over the permanent 1996 constitution yielded a much more liberal approach.[7] Transplanting the necessity qualifier, article 32 of the new constitution declared, '(1) Everyone has the right of access to—(a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights'.[8] A paragraph (2) required implementing legislation 'to give effect to this right', allowing 'for reasonable measures to alleviate the administrative and financial burden on the state'.[9]

Many factors influenced the advent of ATI in horizontal application. The European Data Protection Directive had been adopted in 1995 and advanced the notion that personal privacy, or personal integrity, justified a horizontal imposition of rights against the private sector for access to personally identifying information.[10] European advisers played a part in the development of the new South African constitution[11]; extrapolation to the protection of human rights besides privacy is not a great leap.[12]

At the same time, expanded ATI in the new South African constitution cannot be viewed apart from the document's unprecedented commitment to socio-economic development. ATI was recognised for its auxiliary capacity to facilitate access to housing, healthcare, food, water, social security, education, and anti-discrimination, as well as the possibility of land restitution and the collective right to a clean envi-

[4] See Liebenberg [16].

[5] Calland [7], Roberts [28].

[6] S. Afr. (Interim) Const., 1993, § 24.

[7] O'Regan [21].

[8] S. Afr. Const., 1996, § 32(1).

[9] *Id.* § 32(2).

[10] Directive 95/46/EC of the European Parliament and the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1995:281:0031:0050:EN:PDF.

[11] See Lange [15].

[12] See Klaaren et al. [14].

ronment.[13] Responsive to the abuses of Apartheid, ATI constitutionalised fairness in administrative process through transparency.[14]

In 2000, the constitutionally required implementing legislation took shape in the Promotion of Access to Information Act (PAIA).[15] Notwithstanding a constitutional challenge, the PAIA operationally superseded ATI claims that had been brought directly under the 1996 constitution.[16] Though influenced by ATI laws in the common law cohort of Australia, Canada, Ireland, New Zealand, and the United States,[17] the PAIA marked a significant departure by effecting the constitutional guarantee of direct access to the private sector.[18] Public bodies include quasi-public entities through a disjunctive power-or-function test.[19] Defining a 'private body', the PAIA includes natural persons and partnerships, insofar as they are engaged in 'any trade, business or profession', and 'any former or existing juristic person'.[20]

The PAIA spells out procedures for access to private bodies apart from access to public bodies, though the provisions play out in parallel. Like the later African Model Law, the PAIA burdens the requester 'to identify the right the requester is seeking to exercise or protect and provide an explanation of why the requested record is required for the exercise or protection of that right'.[21] Public bodies acting in the public interest may assert private persons' rights and act as requesters.[22]

A private body under the PAIA—so in essence, any business—affirmatively must compile and maintain an access manual that lists contact information and describes categories of information already publicly available, information available through other legislation, and 'description of the subjects on which the body holds records and the categories of records held on each subject'.[23] The PAIA authorises denial of access by private respondents upon grounds[24] that track those that pertain to public bodies[25] and include the privacy of a third-party natural person, trade secrets and commercially sensitive information, breach of confidentiality obligation to a third

[13] Asimow [2]; O'Regan, *supra* note 7, at 14; OPEN DEMOCRACY ADVICE CTR., RIGHT TO ACCESS INFORMATION TRAINING MANUAL 14 (2011), http://www.r2k.org.za/wp-content/uploads/2012/12/rti-training-manual-dec-2012.pdf.

[14] Asimow, *supra* note 13, at 395; Calland, *Illuminating the Politics*, *supra* note 1, at 6; O'Regan, *supra* note 7, at 14.

[15] Promotion of Access to Information Act, No. 2 of 2000, § 9(b) (S. Afr.) [hereinafter PAIA].

[16] *Inst. for Democracy in S. Afr. v. Afr. Nat'l Cong.* [2005] ZAWCHC 30, 2005 (5) SA 39 (C), [2005] 3 All SA 45 (C), ¶¶ 14–19.

[17] Roling, *supra* note 2, at 10.

[18] Burns [5].

[19] PAIA, § 1.

[20] *Id.*

[21] *Id.* §§ 50(1), 52(2)(d). Because a requester must assert a rationale under this unusual provision, the usual ATI principle of interest neutrality must be forfeit.

[22] *Id.* § 50(2).

[23] *Id.* § 51(1)–(3).

[24] *Id.* §§ 63–69.

[25] Roling, *supra* note 2, at 21–22.

party, risk to safety of person or property, legal privilege, and research integrity.[26] Most exemptions are subject to a public-interest override when disclosure would reveal illegality or 'imminent and serious public safety or environmental risk', or the public interest in disclosure 'clearly outweighs' the harm exemption seeks to avert.[27]

Following the example of its 1995 predecessor, the PAIA was accompanied by the formation of an independent civil society organisation to support implementation, the Open Democracy Advice Centre (ODAC).[28] Still today, ODAC strives vigorously for social and economic development and its ethical attainment, employing the PAIA and complementary whistle-blower protection law. It must be said, though, that PAIA compliance in South Africa has been consistently poor.[29] ODAC has documented trending secrecy in public and private sectors, as well as efforts to intimidate requesters and commodify information.[30] Darch and Underwood cautioned that failure of African states to fulfil their duties fails to account for profound public demand and need for information.[31] As a result, 'the freedom of information idea may be under wider critical examination in African countries than the data in the global surveys indicate'.[32] Examining the efforts of civil society organisations to press for accountability, researchers have located transparency obstacles in unduly complex procedures, insufficient pre-judicial enforcement mechanisms, and an enduring political culture of secrecy.[33]

Compliance notwithstanding, ODAC's stated priorities suggest the extant potential of the PAIA to advance development through transparency in housing, planning, land and property disposition, social welfare, procurement, energy, environment, public spending, municipal minutes and resolutions, information policy, and public participation in legislation and rulemaking.[34] Regarding ethics in development practice, ODAC has reported mixed success, with more work to do, using PAIA to investigate public-private partnerships, procurement corruption, private land ownership, utility pricing, medical malpractice, industrial pollution, utility infrastructure, genetic engineering, and human displacements—the latter such as occasioned by the 2010 World Cup.[35]

At the African continental level, the ATI has followed an evolutionary track from European model to South African influence. Developed in the early 1980s, the African Charter on Human and Peoples' Rights enumerates a 'right to receive information' next to, but distinctly from, the freedom of expression.[36] The African

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[26]PAIA, §§ 63–69.

[27]*Id.* § 70.

[28]Ngabirano, *supra* note 2, at 209–10.

[29]See Darch and Underwood, *supra* note 1, 237–42.

[30]McKinley [17].

[31]Darch and Underwood, *supra* note 1, at 243.

[32]*Id.*

[33]Bentley and Calland [3].

[34]McKinley, *supra* note 30, at 12–13.

[35]*Id.* at 20–92.

[36]African Charter on Human and People's Rights art. 9.

Commission of Human and People's Rights has cited the right as acting in tandem with the freedom of expression to serve purposes of both self-fulfilment and political involvement.[37] ATI is found in other pan-African instruments[38] and in sectoral devices of the South African Development Community regarding anti-corruption, mining, fishery and forest management, wildlife conservation, transport and communication, and cultural information and sport.[39]

Implementing the African Charter, the African Commission adopted the 2002 Declaration of Principles on Freedom of Expression in Africa, which articulates the 'Freedom of Information' in a detailed article IV, following the South African example in extension to the private sector. Explicitly recognising that information is held by public authorities in public trust, the article asserts a right to ATI in 'public bodies' and in 'private bodies which [information] is necessary for the exercise or protection of any right'. The same article also spells out what today are characterised as data protection rights of access and correction vis-à-vis both public and private sectors, leaving no doubt as to the deliberately horizontal implication of the ATI right.

To facilitate the recognition of ATI in domestic law, the African Commission in 2013 adopted a model ATI law.[40] The Pan-African Parliament, the inter-governmental legislative body of the African Union, called on countries to adopt the African Model Law and to review existing ATI laws to ensure compliance with pan-African norms.[41] The model law is premised upon the familiar presumption of public access and duty of government to respond to requests, subject to narrowly drawn exemptions in the public interest.[42] The product of a two-and-a-half-year drafting process coordinated by the Centre for Human Rights at the University of Pretoria,[43] the African Model Law represents a thorough compilation of best practices in contemporary ATI law.[44]

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[37]Phooko [26].

