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**‘Access to Environmental Information – the International Perspective and a Comparative Review of South African and German Law in the Context of Nuclear Energy Development’**

Research Dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LL.M. in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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Cape Town 09/07/2007

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**‘Access to Environmental Information – the International  
Perspective and a Comparative Review of South African and German Law  
in the Context of Nuclear Energy Development’**

**Chapter I Introduction**

*‘Environmental issues are best handled with the 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 [...] States shall facilitate and encourage public awareness and participation by making information widely available [...]’<sup>1</sup>.*

**1. Background**

At the outline, it should be noted that environmental concerns are essentially subject to public interest, including affected individuals, communities and NGOs. Consequently, the civil society has to get an opportunity to participate in all environmental decision-making on the governmental level to ensure a democratic administrative process<sup>2</sup>.

As Principle 10 of the Rio Declaration implies, the legitimacy of environmental decision-making largely depends on public participation for ‘the governed must have and perceive that they have a voice in governance through representation, deliberation or some other form of action’<sup>3</sup>. In consideration of the fact that access to information itself forms a necessary prerequisite to public participation, only a state offering access to governmental information to its citizens provides for the essential transparency for an efficient involvement of the civil population and secures a comprehensive evaluation of administrative action<sup>4</sup>. Apparently, the right to obtain information from the state is likely to combat administrative abuse and may assist affected individuals to challenge the

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<sup>1</sup> Principle 10 of the 1992 Rio Declaration on Environment and Development.

<sup>2</sup> E Bray ‘Public Participation in Environmental Law’ 2003 SAPR/PL 18 at 136.

<sup>3</sup> A Kiss/D Shelton *International Environmental Law* 2004 at 673, 674.

<sup>4</sup> C Stoffel *Umweltrecht in Suedafrika – Ein Ueberblick* 2002, at 65; E Bray *op cit* at 123.

legality of administrative decisions, thus exercising or protecting their personal rights<sup>5</sup>. Recognising furthermore that access to state information has generally been the exception rather than the rule in both South Africa's and Germany's past<sup>6</sup>, it seems to be highly important to introduce efficient legal instruments to ensure access to information and to examine their virtues in practice.

More precisely, a constitutional right of access to information and subsequent legislation, promulgated to give effect to these targets, play an important role in assuring open democracy and can be regarded as 'something more than a mere constitutional right to discovery, it is [...] a necessary adjunct to an open democratic society committed to the principles of openness and accountability'.<sup>7</sup> Hence, this constitutional right lays the foundation for a democratic and transparent governmental work, which has to be implemented through national legislation. An example of this is s 32 of the Constitution of South Africa, given effect by different national legislation such as the Promotion of Access to Information Act 2 of 2000<sup>8</sup>, which will be examined in detail.

Specifically with regard to environmental matters, it is evident that only official directives from governmental organs are not sufficient for a comprehensive protection of the environment. In fact, the protection of the environment is basically kept alive by way of active co-operation between all parties concerned and by raising public awareness towards environmental concerns<sup>9</sup>. As a general requirement, there is a need for an efficient flow of information for only a well-informed public can take an active part in governmental work and enforce individual rights as well as environmental standards<sup>10</sup>. Moreover, the need for and the importance of a separate and distinct field covering access to environmental information arises from the potentially detrimental impact of environmental decision-making and authorised activities possibly affecting the public or causing transboundary effects as illustrated by the Chernobyl catastrophe in 1986. Indeed, the development and usage of nuclear

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<sup>5</sup> Y Burns *Administrative Law under the 1996 Constitution* 2006, at 52.

<sup>6</sup> Y Burns *op cit* at 78.

<sup>7</sup> *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) at 630.

<sup>8</sup> PAIA in the following.

<sup>9</sup> A Scheidler 'Der Anspruch auf Zugang zu Umweltinformationen' 2006 UPR 1 at 13.

<sup>10</sup> A Scheidler *op cit* at 13.

energy exemplifies such activities and will be mentioned with regard to various cases below.

With reference to this special subject, we are however faced with diverse situations when looking at the recent development in South Africa and Germany. The nuclear energy sector in South Africa and the operation of two nuclear reactors, generating six percent of the electricity, is strongly supported both by the government<sup>11</sup> and by the operators, planning to develop more nuclear energy sites<sup>12</sup>, which is nevertheless subject to a controversial discussion. In contrast, the operation of the seventeen German nuclear reactors, currently running, will be terminated in a controlled long-term way due to the fact that Germany decided to join the nuclear power phase-out<sup>13</sup>. However, in both countries there are recent cases existing to exemplify the significance of instruments covering access to environmental information in this context.

Referring to the proposition above, it can be generally assumed that governments acting in accordance with transparency and public participation are more likely to contribute to environmental justice, integrate environmental concerns into administrative decisions, implement and enforce environmental targets, therefore being able to protect the environment more efficiently<sup>14</sup>. In this context, the right to be informed about environmental issues in question forms the framework for public participation in a transparent governmental decision-making. In Germany for instance, the administrative institutions begun to realise in the past years that an informed public can be an important associate to the efficient implementation of environmental laws. Besides, an increased transparency and a reliable co-operation between administrative organs and the public should be more likely to contribute to the general acceptance of official decision-making in the civil society<sup>15</sup>.

Within the scope of this discussion, it has to be finally recognised that a right to environmental information can refer to both government-held, public

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<sup>11</sup> <http://www.dme.gov.za/energy/nuclear.stm>.

<sup>12</sup> <http://www.scienceinafrica.co.za/2003/june/nonuclear.htm>.

<sup>13</sup> 'Vereinbarung zwischen der Bundesregierung und den Energieversorgungsunternehmen vom 14. Juni 2000' <http://www.wind-energie.de/fileadmin/dokumente/Gesetze/Vereinbarung%20zum%20Atomausstieg.pdf>.

<sup>14</sup> P W Birnie/AE Boyle *International Law and the Environment* 2002 at 261.

<sup>15</sup> T Schomerus *Umweltinformationsgesetz – Handkommentar* 2002 at 2.

project information and information concerning private activities held by non-governmental persons, since the envisaged conduct may affect the environment in a similar manner<sup>16</sup>.

## **2. Structure and Aims of the Thesis**

This dissertation looks critically at the legal framework and relevant case law covering access to environmental information held by the relevant bodies in South Africa and Germany in a comparative way after examining the international framework especially in the context of nuclear energy development.

Chapter II will outline the international legal framework and international law trends dealing with access to environmental information. The Chernobyl disaster will illustrate the international scope of the problem of whether to grant environmental information or to refuse it in certain situations. International elaborations like Principle 10 of the 1992 Rio Declaration, providing for appropriate access to relevant information, will be outlined. Besides, some strong and weak approaches towards dealing with public access in international agreements will be examined by working out a progressive and chronological development in this context. In the European context, the 1998 Aarhus Convention, EC Directives and their implementation by the member states at the domestic level will be mentioned.

A further centre of this work will be Chapters III and IV, dealing with the South African and German position on the given subject. At the outset, the constitutional context will be highlighted in order to provide ‘umbrella’ provisions, which should be implemented by national, provincial or federal state legislation. This legislation, giving effect to the constitutional standards, will be subsequently discussed in a comparative way with regard to the positions in the two countries. Specifically, there will be the question to what extent South African and German legislation is able to balance the public interest in the disclosure of information against the interests of the holders of relevant information to keep them under cover. Additionally, relevant case law, such as the *Trustees, Biowatch Trust v Registrar: Genetic Resources* case of 2005 or the

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<sup>16</sup> A Kiss/D Shelton *op cit* at 669.

*Earthlife Africa v Eskom Holdings Ltd* case of 2006 on the South African side, and the recent discussion about the nuclear power plant *Brunsbüttel* in the German context, will be mentioned.

The final Chapter V of this discussion will contain an assessment of the present legal situations in South Africa and Germany concerning existing strengths and remaining weaknesses within this field of law in the two countries and the differences between the two positions. Finally, this will include the question about the distinction between the theoretical framework and the provisions made to regulate access to environmental information on the one hand and the situation in practice on the other. What are the challenges we are faced with concerning the appropriate usage, implementation and enforcement of the relevant legislation?

Overall, the main focus here will be on pointing out what could be learned from one another to overcome the weak spots still existing and to improve the situation.

## Chapter II The International Perspective

### 1. Introduction

This chapter examines the international approach of regulating access to environmental information by looking at exemplary international agreements and working out a progressive and chronological development in this context instead of sorting them out from ‘big’, global, to ‘small’, regional arrangements. In addition, the focus will be on the special European situation to highlight the progressive development within this self-contained area.

On the 26<sup>th</sup> of April 1986, operating errors and constructional defects resulted in a so-called ‘maximum credible accident’ in the nuclear power plant of Chernobyl near the city of Prypiat (Ukraine). Large quantities of radioactive material were thrown into the air and spread both over the region north-easterly of Chernobyl and over many parts of Europe. The Chernobyl accident resulted in one of the most severe environmental catastrophes on record, including human casualties, economic loss and transboundary impacts on the environment of most European nations<sup>17</sup>. However, the former Soviet government not only failed to immediately notify its own citizens and neighbouring states about the incident, about the possible effects and about protective measures, but it even imposed a 72- hour ban on access to state information after the incident took place<sup>18</sup>. Until the final stages of the Soviet Union, most of the local consequences were kept as a state secret and closely attached nations, like the former German Democratic Republic, only hesitantly circulated information concerning this tragedy. There is still disagreement among scientists about the expected long-term effects<sup>19</sup>. In 1989, due to the lack of available information, the Green World Association began searching for the reasons and for personal responsibilities subsequently publishing the relevant facts in order to encourage criminal investigations. However, nothing was done<sup>20</sup>. As a reaction on the Chernobyl accident, the 1986 Notification Convention was adopted. This agreement obliges the member

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<sup>17</sup> [http://de.wikipedia.org/wiki/Katasptrophe\\_von\\_Tschernobyl](http://de.wikipedia.org/wiki/Katasptrophe_von_Tschernobyl).