[38]Media Inst. of S. Africa, Draft Law on Access to Information in Africa, https://misaswaziland.com/draft-law-on-access-to-information-in-africa/ (last visited Sept. 18, 2018); *see* African Charter on Democracy, Elections, and Governance art. 19(2) (2007); African Charter on Statistics princ. 1 (2009) (transparency); African Charter on Values and Principles of Public Service and Administration art. 6 (2011); African Union Convention on Preventing and Combating Corruption art. 9 (2003); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('Maputo Protocol') art. 2(2), 4(2)(f), 5(a), 14(2)(a), 18(2)(b) (2003).

[39]Lasseko Phooko, *supra* note 37, at 179.

[40]Afr. Comm'n on Hum. & Peoples' Rts. [ACHPR], Model Law on Access to Information for Africa (2012) [hereinafter African Model Law], http://www.achpr.org/files/instruments/access-information/achpr_instr_model_law_access_to_information_2012_eng.pdf (adopted 2013).

[41]Pan-African Parliament, *Midrand Declaration on Press Freedom in Africa* (May 15, 2013), https://africacheck.org/wp-content/uploads/2014/06/Midrand-Declaration-on-Press-Freedom_FINAL_En-3-1.pdf.

[42]See African Model Law, *supra* note 40, § 2.

[43]*A New Model Law on Access to Information for Africa*, FREEDOMINFO.ORG, Apr. 12, 2013, http://www.freedominfo.org/2013/04/african-model-access-law-issued-by-rights-panel/.

[44]Though in sum the African Model Law is exemplary, there remain points of contention. For example, the model might afford respondent authorities too much latitude to refuse requests as

Just as elsewhere in the world, existing ATI laws in Africa approach the private sector principally through an array of policy choices that rationalise access upon entanglements with public money or power.[45] The African Model Law describes this mechanism by defining a class of private respondents as 'relevant public bod[ies]',[46] a confusing label if 'welcome' distinction.[47] The definition reaches the private sector coextensively with public control, financing, or function.[48]

Unlike anywhere else in the world, the African Model Law extends its reach to the private sector, adopting a variation of South Africa's conditional language. Apart from public bodies and relevant private bodies, a 'private body' is defined exhaustively to include natural persons, businesses, or any other 'juristic person' (such as an estate).[49] ATI is afforded as against a private body 'where the information may assist in the exercise or protection of any right'.[50] The express 'general principles' of the model law articulate the same right of ATI as against public, relevant private, and private bodies, to be effected 'expeditiously and inexpensively', only adding the rights-protective requirement for the latter class of respondents.[51] Variations of such direct, conditional access to the private sector are now known in at least five other African countries.[52]

An academic observer rated private-sector accountability the 'key strength' of the African Model Law, especially for its potential to combat environmental pollution and threats to public health attributable to extractive industries.[53] At the same time, Western commenters have wrung their hands over potential overreach to the detriment of the free market.[54] Critics focused on impact on small business and individuals, who would be bound to designate information officers and submit to compliance oversight, as well as media outlets, whose confidential sources and investigative journalism might be compromised. The African Model Law does restrain itself by excluding purely private bodies from some expectations, such as proactive disclosure requirements, the obligation to transfer record requests to more appropriate respondents, internal compliance training, and planning and reporting requirements.[55]

'manifestly vexatious'. African Model Law, *supra* note 40, § 37; see also Mutula and Wamukoya [19] (quasi-public bodies).

[45] Mutula and Wamukoya, *supra* note 44, at 334.

[46] African Model Law, *supra* note 40, § 1.

[47] Darwala et al. [9] (on behalf of Commonwealth Human Rights Initiative, New Delhi).

[48] African Model Law, *supra* note 40, § 1.

[49] African Model Law, *supra* note 40, § 1.

[50] *Id.* § 12(1)(b).

[51] *Id.* § 2(a)–(b).

[52] Peltz-Steele [24], *Access,* at 930 (Kenya, Rwanda, Sierra Leone, South Sudan, Tanzania).

[53] Hartshorn [10].

[54] E.g., Bertoni and Sánchez (n.d.) [on behalf of Centro de Estudios en Libertad de Expresión y Acceso a la Información, University of Palermo (Argentina) Law School].

[55] See African Model Law, *supra* note 40, §§ 6–9, 17, 62(2)(d), 65, 57.

8.2.2 South African ATI and the Private Sector

The 1996 South Africa Constitution and the 2000 PAIA, section 50—'any information that is held by another person [private body] and that is required for the exercise or protection of any rights'—raise two key substantive questions: (1) what rights are 'any rights'?; and (2) when is access 'required', or necessary? Today there is a small body of section 50 case law, mostly in business contexts unrelated to development. At the same time, a small body of public-sector access cases in development contexts suggest future applications for section 50. Questions of direct access to the private sector are only now coming to the fore in the judiciary. But together, these bodies of precedent sum a profound potential of ATI to further development through private-sector accountability.

The 'rights-required' test ostensibly posits two questions, though neither is binary, and the two are inextricably relative. The more intensely a 'right' is implicated—say, a fundamental human right, such as the right to life—the less demanding is the 'required' connection to vindicate that right. Inversely, the less intense the right—say, the right to demand performance on a contract—the more tightly the sought-after disclosure must exclusively and demonstrably ensure vindication of the right. The dynamic is not unlike the 'necessity' analysis of European human rights law, or the strict scrutiny of US constitutional law. But here the analysis tests the burden of ATI law, initiated by the private requester, on the social and economic freedom of another, the private respondent.

Guidance on the 'rights' question comes from the oft-cited *Cape Metropolitan Council v. Metro Inspection Services (Cape Metro)* in the Supreme Court of Appeal (SCA).[56] Interpretation of the 'required' question was refined by a line of high court cases—of which the Cape's *Van Huyssteen v. Minister of Environmental Affairs and Tourism* and *Nortje v. Attorney General* are representative—and then treated accordingly in two key SCA precedents, *Clutchco v. Davis*[57] and *Unitas Hospital v. Van Wyk.*[58]

Certainly 'any right' includes any fundamental right,[59] but case law has taken 'any' literally, generating a range of enforceable interests. *Cape Metro* involved a contract dispute between the council and contract levy collector Metro, amid allegations of fraud in claims for commissions.[60] Metro asserted 'rights' (1) to enforce 'a contractual or delictual claim for damages', and (2) 'to equality or to protect its busi-

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

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

[58] *Van Huyssteen v. Minister of Envtl. Affairs & Tourism* 1996 (1) SA 283 (C) (High Ct. E. Cape Prov. Div. June 28, 1995), *reprinted in* 1 Compendium of Judicial Decisions on Matters Related to Environment: National Decisions 59, 71 (1998) [hereinafter Compendium], http://www.right2info.org/resources/publications/case-pdfs/south-africa_van-huyssteen-and-others-nno-v-minister-of-environmental-affairs-and-tourism-and-others.

[59] E.g., *Shabalala v. Attorney-Gen. of Transvaal* (CCT23/94) [1995] ZACC 12, 1995 (12) BCLR 1593, 1996 (1) SA 725 (fair trial).

[60] *Cape Metro. Council*, [2001] ZASCA 56, ¶ 6 (applying interim constitution); *see id.* ¶ 26.

ness reputation and good name'.[61] Relying upon precedent, the court reaffirmed that '"rights" in [ATI] in the interim Constitution included *not only* fundamental rights as set out in the … the interim Constitution'—and moreover, that the same principle carried over into ATI in the 1996 constitution.[62] Common law contract enforcement suffices. Later, though, the court pinned its decision on reputation, ruling that disclosure would help Metro to clear its name.[63] Producing language oft quoted as to the 'required' analysis, the court opined, 'Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right'.[64] The court made no fuss over the leap from 'required' to the seemingly much weaker, 'of assistance'.

When disclosure is 'required' was the preoccupation of a series of cases under the 1993 interim constitution. Because the interim constitution used the rights-required test for *all* ATI claims, provincial case law on public-sector access from 1993 to 1996 informs the rights-required problem for private-sector access since 1996. The asserted right in *Van Huyssteen* was administrative fairness, which is constitutionally guaranteed. The decision confirmed that 'required' cannot be construed strictly. The case involved land trustees seeking access to environmental ministry records about a steel mill proposed for construction on neighbouring wetlands. The trustees feared pollution. The court concluded that the trustees 'reasonably require[d]' access to ministry records to be able to make their case and thereby vindicate the right to fair administrative process.[65] The *Van Huyssteen* court relied on discussion in the earlier *Nortje*,[66] in which criminally accused defendants won access to police records.[67] Considering where 'required' lies in a range from 'desire[]' to 'need[]',[68] the *Nortje* court concluded that witness statements 'would ordinarily be reasonably required by an accused person in order to prepare for trial in a criminal prosecution', criminal defence being a right 'beyond question'.[69]

The *Nortje-Van Huyssteen* line of cases received SCA imprimatur in *Clutchco*[70] and *Unitas Hospital*.[71] In both cases, requesters sought to apply the PAIA to private respondents, and both requesters ultimately failed. The court acknowledged up front in *Clutchco*: 'In extending the fundamental right of access to information to records

[61] *Id.* ¶ 24.