<sup>18</sup> P Sands *Principles of International Environmental Law* (2003) at 845;

<sup>19</sup> [http://de.wikipedia.org/wiki/Katasptrophe\\_von\\_Tschernobyl](http://de.wikipedia.org/wiki/Katasptrophe_von_Tschernobyl).

<sup>20</sup> <http://www.rec.org/REC/Publications/PPDoors/NIS/overview2.html>.

parties to immediately notify potentially affected states and provide for detailed information<sup>21</sup>.

This introductory example clearly illustrates the importance of a separate field of access to environmental information both on the international and the domestic level due to the potentially grave impacts of transboundary incidents. Even if not all environmental catastrophes can be avoided, an immediate and efficient flow of all available scientific and technical information and the subsequent action to be taken can mitigate the adverse impact on the public and the environment. And it should be assumed that, even if the affected parts of the public might sleep more soundly without the knowledge of risks and threats to their health or wellbeing, they would prefer information to ignorance to be able to ask for responsibility and preventive action<sup>22</sup>.

Moreover, the Chernobyl disaster obviously discloses the permanent clash of interests underlying this subject – confidentiality on the one hand and transparency on the other.

## **2. The 1992 Rio Declaration on Environment and Development**

Before the 1992 United Nations Conference on Environment and Development<sup>23</sup> elaborated the Declaration's twenty-seven principles to support global sustainable development, Principle 2 of the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment broadly emphasised the 'free flow of up-to-date scientific information and transfer of experience'. This commitment to the overall importance of environmental information was extended by a general trend in the 1980s to recognise the right of the public to receive information on the state of their environment<sup>24</sup>. Accordingly, the 1982 World Charter requested, *inter alia*, the participation of all persons in environmental decision-making<sup>25</sup>. Twenty years later, the Resolution 45/94 of the UN General Assembly was generally concerned with human rights

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<sup>21</sup> P Sands *op cit* at 845.

<sup>22</sup> D H Robbins 'Doing Business in the Sunshine: Public Access to Environmental Information in the United States' 1994 RECIEL 3 at 26.

<sup>23</sup> The UNCED in the following.

<sup>24</sup> L de la Fayette 'The OSPAR Convention Comes into Force: Continuity and Progress' (1999) *Marine & Coastal Law* at 263.

<sup>25</sup> P Sands *op cit* at 827.

and environmental protection, although it did not address environmental information rights in particular<sup>26</sup>.

Although the Rio Declaration does not allocate any specific human right to a decent environment, no fewer than four of the Rio Declaration's mutually interrelated Principles are concerned with environmental information: Principle 9 refers to the exchange of knowledge, Principle 18 deals with notification in emergency situations, the prior notification of potentially hazardous activities is envisaged by Principle 19 and individual access to environmental information is a core element of Principle 10 which is the crucial part here and should be outlined in brief<sup>27</sup>. Chapter 40 of the Agenda 21, a comprehensive plan of action adopted besides the Rio Declaration, recognises the importance of the availability of information concerning the environment and development for the benefit of individuals, groups and organisations to enable an efficient participation of the public in environmental issues<sup>28</sup>.

The 1992 Rio Declaration embodies non-binding environmental principles at a global level for the first time and provides for 'umbrella' provisions for environmental and developmental concerns<sup>29</sup>. In particular, Principle 10 provides for an essential support of participatory rights in environmental decision-making and forms a framework regulation concerning access to environmental information<sup>30</sup>. Typical for provisions like this is a rather broad wording which reflects the framework character of the agreement. In accordance with this, the scope and meaning of 'appropriate access' remains undefined, although paragraph 23.3. of the Agenda 21 gives some advice by stipulating that 'individuals, groups and organisations should have access to information relevant to the environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures'. Besides recognising Principle 10 as a part

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<sup>26</sup> A Kiss/D Shelton *op cit* at 667.

<sup>27</sup> Z N Jobodwana 'A Critical Review of the United Nations Declaration on Environment and Development' 1998 Lesotho Law Journal 11 at 202; P Sands *op cit* at 827.

<sup>28</sup> A Kiss/D Shelton *op cit* at 669.

<sup>29</sup> R V Makaramba 'A Commentary on the Rio Declaration on Environment and Development' 1992 Lesotho Law Journal 8 at 97-99.

<sup>30</sup> P Birnie/A Boyle *op cit* at 261.

of a broadly framed ‘umbrella’ agreement, it is important to emphasise that the real value and the efficiency of Principle 10 is to be seen both in further international instruments, giving effect to these objectives and guidelines, and in national law providing for a special access right in the environmental context and thus helping to enforce domestic environmental laws and standards<sup>31</sup>.

The question of how and to what extent international environmental agreements implement the wide target of Principle 10 will be discussed in the following.

### **3. The Weak Approach in Multilateral Environmental Agreements**

To start with examples of weak approaches towards regulating the subject, some Conventions clearly do not provide for advanced mechanisms to contribute to an efficient flow of information from public authorities towards the public.

The 1992 United Nations Framework Convention on Climate Change solely provides that member states ‘shall promote and facilitate [...] in accordance with national laws [...] public access to information and public participation’<sup>32</sup> and does not grant an enforceable public right of access to information<sup>33</sup>.

Similarly, the 1992 Convention on Biological Diversity as a framework agreement, laying down broad objectives<sup>34</sup>, does not impose any obligation on its member parties to provide environmental information. Indeed, the Preamble mentions the ‘general lack of information and knowledge regarding biological diversity [...]’ and affirms ‘the need for the full participation of women at all levels of policy-making and implementation’. Moreover, Art. 13 focuses on the importance of public awareness and education of biological diversity. Art. 14 requires that each contracting party, ‘as far as possible and as appropriate’, shall establish ‘appropriate’ environmental impact assessment procedures and ‘where

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<sup>31</sup> Z N Jobodwana *op cit* at 218; P Sands *op cit* at 854.

<sup>32</sup> Art. 6 (a) (ii) and (iii).

<sup>33</sup> P Sands *op cit* at 853.

<sup>34</sup> United Nations Environment Programme *Training Manual on International Environmental Law* 1997 at 185.

appropriate' allow for public participation in these cases. However, no broader guarantees of public information are to be found in this agreement<sup>35</sup>.

Finally, the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade only loosely provides for incentives to implement provisions covering access to information on chemicals and pesticide hazards into domestic legislation for the 'prior informed consent' mentioned is that between the parties of the international trade in hazardous wastes. Art. 15 (2) is the only provision imposing an obligation on the member parties to grant access to relevant information by calling for each member state to 'ensure, to the extent practicable, that the public has appropriate access to information on chemical handling and accident management and on alternatives that are safer for human health or the environment than the chemicals listed in Annex III'. However, this clause leaves much space for discretion and only applies to a restricted scope of information. Overall, it seems to be doubtful whether the objectives of the Convention, *inter alia* the protection of human health and the environment, can be reached without an informed public on both sides of the trade<sup>36</sup>.

Weak approaches covering access to relevant environmental information in multilateral environmental agreements and vague suggestions like the ones included in the three exemplary conventions above leave too much space for interpretation and thus rely completely on the willingness of member state parties to implement and create efficient legislative measures. As a result, there are different domestic regimes covering the same subject and each party state's relevant governmental organ may decide what is 'appropriate access' or a 'practicable extent'. Thus, a clearly formulated and unambiguous duty on the member states to provide for domestic legislation on access to environmental information is obviously a more forceful and efficient alternative. However, without the broad and open wording of some of the framework conventions, like the 1992 Convention on Biological Diversity, compromises between the parties

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<sup>35</sup> A Kiss/D Shelton *op cit* at 670.

<sup>36</sup> A Kiss/D Shelton *op cit* at 670.

of the negotiation process would never have been reached and an adoption of the relevant agreements would have been unlikely<sup>37</sup>.

#### **4. The 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic<sup>38</sup>**

The 1992 OSPAR Convention is a regional agreement covering the protection of the maritime environment in the North-East Atlantic and it came into force in 1998 replacing the Oslo and Paris Conventions<sup>39</sup>. It was the first Convention to provide for a specific instrument dealing with the right of individuals to environmental information in the maritime context and it gives a broad guarantee of public information.

##### **4.1. The Access Regime**

All member parties are obliged by Art. 9 (1) to ‘ensure that their competent authorities are required to make available the information described in paragraph 2 of this Article to any natural or legal person, in response to any reasonable request, without that person having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months’. With regard to the relevant information, ‘any available information in written, visual, oral or data-based form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it [...]’ is covered by Art. 9 (2). As with most of the provisions granting a right to information, we are faced with certain limitations in Art. 9 (3) allowing refusal in accordance with national law, *inter alia* on the grounds of the confidentiality of the proceedings of public authorities, international relations, national defence, public security, commercial and industrial confidentiality, the confidentiality of personal data or material, the disclosure of which would make it more likely that the environment to which such material related would be damaged.

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<sup>37</sup> P Birnie/A Boyle *op cit* at 569.

<sup>38</sup> The 1992 OSPAR Convention in the following.

<sup>39</sup> <http://www.ospar.org/eng/html/welcome.html>.

In effect, the reference to national law provides for the possibility to carry out domestic implementation in different ways on the basis of different policies of state practice with regard to the disclosure of data held by state institutions. The approaches of governmental authorities towards the disclosure of information have always differed due to diverse historical circumstances and resulting philosophies – some states apply a traditionally secretive approach built on the discreetness of public servants, while some nations regard the refusal of information as the great exception and apply a consistently open approach of granting information<sup>40</sup>. By leaving this decision to the legislative discretion of the member states, Art. 9 provides for unwanted room for either secretive or open legislative strategies<sup>41</sup>.