[62] *Id.* ¶ 27 (emphasis added) (citing *Van Niekerk v. Pretoria City Council* 1997 (3) SA 839 (T) at 844A-846G).

[63] *Id.* ¶ 29.

[64] *Id.* ¶ 28.

[65] *Van Huyssteen*, 1996 (1) SA 283 (C), *reprinted in* COMPENDIUM, *supra* note 58, at 71 (citing interim constitution).

[66] *Nortje v. Attorney Gen.* 1995 (2) SA 460 (C).

[67] *Van Huyssteen*, 1996 (1) SA 283 (C), *reprinted in* COMPENDIUM, *supra* note 58, at 70 (citing *Nortje*, 1995 (2) SA 460 (C) at 474F–475A).

[68] *Id.* (citing *Nortje*, 1995 (2) SA 460 (C) at 474F–475A).

[69] *Id.* (citing *Nortje*, 1995 (2) SA 460 (C) at 474F–475A).

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

[71] *Unitas Hosp. v. Van Wyk* 2006 (4) SA 436.

held by private bodies, the Constitution and the statute have taken a step unmatched in human rights jurisprudence'.[72] Arising from straightforward commercial relationships, neither case bore overtones of development or public accountability, though that was not a causal factor in either analysis. Rather, the failure of both requesters might best be attributed to the existence of a parallel access system, causing the court to construe the PAIA strictly.

Clutchco arose out of an internecine struggle over control of a family company.[73] Davis, a son estranged from the company but a thirty-percent shareholder, sought access to company books for the asserted purpose—a 'right'—of valuing his shares after refusing a buy-out.[74] The Companies Act did not authorise access to the detailed books as Davis desired, so he resorted to the PAIA.[75] The court did not reject the PAIA as overridden by the Companies Act, but the legislature's failure to provide detailed access pressed the court to seek a 'substantial foundation' for PAIA access.[76] The court explained: 'In enacting PAIA Parliament could not have intended that the books of a company, great or small, should be thrown open to members on a whiff of impropriety or on the ground that relatively minor errors or irregularities have occurred'.[77]

The court assumed *arguendo* that Davis's right held water, though never analysed it on the merits.[78] Suggesting that Davis's personal reputation might be tied up with his valuation claim, the court quoted *Cape Metro* approvingly with regard to reputation as a viable rights theory.[79] But the court found fault with Davis's 'required' claim. Citing the *Nortje* line, the court revisited the 'reasonably required' range, from mere desire, to assistive, to indispensable, and to 'dire necessity', locating legislative intent at 'more than "useful"' and shy of 'essential'.[80] To articulate 'required', a requester must 'lay a proper foundation for why that document is reasonably "required" for the exercise or protection of his or her rights'.[81] '"[R]easonably required" in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need'.[82] Because 'an experienced accountant and auditor' had failed to agree that disclosure would support the claim by Davis,[83] he could not meet the PAIA standard.[84]

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[72] *Clutchco*, [2005] ZASCA 16, ¶ 10.

[73] *Id.* ¶¶ 2–9.

[74] *Id.* ¶¶ 3, 7–8.

[75] *Id.* ¶¶ 14–16.

[76] *Id.* ¶ 17.

[77] *Id.*

[78] *Id.*

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

[80] *Id.* ¶ 11 (quoting precedents).

[81] *Id.* ¶ 12.

[82] *Id.* ¶ 13.

[83] *Id.* ¶ 18.

[84] *Id.* Later high court cases have divided on cases that are factually distinguishable. *Compare Loest v. Gendac* 2017 (4) SA 187 (GP) (finding better foundation in requester's contract-based claim to

In *Unitas Hospital*, the court acknowledged the relativity of 'required' analysis.[85] Van Wyk's husband died in intensive care after surgery at Unitas Hospital.[86] Van Wyk suspected nursing malpractice and moreover suspected that a hospital assessment report had documented the problem.[87] Thus in anticipation of a negligence claim, Van Wyk asked for the report under the PAIA.[88] Upon Van Wyk's 'right' to claim tort damages,[89] arguments focused on what the report would show. The lower court sided with Van Wyk, reasoning that even if the report would not evidence negligence, she would 'know this early and therefore avoid unnecessary litigation'.[90]

The SCA reversed. Acknowledging the 'reasonably required' standard of *Clutchco*, the court observed that negligence litigation would allow Van Wyk to avail of discovery.[91] Pre-litigation discovery under section 50 'would encourage … "fishing expeditions"', the court worried.[92] That is not to say that 'reliance on s 50 is automatically precluded merely because the information sought would eventually become accessible under the rules of discovery',[93] but the prospect of litigation is a factor in 'required' analysis.

Indeed, the SCA later confirmed the viability of the PAIA as a pre-litigation discovery tool in *Claase v. Information Officer of South African Airways (Pty.) Ltd*.[94] A retired pilot, Claase sought access to SAA records in a bid to prove non-compliance with the terms of his retirement contract.[95] The court lamented that 'disregard of the aims of the [PAIA] and the absence of common sense and reasonableness has resulted in this court having to deal with a matter which should never have required litigation'.[96] Reasoning that access 'would be decisive', 'bring[ing] a short sharp end to the dispute' without a need for litigation, the court ordered access and awarded Claase punitive costs.[97]

In sum, the 'reasonably required' formulation made for lasting precedent, not for its semantic significance, but for its consignment of a multi-factor analysis. An inverse function of the magnitude of the 'rights' claim, a case for 'required' must be constructed upon evidentiary foundation in documents and expert testimony, and

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access books for valuation, nevertheless defeated on 'required' analysis for incompatibility with remedies under Companies Act), *with Fortuin v. Cobra Promotions CC* 2010 (5) SA 288 (ECP) (viewing valuation claim as legitimate pre-litigation discovery).

[85] *Unitas Hosp.*, 2006 (4) SA 436, ¶ 6.

[86] *Id.* ¶ 7.

[87] *Id.* ¶¶ 8–9.

[88] *Id.* ¶ 3.

[89] *Id.* ¶ 14.

[90] *Id.* (quoting lower court opinion).

[91] *Id.* ¶ 19.

[92] *Id.* ¶ 21.

[93] *Id.* ¶ 22.

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

[95] *Id.* ¶¶ 2–3.

[96] *Claase*, [2006] SCA 163 (RSA), ¶ 1.

[97] *Id.* ¶ 11.

must navigate the shoals of parallel disclosure systems, such as the Companies Act and litigation discovery.

8.2.3 African ATI and Development

We have identified five reported ATI cases in South Africa with important implications for development accountability—specifically in areas of election law, truth and reconciliation, environmental law, and sport for development. Together these cases demonstrate that collective rights concomitant with social and economic development, such as the right to a healthy environment, can satisfy the 'rights' inquiry to empower citizens with access to the private sector. The cases furthermore articulate fact scenarios in which access may be argued as promotive of ethical development, or remonstrative of the unethical, well sufficiently to meet the 'required' standard of the ATI law.

8.2.3.1 Elections

Civil-society record requesters failed to gain access to the contribution records of major political parties in *Institute for Democracy in South Africa (IDASA) v. African National Congress (ANC)*.[98] Nevertheless, the bid of requesters IDASA, et al., to combat corruptive money in politics provides a roadmap for potential ATI litigation to secure civil and political rights.

With much wrangling, the respondent political parties in *IDASA* were held purely private bodies for the particular purpose of fundraising, so the ATI claim properly arose under PAIA section 50.[99] Because electoral integrity is essential to democracy, the requesters were able to assert manifold constitutional 'rights' theories.[100] The court rejected as non-justiciable 'rights' arising from the organisation of government and faulted requesters for failure to articulate a 'rational connection' between contribution-record access and the freedoms of expression and association.[101] But two 'rights' held water: the constitutional 'free[dom] to make political choices', including party organisation, and the 'right to free, fair and regular elections for any [constitutional] legislative body'.[102]

Tracking the 'reasonably required' approach of *Clutchco*, the requesters relied on political scientists to build a foundation proving the essentiality of contribution

[98] *Inst. for Democracy in S. Afr. v. Afr. Nat'l Cong. (IDASA)* [2005] ZAWCHC 30, 2005 (5) SA 39 (C), [2005] 3 All SA 45 (C).