The relevant provisions of the OSPAR Convention can be regarded as a progressive implementation of the broad targets included in Principle 10 of the Rio Declaration, although there are some weaknesses remaining especially with regard to the broad wording, the missing inclusion of information held by private bodies and the possible risk of promoting diverse designs of the right in domestic legislation.

#### **4.2.The 2001 MOX Nuclear Plant Case**

A practical example of the application of Art. 9 of the OSPAR Convention is the case involving the MOX Nuclear Plant in Sellafield, UK, in 2001.

The legal dispute between Ireland and the UK concerned the discharge of radioactive liquid wastes produced as a result of the operation of the MOX reprocessing plant at Sellafield on the Irish Sea into this adjacent water. The plant was operated by British Nuclear Fuels Plc, authorised by the United Kingdom government and all procedures were governed by United Kingdom legislation<sup>42</sup>. Even though there was an environmental impact assessment and a legal opinion issued by the European Commission, Ireland considered that there

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<sup>40</sup> J Fluck 'Zugang zu Behoerdlichen Informationen' 2006 Verwaltungsarchiv at 407.

<sup>41</sup> L de la Fayette *op cit* at 264.

<sup>42</sup> V Roeben 'The Order of the UNCLOS Annex VII Arbitral Tribunal to Suspend Proceedings in the Case of the MOX Plant at Sellafield: How Much Jurisdictional Subsidiarity?' 2004 Nordic Journal of International Law at 224.

was the risk of harm to the marine environment of the Irish sea with regard to the disposal of nuclear wastes generated by the operation of the nuclear plant and sought for co-operation between the two states in order to ensure prevention and control of pollution under the 1982 United Nations Convention on the Law of the Sea<sup>43</sup>. Besides, Ireland instituted proceedings against the United Kingdom to seek access to information under Art. 9 of the OSPAR Convention related to the authorisation and economical justification of the MOX nuclear plant.

A first general problem was the jurisdictional overlap of the subjects in question due to three applicable conventional regimes, namely the UNCLOS, the OSPAR Convention and the Treaty establishing the European Community, each system providing for a dispute settlement procedure<sup>44</sup>. However, the proceedings were eventually instituted and carried out in front of an UNCLOS arbitral tribunal under Art. 32 of the OSPAR Convention who announced the outcomes in 2002.

The information sought by Ireland was contained in two reports on the assessment of the economical justification of the plant, as required by EURATOM and concerned details of the operation and costs of the plant<sup>45</sup>. The United Kingdom initially refused access on the grounds that the relevant data was not covered by the information in terms of Art. 9 (1) and later, *inter alia*, tried to apply the ‘commercial confidentiality’ exception under Art. 9 (3) to reject the disclosure. However, Ireland’s query was refused by a 2 to 1 majority of the arbitral tribunal on the grounds that the claim did not fall within the scope of Art. 9 (2) for not being ‘information [...] on the state of the maritime area’ or, even if that was the case, that the relevant activities carried out by the United Kingdom were not ‘likely to adversely affect the maritime area’. The dissenting opinion pointed at the necessity to respect and apply the internationally accepted precautionary principle and that the burden of proof concerning the non-adverse effect of authorising and justifying the operation of a nuclear plant consequently rested with the government of the United Kingdom<sup>46</sup>. This seems to be the better

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<sup>43</sup> V Roeben *op cit* at 225; the UNCLOS in the following.

<sup>44</sup> V Roeben *op cit* at 223.

<sup>45</sup> P Sands *op cit* at 857.

<sup>46</sup> P Sands *op cit* at 857.

founded and more comprehensible argumentation taking into account one of the most important concepts of modern international environmental law.

### **5. The 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment**

The 1993 Civil Liability Convention aims at ensuring adequate compensation for damage resulting from activities dangerous to the environment and also provides for means of prevention and reinstatement. However, this agreement has not yet come into force because the necessary three ratifications have not been carried out yet<sup>47</sup>, but shall be considered at this point, as it implies a further step towards a holistic mechanism of granting a right of access to environmental information.

Chapter III, trying to establish a broad access regime even if there has not been any damage to the environment<sup>48</sup>, includes the right of access to the relevant information held by public authorities for the public without having to prove an interest. Response shall be given within a reasonable time and within two months at the latest<sup>49</sup>. Additionally, there are certain grounds of refusal listed in Art. 14 (2) and (3) which are similar to those elaborated for the 1992 OSPAR Convention, but also include matters being under investigation, unfinished documents, manifestly unreasonable requests or requests being formulated in a too broad manner. In these cases, reasons for the refusal must be given and there is the possibility for the person seeking access to information to have the decision reviewed in accordance with domestic legislation. Especially with regard to the definition of the practical arrangements, the parties are given substantial scope of discretion. Even though the design of the detailed access regime is left to the domestic legislation of the member states, the Convention provides for a broad-ranging framework and sets out the guiding principles of

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<sup>47</sup> <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=150&CM=8&DF=6/21/2007&CL=ENG>.

<sup>48</sup> Council of Europe 'Explanatory Reports on the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (as approved on 8 March 1993) – Commentaries on the Articles' <http://conventions.coe.int/Treaty/en/Reports/Html/150.htm>.

<sup>49</sup> Art. 14.

granting or refusing access to relevant information and the administrative and judicial review of decisions<sup>50</sup>.

However, there are innovative elements included going beyond the approach of the OSPAR Convention by explicitly involving the private sector: under Art. 15, ‘any person shall have access to information relating to the environment held by bodies with public responsibilities for the environment and under the control of a public authority’ on the same terms and conditions as set out in Art. 14. This provision takes into account the organs carrying out public service functions and being concerned with environmental issues, thus working at the same level as the public authorities themselves<sup>51</sup>. Moreover, Art. 16 provides for access to information ‘held by operators’, defined in Art. 2 (5) as being ‘the person who exercises the control of a dangerous activity’. A possible line-up under Art. 16 would be to entitle a person, having suffered any damage, to request a court to order a private operator to provide the applicant with specific information necessary to establish the claim for compensation under the Convention. The operator himself would then be entitled to request the court to order another operator to provide the relevant information which may be necessary to establish his own right of compensation from the other operator<sup>52</sup>. However, the broad access rights are to be carried out under strict conditions and supervision of the court in order to protect the interests of the operator, as he may hold information possibly disclosing liability or an increase thereof<sup>53</sup>.

The entitlements under the Convention clearly form an advanced system of disclosing as much information as possible and still provide for necessary grounds of refusal. The fact that the Convention goes deep into the private sector is a big step towards a more holistic system of granting access – the strict distinction between information held by public authorities on the one hand and by private institutions on the other seems to be unacceptable in this context, as it possibly reveals the same environmental risks or detrimental impacts of activities.

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<sup>50</sup> Council of Europe *op cit* <http://conventions.coe.int/Treaty/en/Reports/Html/150.htm>.

<sup>51</sup> Council of Europe *op cit* <http://conventions.coe.int/Treaty/en/Reports/Html/150.htm>.

<sup>52</sup> P Sands *op cit* at 858.

<sup>53</sup> Council of Europe *op cit* <http://conventions.coe.int/Treaty/en/Reports/Html/150.htm>.

## 6. The European Context

In a regional approach, the European Community generally ensures the right of individuals to be informed about possible risks and environmental factors concerning products, industrial installations and manufacturing processes and their effects on the environment by adopting various directives, differing in their determination of a scope of public rights to information – some directives do not mention public information at all, while some others oblige the EC member states to provide for appropriate access regimes under domestic legislation<sup>54</sup>. Furthermore, the Community legislation broadly makes provision for access to environmental information for the benefit of those being at risk. For instance, the making available of information relating to the protection of workers against risks at their workplace is envisaged by the Framework Directive 89/391 and other directives are concerned with access regimes with regard to certain parts of the industry, such as mining and fishing, or various specific risks like asbestos<sup>55</sup>.

However, emphasis should be on the two major EC Directives on Access to Environmental Information<sup>56</sup> and the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters<sup>57</sup>.

### 6.1. The 1990 EC Directive

Acknowledging the fact that information comes along with influence, the EC enacted the Directive 90/313/EEC on Access to Environmental Information as a means to support enforcement of environmental standards by individuals<sup>58</sup>. This piece of European legislation was the very first international mechanism to provide a right of access to environmental information by setting out basic terms and conditions to ensure free access to information held by public authorities. Interestingly, the objective of the Directive is to ensure free access to and dissemination of access to environmental information, but the Preamble already

<sup>54</sup> A Kiss/D Shelton *op cit* at 671; Directive 80/778/EEC on Air Pollution on the one hand, Directive 84/360/EEC on Combating Air Pollution from Industrial Plants on the other.

<sup>55</sup> A Kiss/D Shelton *op cit* at 672.

<sup>56</sup> Directive 90/313/EEC on Access to Environmental Information and Directive 2003/4/EC on Public Access to Environmental Information.

<sup>57</sup> The 1998 Aarhus Convention in the following.

<sup>58</sup> M Wheeler 'The Right to Know in the European Union' 1994 RECIEL 1 at 1.

emphasises the access regime as a means to improve environmental protection and a way to remove disparities in member states' legislation which may contribute to inequalities in competition<sup>59</sup>. Accordingly, Environment Commissioner Margot Wallstroem declared: 'Improved access to environmental information is a pre-condition for a higher degree of involvement of citizens and stakeholders in environmental decision-making. We need this to achieve better informed and accountable decisions - and support for decisions taken -, on the road towards sustainable development'<sup>60</sup>.