[99] *IDASA*, [2005] ZAWCHC 30, ¶ 32.

[100] *Id.* ¶ 36 (citing S. Afr. Const., 1996, §§ 1(d), 16, 18, 19(1)–(2), 41(1)(c), 152(1)(a), 195(1)).

[101] *Id.* ¶¶ 39–40 (citing S. Afr. Const., 1996, §§ 1(d), 16, 18).

[102] S. Afr. Const., 1996, § 19(1)–(2).

transparency to inform and empower the electorate.[103] Experts proffered sectoral transparency systems in other countries. The court was unimpressed. Nowhere else, the court observed, did transparency arise from general ATI legislation or constitutional litigation.[104] Moreover, the requesters could not close the 'required' loop by explaining how contribution-record access would protect electoral rights.[105] The court was unconvinced that anyone 'require[s] such information *now*'.[106] Indeed, the requesters were undone by their own words in a position paper touting litigation as leverage to prompt sectoral legislation.[107]

If the *Clutchco* requester failed because his request was too narrow, eclipsed by the Companies Act, the *IDASA* request was too broad. The *IDASA* requesters would have had the PAIA occupy the field of campaign-finance regulation, constitutionally pre-empting legislative policymaking. To mind its lane, ATI in the private sector must neither undermine nor pre-empt a parallel access system. Despite the requesters' failure, *IDASA* established that political rights can support a section 50 claim. The requester must then delineate with care a scope of 'required' access mindful of parallel avenues. ATI can thus facilitate the maintenance of accountable democratic governance, a precondition to social and economic development.

8.2.3.2 Truth and Reconciliation

Truth and reconciliation naturally complement the post-Apartheid motivation behind constitutional ATI. The right to truth is recognised worldwide as a precondition to social development, and the role of commercial actors in past atrocities must be reconciled with prospective economic development. In this vein, Hlatshwayo, a researcher, sought access to historical records of the private manufacturer Mittalsteel in *Mittalsteel South Africa Ltd. v. Hlatshwayo*.[108] The time in question, from 1965 to 1973, predated the 1989 privatisation of Mittalsteel, which had been South Africa's largest steel producer as the state-controlled 'ISCOR'.[109] The SCA studiously underplayed the shadow of Apartheid, but it lay at the heart of Hlatshwayo's investigation into ISCOR labor[110]: a troubling mix of 'racial despotism', the 'cheap black labour system', and Afrikaner nationalism in the 'apartheid company state'.[111]

Mittalsteel was obliged as a former public body to respond to Hlatshwayo under the PAIA, the SCA concluded.[112] So the researcher was not obliged to articulate a

[103] *IDASA*, [2005] ZAWCHC 30, ¶¶ 42–43.
[104] *Id.* ¶ 45.
[105] *Id.* ¶ 47.
[106] *Id.* ¶ 48 (original emphasis).
[107] *Id.* ¶ 49.
[108] *Mittalsteel S. Afr. Ltd. v. Hlatshwayo* [2006] SCA 94, ¶ 2 (RSA).
[109] *Id.* ¶¶ 1, 23–27.
[110] *Id.* ¶ 2.
[111] Hlatshwayo [11].
[112] *Mittalsteel S. Afr. Ltd. v. Hlatshwayo* [2006] SCA 94, ¶ 28 (RSA).

'rights-required' foundation. Nevertheless, such historical inquiry furthers the human right to truth, which has motivated entities such as the South African History Archive to be a frequent user of the ATI law. The court's treatment-in-time of Mittalsteel ensures that privatisation is not an escape from accountability. Hlatshwayo's case moreover suggests the viability of PAIA section 50 as a vehicle to retrospective accountability for the many corporate actors that did exploit labour and profit from Apartheid.

8.2.3.3 Environment

Two ATI cases have involved civil-society advocacy for environmental protection: *Trustees for the Time Being of Biowatch Trust v. Registrar: Genetic Resources* in the Gauteng high court,[113] and *ArcelorMittal South Africa Ltd. (Arcelor) v. Vaal Environmental Justice Alliance (VEJA)* in the SCA.[114]

Though playing out against public-sector respondents, *Biowatch* involved privately owned information with important implications for agricultural development and public health. The court awarded watchdog Biowatch, along with intervenor ODAC,[115] presumptive access to a public registry of genetically modified organisms (GMOs).[116] From private-sector biotech, heavy-hitter Monsanto led intervening *amici* in opposing access.[117] Biowatch feared contamination of native maize by insecticide-resistant GMOs.[118] The corporate intervenors vigorously asserted commercial confidentiality.[119] Without ruling on the merits, the court allowed that the registrar could subsequently, after due consideration, deny access insofar as required to protect commercial confidentiality, '—if he were honestly and *bona fide* of the opinion that such a refusal is justified'.[120]

Biowatch demonstrates how the rights-required balance of ATI law tracks the balancing of interests at stake in social and economic development. It is not difficult to imagine a subsequent PAIA request, grounded in constitutional environmental guarantees or administrative fairness, lodged directly against a private entity such as Monsanto.[121] Biowatch instructs that commercial secrecy merits deference, because absolute transparency would be counter-productive to investment. At the same time, the PAIA remains as an investigative tool in the event native crops are genetically compromised. The ATI law thereby promotes commercial research in the public

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[113] *Trs. for Time Being of Biowatch Tr. v. Registrar: Genetic Res.* [2005] ZAGPHC 135, ¶ 69.

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

[115] *Id.* ¶ 11.

[116] *Trs. for Time Being of Biowatch Tr.*, [2005] ZAGPHC 135, ¶ 69.

[117] *Id.* ¶¶ 7–10.

[118] *Id.* ¶¶ 17–21.

[119] *Id.* ¶¶ 39–40.

[120] *Id.* ¶ 41.

[121] *See* S. Afr. Const., 1996, §§ 24, 33.

interest while also limiting commercial activity at the point of injury or exploitation at public expense.

In a second environmental case, VEJA won access to historical and strategic information from steel producer Arcelor (progeny of ISCOR and Mittalsteel) about its waste disposal practices, particularly one 'comprehensive strategy document'.[122] The court began with a solicitous statement on collective rights:

> First, the world, for obvious reasons, is becoming increasingly ecologically sensitive. Second, citizens in democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect of governments and in relation to corporations. In South Africa, because of our past, the latter aspect has increased significance.[123]

The court furthermore characterised the case as an 'entanglement' of economic development and environmental conservation, both constitutional priorities that must be balanced.[124]

For 'rights', the court allowed VEJA to rely on the constitutional right to a healthy environment; restraint would derive from the rights-required analysis.[125] VEJA was held to be a 'genuine advocate[] for environmental justice'.[126] The court rejected Arcelor counterarguments, including that VEJA was on a fishing expedition, that VEJA would effect itself as a shadow regulatory authority, and that VEJA should have availed of access under sectoral environmental law rather than the PAIA.[127] Distinguishing *Clutchco*'s analysis of the Companies Act, the court found VEJA's aims complementary rather than circumventive of environmental regulation because constitutional policy calls for 'collaborative corporate governance in relation to the environment'.[128] Rebuffing Arcelor's objection to private accountability, the court invoked South African history to explain the constitution's deliberate articulation of horizontal rights[129]: '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'.[130]

VEJA established environmental protection as a cognisable right for ATI purposes. Moreover, through section 50 rights-required testing, *VEJA* plays out the *Biowatch* balancing of development interests, suggested there by disclosure-and-exemption analysis. The SCA in VEJA plainly allowed ATI as a horizontal right and enabler of collective rights, and thereby a means to corporate accountability. Where the *IDASA* requesters were too bluntly ambitious, VEJA navigated 'rights-required' on a tight

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[122] *Co. Sec'y, ArcelorMittal S. Afr. Ltd. v. Vaal Envtl. Justice Alliance* [2014] ZASCA 184, 2015 (1) SA 515 (SCA), ¶¶ 2, 9.

[123] *ArcelorMittal*, [2014] ZASCA 184, ¶ 1.

[124] *Id.* ¶¶ 3–4.

[125] *Id.* ¶ 41 (quoting S. AFR. CONST., 1996, § 24), ¶¶ 49–50.

[126] *Id.* ¶ 53.

[127] *Id.* ¶¶ 58–60.

[128] *Id.* ¶¶ 53, 60–74, 83; *see id.* ¶ 80.

[129] *Id.* ¶ 78.

[130] *Id.* ¶ 82.

course, aiming narrowly for foreseeably revelatory records known already to exist. This roadmap is instructive for future section 50 claims, whether in furtherance of civil-political, environmental, or other rights.

8.2.3.4 Sport

Finally one high court case directly implicated development in relation to the 2010 FIFA World Cup in South Africa: *M&G Media Ltd. v. 2010 FIFA World Cup Org. Comm. S. Afr. Ltd.*[131] Because the 2010 tournament marked the quadrennial mega-event's debut on the African continent, media watchdogs and academic researchers were keen to determine whether organisers and corporate sponsors made good on abundant promises of favourable development impact. To that end, the Johannesburg-based weekly *Mail & Guardian* (M&G) sought access to procurement records of the quasi-public organising committee.[132] Most of the lengthy court opinion was preoccupied with whether the respondent was a public or private body, owing to its oddly hybrid constitution. Ultimately, the court equivocated, but opted for an efficient ruling: M&G was entitled to have its request fulfilled either way.[133]

On the section 50 analysis, invoking *Cape Metro*, the court emphasised 'any' before 'rights' in the PAIA, construing legislative 'intention to ensure … the broadest possible interpretation'.[134] M&G relied on the freedom of expression.[135] The court acknowledged the media 'duty as public watchdog, and the information they require in order to discharge this obligation',[136] citing South African, European, UK, and Canadian case law,[137] and analogising to 'the special position of journalists', who receive prophylactic latitude in defamation law even to publish falsity.[138]

On the 'required' analysis, the court invoked reasonableness.[139] The court in one breath sought only 'some connection between the requested information and the exercise or protection of the right',[140] and in the next construed 'required [to] exercise or protect[]' as 'will enhance and promote'.[141] Generously to media, the

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[131] *M&G Media Ltd. v. 2010 FIFA World Cup Org. Comm. S. Afr. Ltd.* 2011 (5) SA 163 (GSJ), ¶¶ 1–3.

[132] *Id.*

[133] *Id.* ¶ 163.

[134] *Id.* ¶ 334.

[135] *Id.* ¶ 337; S. Afr. Const., 1996, § 16(1)(a).

[136] *M&G Media Ltd.*, 2011 (5) SA 163 (GSJ), ¶ 338.

[137] *Id.* ¶ 341.

[138] *Id.* ¶ 343. *But see* Nairobi Law Monthly Co. v. Kenya Elec. Generating Co., Pet. No. 278 of 2011 (High Ct. Nairobi, Const. & Hum. Rts. Div. May 13, 2013) (construing private-sector access provision in Kenyan law and rejecting requester reliance on constitutional role of journalist per se, because such bootstrapping would yield unbridled access to private sector upon any investigative claim).

[139] *M&G Media Ltd.*, 2011 (5) SA 163 (GSJ), ¶¶ 350–351.

[140] *Id.* ¶ 353.

[141] *Id.* ¶ 355.

court recognised that a requester who does 'not usually know [a record's] contents … cannot be expected to demonstrate a link between the record and rights with any degree of detail or precision'.[142] Media's watchdog role was specially implicated to investigate 'the most significant sporting event in the world', more than the 'corner fish-and-chips shop'.[143] Thus, the court concluded, access could expose 'corruption, graft and/or incompetence'.[144] M&G proffered no facial evidence of wrongdoing; nevertheless, the court was satisfied by the need to hold the respondent accountable to claims that procurement 'created opportunities for small businesses and previously disadvantaged communities'.[145] '[T]he public has a "right to know" that this in fact so'[146]; inversely, '[t]he consequences of inaccurate reporting may be devastating'.[147] The court moreover rebuffed the respondent's claim of competitive commercial exemption.[148]

Ample doubts surround the development efficacy of the 2010 World Cup, and that story is only a piece of the global debate over the socioeconomic impact of sport mega-events and corruption in international sport governance. The *M&G* case is therefore crucially instructive. Even as mere high court precedent, *M&G* demonstrates the potential of ATI to promote development and combat corruption in a contemporary world in which the power and cachet of governments is dwarfed by the resources and influence of transnational corporations, both for-profit and ostensibly non-profit.

8.3 Access and the Private Sector in Poland

8.3.1 Polish ATI and the Private Sector

Poland has had a tumultuous modern relationship with privatisation. Liberation from the Soviet Union naturally resulted in a radical wave of privatisation in the 1990s, as Poland reshaped its economy into a free market. The run-up to full membership in the European Union, attained in 2004, dampened officials' enthusiasm for privatisation, as Poland revamped social services and regulatory systems to be compatible with European norms. Thereafter, Donald Tusk, prime minister from 2007 to 2014, sought aggressively to reinvigorate privatisation and simultaneously to enhance European integration, moving Poland toward the Eurozone. In 2015, the Law and Justice party (PiS) became the first winner of an outright majority in parliamentary election since 1989 and again applied the brakes to privatisation. Though economically conserva-

[142] *Id.* ¶ 353.
[143] *Id.* ¶¶ 355–356.
[144] *Id.* ¶ 360.
[145] *Id.* ¶¶ 383–385.
[146] *Id.* ¶ 384.
[147] *Id.* ¶ 387.
[148] *Id.* ¶¶ 408–413.

tive in ideology, PiS staked out a middle ground between the free market and state control in 'strategic sectors', namely finance, energy, and media.[149] PiS touts both privatisation and public reinvestment as necessary to strike the right balance. The likely result of this agenda will be a new breed of public/private-hybrid corporations controlling social and economic services that are essential to development.

However dramatic its swings in the short term, Polish experience with privatisation is a microcosm of the vagarious western European experience in the long term. In scarcely 70 years, Europe has vacillated from the advent of the social-democratic state and centralisation of the continental economy to an unprecedented turn-of-the-century privatisation crusade and austerity authorities' recent passion for privatisation—even amid a burgeoning movement for water re-municipalisation. On the accountability side of the coin, the freedom of information also has transformed—from its mere implication as ancillary to political expression in post-World War II human rights instruments, through a phase of rejection in the European human rights court, to widespread contemporary acceptance in the same court, in national constitutions, and in international legal norms.

Like its EU cohort, Poland binds itself to the ATI guarantees—however much, or little, they in fact guarantee—of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights and Fundamental Freedoms.[150] The Constitution of the Republic of Poland recognises ATI generously, both as ancillary to the freedom of expression and as an express right.[151] Article 61 guarantees 'the right to obtain information on the activities of organs of public authority as well as persons discharging public functions' and private entities insofar as they are entrusted with state funds or property.[152] The article prescribes legislative enactment of access and authorises legislative limitations on access 'solely to protect freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State'.[153] Article 51 states principles of data protection, including rights of consent, minimisation, access, and correction of information about oneself. In a development vein, article 74 contains ecological and environmental protection guarantees that include 'the right to be informed of the quality of the environment and its protection'.

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[149] Pacula [22].

[150] See Tarnacka [31].

[151] KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [RP] Z DNIA 2 KWIETNIA 1997 R. [CONSTITUTION OF THE REPUBLIC OF POLAND OF APR. 2, 1997] art. 14, 54, http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (official English translation).

[152] *Id.* art. 61, sec. 1 ('Such right shall also include receipt of information on the activities of self-governing economic or professional organs and other persons or organizational units relating to the field in which they perform the tasks of public authorities and manage communal assets or property of the State Treasury.'). The article also requires access to the records and meetings of 'collective organs of public authority formed by universal elections, with the opportunity to make sound and visual recordings'. *Id.* art. 61, sec. 2.

[153] *Id.* art. 61, sec. 3–4. Legislative access is specified for enactment through rules of procedure in the respective houses of parliament. *Id.* art. 61, sec. 4.

In interpreting the freedom of expression, the Supreme Court of Poland has signaled that constitutional protection exceeds that of the European human rights regime. Regarding the right of access to information, the court in 2000 reiterated the constitutional bar on access restrictions in the absence of a codified state interest in secrecy.[154] Inversely, the court articulated a national interest in affording media the widest possible access to information held by public bodies, including the right to obtain information in oral, written, or any form, and by inspection of records that result from the activity of public bodies.[155]

Poland codified ATI in the Act of September 6, 2001 on Access to Public Information (ATPIA), which entered force in 2002.[156] Broader than the constitution, the ATPIA affords access to all persons, not only citizens.[157] A 'person' includes the natural and juridical, the foreign and stateless, and organisational units without legal personality, such as social organisations.[158] Adhering to the modern ATI principle of interest neutrality, a person is not required to articulate any prerequisite legal or factual interest to obtain specific information.[159] The statute echoes the constitutional characterisation of public information, embracing information created by public authorities sensu *largo*, as well as entities executing public functions and using state or municipal property.[160] Because the constitution does not explicitly catalogue the entities bound by the ATI right, the *ratione materiae* defines the *ratione personae*.[161] Therefore information not produced by covered entities but related to them can be public information. The content of records, not their creation, nor their location, controls their access disposition.[162]

The ATPIA expands on the function test of the constitution to reach otherwise private entities. These quasi-public ATI respondents might not be part of the state authority structure, but they exercise authority normally reserved to the state, because they implement public tasks.[163] These are tasks that serve not only the needs of a

154 Wyrok Sąd Najwyższy [SN] z 1 czerwca 2000 r. [Supreme Court Judgment of June 1, 2000], III RN 64/00, http://www.sn.pl/sites/orzecznictwo/Orzeczenia1/III%20RN%2064-00.pdf.