### 6.1.1. The Access Regime

Under the Directive, any person in the EC is entitled to access to relevant information held by public authorities without having to show a particular interest which was initially largely opposed by the European chemical industry<sup>61</sup>. Further, the information has to be provided at a reasonable charge. Response to the request shall be given as soon as possible and within two months at the latest<sup>62</sup>. The definition of 'information relating to the environment' under Art. 2 (a) is broadly worded and includes all environment related data on the state of the surroundings and activities as well as plans and programmes. Under the access regime, both passive information that means information requested specifically, and active information, such as periodically published reports in accordance with Art. 7, is covered<sup>63</sup>. The right is subject to limitations, including the standard enumeration and thus referring mainly to public and private confidentiality. Additionally, requests may be refused if 'manifestly unreasonable' or 'formulated in too general manner'<sup>64</sup>. Apparently, these further constraints prevent the European administration and judicature from being flooded with applications which fail to display a legitimate interest in disclosure. Finally, Art. 3 (3) imposes a limitation on information not interfering with 'unfinished documents or internal communications'. Once again, these restrictions illustrate

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<sup>59</sup> P Sands *op cit* at 854.

<sup>60</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/699&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>61</sup> M Wheeler *op cit* at 3.

<sup>62</sup> Art. 3 (1) and (4).

<sup>63</sup> M Wheeler *op cit* at 2.

<sup>64</sup> Art. 3 (2) and (3).

the ambition to ensure the efficient work of public authorities and to set off this target against the public interest of transparency.

Under Art. 4 every person may 'seek a judicial or administrative review of the decision in accordance with the relevant national legal system' if there are grounds for an unreasonable refusal, ignorance or an inadequate answer.

Art. 6 of the Convention also covers information relating to the environment held by bodies with public responsibilities for the environment and being under the control of public authorities. The ambition of this provision is clearly to ensure that public access to information should not be avoided and circumvented by, for example, a delegation of responsibilities by a governmental organ to another body<sup>65</sup>.

This comprehensive system of granting a right of access to environmental information in combination with specific limitations and a broadly phrased provision ensuring access to review has led to enormous case law both in the member states and the European Court of Justice<sup>66</sup>. To filter the basic outcomes of this, the ECJ ruled that the whole conception of granting access to environmental information should be interpreted as a broad one, including information on all kinds of administrative action and interpreting the limitations in Art. 3 in a restrictive way for the benefit of the public<sup>67</sup>.

### **6.1.2. Implementation in the Member States**

The first attempt to regulate access to environmental information in Europe was an enormous progression towards openness and transparency using information as a means to promote environmental protection<sup>68</sup>. However, implementation in the member states was generally poor. Germany, for instance, already failed to transpose parts of the Directive into national law on time due to

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<sup>65</sup>European Commission 'Report from the Commission to the Council and the European Parliament on the Experience Gained in the Application of Council Directive 90/313/EEC of 7 June 1990, on Freedom of Access to Information on the Environment'  
[http://ec.europa.eu/environment/docum/00400\\_en.htm](http://ec.europa.eu/environment/docum/00400_en.htm).

<sup>66</sup>The ECJ in the following.

<sup>67</sup>Case C-335/94 1996 ECR I at 1573.

<sup>68</sup>M Wheeler *op cit* at 5.

disputes over the distribution of competences of federal and regional organs<sup>69</sup>. One of the reasons for that might be the fact that the Directive represented a drastic turning point in most of the member states' administrative structures, establishing the rule of transparency with secrecy as the exception where discreetness had prevailed for ages. However, the four next years of experience showed that the changing process is gradually developing and that further improvements in terms of the quantity and the quality of the information available had to be envisaged<sup>70</sup>.

Divided into three groups, reflecting the different legislative starting positions in the member states, the parties were given thirty months to implement the provisions of the Directive into national law. Indeed, this was not done by all due to widespread time delay as a major problem e.g. in Italy, Germany and later in Greece which lead to the application of the 'direct effect' principle of European legislation in member states not or wrongly implementing community legislation<sup>71</sup>.

As an exemplary case study, the United Kingdom implemented the Directive by the Environmental Information Regulations Act 1992 accompanied by a guidance note for the authorities working with the Act. By following the Directive's broad wording, the Act and the guidance embrace all concerned information held by any governmental institution with public responsibilities for the environment; however, there is some confusion about privatised bodies and their inclusion<sup>72</sup>. Besides, the regulatory regime divides the possibilities of refusal into mandatory and discretionary groups running the risk to be interpreted in a too broad manner to avoid conflicts with industrial interests. At last, the ground of refusal to disclose 'incomplete data' seems to be open to mistreatment for giving the authorities the possibility to protect and detain information arbitrarily whenever they want to. Finally, the funding of the new structure in the administrative system is not explicitly clear and obviously tries to avoid the incurrence of heavy costs<sup>73</sup>. Overall, the approach in the United Kingdom seems

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<sup>69</sup> M Wheeler *op cit* at 3; Case C-217/97 1999 ECR I at 5087.

<sup>70</sup> European Environment Agency 'Press release of the European Environment Agency on 6 June 1997' <http://www.eea.europa.eu/pressroom/newsreleases/access.html>.

<sup>71</sup> M Wheeler *op cit* at 2, 3.

<sup>72</sup> M Wheeler *op cit* at 3.

<sup>73</sup> M Wheeler *op cit* at 4.

to be reasonably implementing the broad ambitions of the Directive, although some ambiguities remain which, however, allow a flexible application of the domestic regime.