155 *Id.*

156 Ustawa z dnia 6 września 2001 r. o dostępie do informacji publicznej (Dz. U. 2001 Nr 112 poz. 1198, with amendments), *translated in* LEGIS. ONLINE, https://www.legislationline.org/documents/id/6757 (OSCE Off. for Democratic Institutions & Hum. Rts. last visited Sept. 11, 2018) [hereinafter ATPIA].

157 *Id.* art. 2.

158 Wyrok Wojewódzki Sąd Administracyjny [WSA] w Warszawie z 11 lutego 2004 r. [Warsaw District Administrative Court Judgment of Feb. 11, 2004], III SAB 391/03, http://orzeczenia.nsa.gov.pl/doc/9C8EB0684A.

159 ATPIA art. 2(2); TOMASZ R. ALEKSANDROWICZ, KOMENTARZ DO USTAWY O DOSTEPIE DO INFORMACJI PUBLICZNEJ [COMMENTARY ON THE STATUTE ON ACCESS TO PUBLIC INFORMATION] 121 (2006).

160 ATPIA art. 4.

161 Pawlik [23].

162 Wyrok Najwyższy Sąd Administracyjny [NSA] z 3 kwietnia 2014 r [Supreme Administrative Court Judgment of Apr. 3, 2014], I OSK 2994/13, http://orzeczenia.nsa.gov.pl/doc/1AA23834FB.

163 *Zakres stosowania przepisów dostępowych* [*Scope of Application of Access Rules*], *in* GÓWNE PROBLEMY PRAWA DO INFORMACJI W ŚWIETLE PRAWA I STANDARDÓW MIEDZYNARODOWYCH,

limited number of people, but the public good, that are carried out on an ongoing basis, and that are implemented to effect publicly available benefits.[164] Whether an entity performs public tasks, and thus whether it must disclose public information, is determined by analysing its activity.[165] As to the alternative test for access via public funding, the ATPIA follows public money and property into its private-sector management.[166]

As the constitution authorises, ATPIA access may be limited by statute. The ATPIA itself defers to collateral access systems,[167] which include the Public Procurement Act.[168] That act introduced the principle of transparency for the award of a public contract, extending public inspection to award procedures, offers, expert opinions, statements, information from meetings, notifications, applications, and other records submitted by authorities and contractors. Contractors may apply to restrict access to information protectable in law, such as trade secrets. Similarly, the Protection of Classified Information Act[169] controls access to information held secret by other statutes, such as upon a doctor's or lawyer's duty of confidentiality.[170] The ATPIA defers to personal privacy[171] and the Protection of Personal Data Act.[172] And the ATPIA exempts 'entrepreneur's secrets', when not related to public functions and

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EUROPEJSKICH I WYBRANYCH PAŃSTW UNII EUROPEJSKIEJ [THE MAIN PROBLEMS OF THE RIGHT TO INFORMATION IN LIGHT OF INTERNATIONAL LAW AND STANDARDS, EUROPEAN AND SELECTED EUROPEAN UNION COUNTRIES] 22–23 (Grzegorz Sibiga ed., 2014).

[164] Uchwała NSA z 11 kwietnia 2005 r [NSA Resolution of Apr. 11, 2005], I OPS 1/05, http://orzeczenia.nsa.gov.pl/doc/571022A55E.

[165] Pawlik, *supra* note 161, at 3; *Zakres*, *supra* note 163, at 23.

[166] Pietras [27].

[167] ATPIA art. 1(2); Wyrok WSA w Warszawie z 5 września 2013 r [WSA Judgment of Sept. 5, 2013], VIII SA/Wa 433/13, http://orzeczenia.nsa.gov.pl/doc/41D1B89D6E.

[168] Prawo zamówień publicznyc z 29 stycznia 2004 r (Dz. U. 2004r. Nr 19, poz. 177, with amendments).

[169] Ustawa o ochronie informacji niejawnych z 22 stycznia 1999 r (Dz. U. 2005r Nr 196, poz. 1631, uniform text).

[170] ATPIA art. 5(1); *see* Ustawa o radcach prawnych z 26 maja 1982 r [Advocates' Profession Act of May 26, 1982] art. 6 (Dz. U. 2018 Nr 1184, 1467, uniform text); Ustawa o radcach prawnych z 6 lipca 1982 [Legal Counsels' Profession Act of July 6, 1982] art. 3 (Dz. U. 2018 poz. 138, 723, 1467, uniform text); Ustawa z dnia 5 grudnia 1996 r. o zawodach lekarza i lekarza dentysty [Medical Profession Act of Dec. 5, 1996] art. 40 (Dz. U. 2018, poz. 617, 650, 697, uniform text).

[171] ATPIA art. 5(2).

[172] Ustawa z dnia 10 maja 2018 r. o ochronie danych osobowych [Protection of Personal Data Act of May 10, 2018] (Dz. U. 2018 poz. 1000) (implementing Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, which repealed Directive 95/46/EC).

when secrecy is not waived, without defining the term.[173] Courts have construed the provision *per analogiam* to commercial secrets[174] in the Unfair Competition Act.[175]

8.3.2 Polish ATI and Development

The Polish courts have had ample occasion to apply the ATPIA to quasi-public entities. The court of first instance in ATI cases, the Supreme Administrative Court (NSA) has applied the ATPIA to partially state-owned enterprises. Through the function and funding formulas of the ATPIA, the NSA has moreover extended ATI to privately owned entities in the key development sectors of energy, transportation, and telecommunication. Owing to the constitutional and statutory design, the courts' approach to ATI has been grounded in analysis of an otherwise private actor's public tasks or funding. From this starting point, the courts have applied ATI liberally. The rhetoric in the court opinions suggests broad conceptualisation about the importance of a free flow of information to the provision of vital services to the public. At the same time, the courts remain beholden to the constitutional and statutory focus on the function and funding of the otherwise-private respondent entity. Typically of the classical Western model of ATI, then, access in Poland remains a function of the respondent's role, rather than of the public requester's need.

8.3.2.1 State Ownership

In its resolution of April 11, 2005, the NSA construed 'use of public property' in the ATPIA to include property owned by the state, by a municipality, by an entities of the public finance sector, or by a bank or commercial law company, in which the state holds more than half of shares in the share capital.[176] In a ruling in 2016, the court added that even an indirect dominant position, as the state achieved through ownership of an intermediary company as a shareholder, triggered application of the ATPIA.[177]

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[173] ATPIA art. 5(2).

[174] Wyrok SN z 6 czerwca 2003 r. [SN Judgment of June 6, 2003], IV CKN 211/01 (LEX nr 585877); Wyrok WSA w Krakowie z 18 grudnia 2006 r. [WSA in Kraków Judgment of Dec. 18, 2006], II SAB/Kr 87/06, http://orzeczenia.nsa.gov.pl/doc/C4D7263C27; Wyrok WSA w Poznaniu z 1 marca 2011 r. [WSA in Poznań Judgment of Mar. 1, 2011], II SAB/Po 1/11, http://orzeczenia.nsa.gov.pl/doc/B2BF568588.

[175] Ustawa z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji (Dz. U. 2003 Nr 153 poz. 1503, with amendments).

[176] Uchwała NSA z 11 kwietnia 2005 r. [NSA Resolution of Apr. 11, 2005], I OPS 1/05, http://orzeczenia.nsa.gov.pl/doc/571022A55E.

[177] Wyrok NSA z 28 października 2005 r. [NSA Judgment of Oct. 28, 2016], I OSK 603/15, http://orzeczenia.nsa.gov.pl/doc/89D128A548.

8.3.2.2 Energy

In its judgment of August 18, 2010, the Supreme Administrative Court (NSA), which is the court of first instance in ATI cases, decided that companies in the electric power industry are public utilities that perform public tasks within the meaning of the ATPIA.[178] The court explained that 'public task', as used in the ATPIA, is broader than 'public authority task', as stated in the constitution. The statutory term broadens the *ratione personae* scope to mean that public tasks can be performed by entities which are not authorities, and even which have not been specifically charged with public tasks by statute. First, the performance of public tasks always is connected with the realisation of citizens' basic rights. Because of the importance of electricity for development and standard of living, the generation and distribution of electricity by utility companies are public tasks. Second, public tasks are characterised by universality and usefulness for the general public, as well as promotion of goals enumerated in the constitution or the ATPIA. Delivery of electricity is necessary to attain the common good of the people, which is referenced in article 1 of the constitution. Therefore electric power companies are obliged to obey the ATPIA upon requests for information on 'public matters', as stated in the statute's article 1.1.

8.3.2.3 Transportation

In its judgment of October 17, 2013, the NSA held a transportation company obliged to disclose information on public matters under the ATPIA.[179] The court found that the private provider of a municipal transportation service was executing public tasks and also using public property, as it received subsidies for discounted tickets. Either of those conditions requires compliance with the ATPIA, the court reasoned. First, the court referenced statutes that oblige local governments to secure public transportation for the general public to reason that regular transportation services are public tasks, whether provided by a public or private entity.[180] The trending 'phenomenon of so-called "privatization"' does not vary the ATPIA analysis, the court opined. Second, the NSA held that an entity entrusted with 'even a small part of public property' is bound to accountability under the ATPIA. The law allows local government to finance transportation services, and the mere reimbursement of costs invites the ATPIA to follow the money.

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[178] Wyrok NSA z 18 sierpnia 2010 r. [NSA Judgment of Aug. 18, 2010], I OSK 851/10, http://orzeczenia.nsa.gov.pl/doc/529C4D0B34.

[179] Wyrok NSA z 28 października 2013 r. [NSA Judgment of Oct. 17, 2013], I OSK 952/13, http://orzeczenia.nsa.gov.pl/doc/FBB404C78B.

[180] E.g., Ustawa z dnia 8 marca 1990 r. o samorządzie gminnym [Act on Municipal Local Government of Mar. 8, 1990] (Dz. U. 2018, poz. 994, 1000, 1349, uniform text).

8.3.2.4 Telecommunication

In its judgment of May 28, 2013, the NSA held that Orange Polska S.A. (Orange), a private-sector telecom conglomerate, performs public tasks and is therefore obliged to respond to ATPIA requests on public matters.[181] Orange Polska S.A. was once Telekomunikacja Polska, a wholly state-owned enterprise derived from a communist-era predecessor in 1991. The company underwent a transition of privatisation around the turn of the century, ultimately vesting majority ownership in France Télécom, which rebranded itself as Orange. While Orange is the largest provider in Poland, the NSA's reasoning pertains equally well to a small entrepreneur.

In sum the court reasoned that access to communication, including telephone and internet, is both socially necessary and vital to the functioning of the state. First, the NSA recognised the nature of the contemporary 'information society', in which access to telecommunication services, especially mobile telephony and internet, is fundamentally important. Thus meeting this citizen need, the court reasoned, is as essential socially and economically as the provision of electricity. Telecommunication providers therefore must comply with the ATPIA in making decisions about infrastructure development for both wireless and landline networks. In the instant case, Orange was asked for information about its strategic decisions on locating and constructing telecommunication network infrastructure.

Second, by statute, Poland recognised Orange as a provider and operator of publicly available telecommunications services. The Telecommunications Act obliges a telecommunications entrepreneur to perform tasks and duties of defence, state security, and public safety and order, as specified by statute and regulation.[182] The NSA furthermore grounded its 'public task' analysis in provisions of the Real Estate Management Act[183] and the Spatial Planning and Development Act,[184] which regulate the construction and maintenance of public communication facilities and equipment, regardless of private or public control.

8.4 Analysis and Conclusion

Researchers have recognised the peculiar capacity of ATI as 'an enabler right', capable of facilitating other human rights, from the civil-political to the collective.[185] The

[181] Wyrok NSA z 28 maja 2014 r. [NSA Judgment of May 28, 2014], I OSK 2380/13, http://orzeczenia.nsa.gov.pl/doc/F7EE820FB6.

[182] Prawo telekomunikacyjne 16 lipca 2004 r. [Telecommunications Act of July 16, 2004] art. 176 (Dz. U. 2014, poz. 243, item 1503, with amendments).

[183] Ustawy z dnia 21 sierpnia 1997r. o gospodarce nieruchomościami, art. 6 ust. 1 (t.j. Dz. U. z 2010r. Nr 102 poz. 651 ze zm.).

[184] Ustawy z dnia 27 marca 2003r. o planowaniu i zagospodarowaniu przestrzennym, art. 2 pkt 5 (t.j. Dz. U. z 2012r. nr 647 ze zm.).

[185] Article 19, *Open Development: Access to Information and the Sustainable Development Goals* 9 (July 2017), https://www.article19.org/data/files/medialibrary/38832/Open-Development--Access-to-Information-and-the-SDGs-2017.pdf; *see also* UNESCO, KEYSTONES TO FOSTER INCLUSIVE

International Council on Human Rights recognised that human rights merit protection regardless of whether threats against them emerge from the public sector or the private sector.[186] Joining these observations, researchers in ATI law—notably Darch and Underwood,[187] Calland,[188] and Roberts,[189] building on Hohfeld[190]—have concluded that ATI does its human rights work by altering distributions of power in society.

Both Calland and Roberts have championed the idea of ATI as a *power* dynamic, because it empowers a requester of information as against a holder of information. Roberts described the emergence of transparency as a norm in the twentieth-century United States in response to the proliferation of bureaucracy in the administrative state.[191] The pluralisation of public service provision through a range of hybrid, privatised, and private actors later in the twentieth century marked a shift in power away from people and to the private sector, threatening a second wave of 'democratic deficit'[192] or 'information poverty'.[193] Socio-economic freedom is especially vulnerable to monopolistic or oligopolistic power in the provision of infrastructure, such as transportation and telecommunication, because consumers have no market alternative.[194]

ATI in the private sector is the antidote. Rather than stopping arbitrarily at the public-private divide, ATI should persist as a function of necessity. In the public sector, access is presumptive, because public ownership of government is a defining characteristic of democracy. Beyond the divide, the public interest in transparency does not vanish, but diminishes inversely with the strengthening social and economic freedom of private actors. ATI therefore restores balance. Development seeks the same balance: to promote private-sector growth while simultaneously furthering the public good. The relationship is complementary, not zero-sum.

In the development context, South African law demonstrates how ATI can transcend the classical public-private divide and, through the 'rights-required' analysis, deploy transparency to bolster ethics and efficacy in development. *IDASA* estab-

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Knowledge Societies: Access to Information and Knowledge, Freedom of Expression, Privacy, and Ethics on a Global Internet: Final Study 29, http://unesdoc.unesco.org/images/0023/002325/232563E.pdf.

[186]Int'l Council on Human Rights (ICHR), Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies (2002), http://www.ichrp.org/files/summaries/7/107_summary_en.pdf, cited in Siraj [30].

[187]Darch and Underwood, *supra* note 1, at 140–41.

[188]Calland, *supra* note 1.

[189]Roberts, *supra* note 5.

[190]Hohfeld [12, 13]; see also Siraj, *supra* note 187, at 214 [citing Janet Dine, Companies, International Trade and Human Rights (1995); Tim Dunne & Nicholas J. Wheeler, Human Rights in Global Politics (1999); Jedrzej George Frynas & Scott Pegg, Transnational Corporations and Human Rights (2003)].

[191]Roberts, *supra* note 5, at 245–55.

[192]*Id.* at 269.

[193]Bentley and Calland, supra note 33, at 341.

[194]Mulgan [18].

lished the pertinence of ATI to the rule of law itself as a guarantee of representative democracy, even if through a dedicated statutory framework. *Mittalsteel* revealed an important role for ATI in truth and reconciliation, a proposition with as ready implication in Polish experience with communism as in the South African experience with Apartheid. *Biowatch* and *VEJA* point to the role of ATI in environmental protection, a priority recognised expressly in the Polish constitution. *M&G* applied ATI to the tidal fiscal force of football, which governments in Europe no less than in Africa have sought to enlist in the cause of economic development. While plenty of interpretive work remains to be done—not to mention strengthening implementation on the ground—the driving force in these cases is the necessity of access to protect human rights.

Meanwhile in Poland, as in Europe and much of the world, ATI remains stubbornly tethered to the classical twentieth-century divide between public and private sectors. Accountability through access is a defining feature of the public sector, while the purely private sector is left to the accountability of mere market forces. Yet the Polish state strives to stimulate development and to fulfil the promises of human rights by enlisting the private sector in various permutations of public entanglement. The Polish legislature and courts, after the Western model, press ATI law through public interest into the private sector along avenues such as funding and function. State ownership offers an inviting entry point, but access stops abruptly at the arbitrary halfway line. The courts have recognised the essentiality of energy, transportation, and telecommunication to the realisation of democracy and human rights, extending ATI in tandem with 'public matters' and pushing back against the opacity of privatisation. This advancement signals the overriding importance of the public interest in access analysis. Still, though, the focus of Western ATI remains fixed on *state* accountability.

Access avenues such as funding and function are artifices. The common thread driving access toward the private sector is necessity. To ensure meaningful development within a democratic framework, ATI must do more than hold governments to account. Power to disaffect human rights rests increasingly in the private sector. A resulting democratic deficit cries out for rebalance through ATI. Accordingly, the legal approach to ATI must shift from means to ends. The public-private divide is not a stopping point for access, but a point of burden shifting, where presumptive access inverts to presumptive secrecy. The latter presumption still must yield to human rights upon demonstrated necessity. In this vein, African ATI law is charting a new course, one worthy of attention as the nations of the North and West map out their own agendas for responsible development.

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References

1. Adeleke, F. (2013). Constitutional domestication of the right of access to information in Africa: Retrospect and prospects. In F. Diallo, & R. Calland (Eds.), *Access to information in Africa: Law, culture and practice* (pp. 83, 89).
2. Asimow, M. (1996). Administrative law under South Africa's interim constitution. *The American Journal of Comparative Law, 393,* 394.
3. Bentley, K., & Calland, R. (2014). Access to information and socio-economic rights: A theory of change in practice. In M. Langford & B. Cousins (Eds.), *Socio-economic rights in South Africa: Symbols or substance?* (p. 361).
4. Bertoni, E., & Sánchez, G. (n.d.). Draft model law for African Union States on access to information: Comments and recommendations. http://www.palermo.edu/cele/pdf/investigaciones/AU-Draft-Model-Law-CELE.pdf.
5. Burns, Y. (2000). Introduction. In *The Constitutional Right of Access to Information, Conference Proceedings*, September 4, 2000 (p. 5) http://www.kas.de/wf/doc/kas_4936-1522-2-30.pdf?040625152235.
6. Calland, R. (2009). Illuminating the politics and practice of access to information in South Africa. In K. Allan (Ed.), *Paper wars: Access to information in South Africa* (Vol. 1, p. 4). http://foip.saha.org.za/static/paper-wars-access-to-information-in-south-africa.
7. Calland, R. (2014). Exploring the liberal genealogy and the changing praxis of the right of access to information: Towards an egalitarian realisation, *Theoria, 61,* 70–71.
8. Darch, C., & Underwood, P. (2010). *Freedom of information and the developing world: The citizen, the state and models of openness* (pp. 233–235).
9. Darwala, M., Nayak, V., Nalule, C., & Choraria, V. (2011). *Draft model law for African Union Member States on access to information: A preliminary analysis with recommendations for change*, August 2011 (p. 6). http://www.humanrightsinitiative.org/programs/ai/rti/international/AUmodelATIlaw-CHRIprelimcritique-Aug11-Delhi-VrindaCVenkatN.pdf.
10. Hartshorn, J. V. (2014). *Can the model law on access to information for Africa fulfil expectations?* Paper at European Consortium for Political Research Conference on Regulatory Governance, Barcelona (pp. 10, 12). http://reggov2014.ibei.org/bcn-14-papers/66-212.pdf.
11. Hlatshwayo, M. S. (2003). *The politics of production and forms of worker response at the ISCOR Vanderbijlpark works, 1965–1973* (p. 53) (Unpublished M.A. thesis, University of the Witwatersrand). Available at Academia.edu, https://www.academia.edu/24723973/THE_POLITICS_OF_PRODUCTION_AND_FORMS_OF_WORKER_RESPONSE_AT_THE_ISCOR_VANDERBIJLPARK_WORKS_1965-1973.
12. Hohfeld, W. N. (1917). Fundamental legal conceptions as applied in judicial reasoning. *The Yale Law Journal, 26,* 710.
13. Hohfeld, W. N. (1920). *Fundamental legal conceptions as applied in judicial reasoning and other legal essays* (p. 5).
14. Klaaren, J., Currie, I., & Smith, A. (2000). Analysing foreign access to information legislation from a South African viewpoint. In *The Constitutional Right of Access to Information, Conference Proceedings*, September 4, 2000 (pp. 29–30). http://www.kas.de/wf/doc/kas_4936-1522-2-30.pdf?040625152235.
15. Lange, M. (2000). Welcoming remarks. In *The Constitutional Right of Access to Information, Conference Proceedings*, September 4, 2000 (pp. 7–8). http://www.kas.de/wf/doc/kas_4936-1522-2-30.pdf?040625152235.
16. Liebenberg, S. (2014). Socio-economic rights beyond the public-private law divide. In M. Langford & B. Cousins (Eds.), *Socio-economic rights in South Africa: Symbols or substance?* (pp. 63, 66–72).
17. McKinley, D. T. (2012). *The right to know, the right to live: Open data in South Africa* (p. 7). https://opengovernmentafrica.files.wordpress.com/2013/04/info-needs-report.pdf.
18. Mulgan, R. (2000). Comparing accountability in the public and private sectors. *Australian Journal of Public Administration, 59,* 87–88.

19. Mutula, S., & Wamukoya, J. M. (2009). Public sector information management in east and southern Africa: Implications for FOI, democracy and integrity in government. *International Journal of Information Management, 29,* 333–334.
20. Ngabirano, D. (2013). The Uganda freedom of information campaign: Stuck in the mud? In Diallo, F., & Calland, R. (Eds.), *Access to information in Africa: Law, culture and practice* (pp. 191, 208–209).
21. O'Regan, K. (2000). Democracy and access to information in the South Africa Constitution: Some reflections. In *The Constitutional Right of Access to Information, Conference Proceedings*, September 4, 2000 (pp. 11–12). http://www.kas.de/wf/doc/kas_4936-1522-2-30.pdf?040625152235.
22. Pacula, P. (2016). Poland seeks to boost state control of economy. *EU Observer*, February 24, 2016. https://euobserver.com/beyond-brussels/132421.
23. Pawlik, K. (2018). Przedsiębiorca w procedurze dostępu do informacji publicznej [Entrepreneur in the procedure of access to public information]. *Studenckie Zeszyty Naukowe* [*Sci. J. Students*], *21,* 37–38. http://journals.umcs.pl/szn/article/view/6782/5157.
24. Peltz-Steele, R. J. (2018, Forthcoming). Access to information in the private sector: African inspiration for U.S. FOIA reform. *Villanova Law Review, 63,* 907.
25. Peltz-Steele, R. J. (2017). Accountability in the private sector: African ambition for right to information in India, *Research Journal Social Sciences, 25,* 203.
26. Phooko, M. L. (2013). An actionable constitutional right of ATI. In F. Diallo & R. Calland, R. (Eds.), *Access to information in Africa: Law, culture and practice* (pp. 171, 177).
27. Pietras, S. M. (2011). Podmioty zobowiązane do udzielenia informacji publicznej w rozumieniu art. 4 ustawy z dnia 6 września 2001 r. o dostępie do informacji publicznej [Entities obliged to public information in the meaning of ATPIA]. *Ius Novum*, 108–119. https://iusnovum.lazarski.pl/fileadmin/user_upload/dokumenty/czasopisma/ius-novum/2011/Ius_Novum_4_6_2011_Pietras.pdf.
28. Roberts, A. (2001). Structural pluralism and the right to information. *The University of Toronto Law Journal, 51,* 243, 265.
29. Roling, S. (2007). *Transparency & access to information in South Africa: An evaluation of the promotion of access to Information Act 2 of 2000* (Dissertation) (p. 3). http://www.publiclaw.uct.ac.za/usr/public_law/LLMPapers/roling.pdf.
30. Siraj, M. (2010). Exclusion of private sector from freedom of information laws: Implications from a human rights perspective. *Journal of Alternative Perspectives in the Social Sciences, 211,* 215–216.
31. Tarnacka, K. (2009). *Prawo do informacji w polskim prawie konstytucyjnym* [*The right to information in Polish constitutional law*] (p. 13).