### 6.1.3. The Leading Case of *Wilhelm Mecklenburg v Kreis Pinneberg*

In the leading case of *Wilhelm Mecklenburg v Kreis Pinneberg*<sup>74</sup> the ECJ was called upon to interpret Art. 2 (a), providing that public authorities of the member states 'are required to make available information relating to the environment', and Art. 3 (2), allowing the refusal of a request, *inter alia* on the grounds 'where it affects matters which are, or have been, *sub judice*, or under enquiry or which are subject of preliminary investigation proceedings'. The Directive was transposed into German law by the 'Umweltinformationsgesetz' in 1994<sup>75</sup> which, *inter alia*, refuses access to environmental information 'during the course of an administrative procedure, as regards information received by the authorities in the course of such proceedings'<sup>76</sup>.

In accordance with Directive 90/313, the applicant requested a copy of the statement of views adopted by the countryside protection authority in connection with a development consent procedure regarding the construction of the 'western bypass' from the town of Pinneberg and district of Pinneberg in 1993<sup>77</sup>. However, the district of Pinneberg rejected the applicant's request by decision of May 1993 on the grounds that the authority's statement of views was not 'information relating to the environment' in terms of the Directive because it was merely an assessment of information already accessible to him. Moreover, the criteria for refusal set out in Art. 3 (2) applied in any event, since a development consent procedure must be regarded as 'preliminary investigation proceedings'<sup>78</sup>.

With regard to the first question, the national court requested the decision from the ECJ within the preliminary ruling under Art. 177 of the EC Treaty about whether Art. 2 (a) of the Directive has to be interpreted in a way that a

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<sup>74</sup> Case C-321/96 1998 ECR I at 3809.

<sup>75</sup> The Access to Environmental Information Act; the UIG in the following.

<sup>76</sup> Section 7 (2) UIG.

<sup>77</sup> Case C-321/96 1998 ECR I 3809 at 9.

<sup>78</sup> Case C-321/96 1998 ECR I 3809 at 10.

statement of views by a countryside protection authority in connection with a development consent procedure is falling within its scope. The court illustrated that it should be noted in the first place that Article 2 (a) is to be interpreted as covering all information on the state of the various parts of the environment mentioned as well as activities and measures which are able to adversely change or protect these parts ‘including administrative measures and environmental management programmes’. Following the wording, the Community legislation apparently intended to provide for a broad concept of environmental information, including both information and activities affecting the state of the environment<sup>79</sup>. Furthermore, the legislative organs deliberately avoided to provide a clear definition of ‘information relating to the environment’ which could lead to the exclusion of any of the activities or measures by the public authorities. Thus, the term ‘measures’ solely clarifies that all forms of administrative action are embraced by the activities under the Directive<sup>80</sup>. Finally, the statement in question is to be regarded as being information on the environment in terms of the Directive if that statement may influence the outcome of the planning approval proceedings with regard to the protection of the environment<sup>81</sup>.

The second question of the domestic court referred to the term of ‘preliminary investigation proceedings’ in Art. 3 (2) of the Directive and whether this ground of refusal is to be interpreted as to include administrative proceedings, such as those mentioned in the UIG, which solely prepare for an administrative measure. The court noted that this exception merely related to judicial, quasi-judicial proceedings or at least to proceedings directly preceding judicial proceedings<sup>82</sup>. To support these findings, the court referred to the history of the adoption of the directive and a comparison of the wording of the phrase ‘preliminary investigation proceedings’ in various European languages. Consequently, the court refused the applicability of the ground of refusal implemented in section 7 (2) UIG for merely preparing an administrative measure, but not immediately preceding a judicial proceeding<sup>83</sup>.

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<sup>79</sup> Case C-321/96 1998 ECR I 3809 at 19.

<sup>80</sup> Case C-321/96 1998 ECR I 3809 at 20.

<sup>81</sup> Case C-321/96 1998 ECR I 3809 at 21.

<sup>82</sup> Case C-321/96 1998 ECR I 3809 at 27.

<sup>83</sup> Case C-321/96 1998 ECR I 3809 at 28, 29, 30.

## 6.2. The 1998 Aarhus Convention

A further step in the progressive development of international environmental law which emphasises advanced public participation in the enforcement of environmental laws is the 1998 Aarhus Convention. This agreement came into force on 30 November 2001 and deals with access to environmental information, public participation in decision-making and access to justice in environmental matters in accordance with its three pillars<sup>84</sup>. The objective of the Convention is, *inter alia*, to increase the transparency of the administrative structures in Europe by providing a comprehensive access regime and thus to reach a higher level of acceptance of official decision-making and public awareness for environmental concerns<sup>85</sup>.

The Aarhus Convention is often regarded as the most advanced agreement in order to give effect to Principle 10 of the Rio Declaration and recognising the relationship between environmental protection and human rights, stating that ‘every person has the right to live in an environment adequate to his or her well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations’<sup>86</sup>. The Convention further incorporates the 1995 UNECE Guidelines on Access to Environmental Information and Public Participation in Decision-Making. Although regional in its character, the Convention is open to signatory by consultative members of the UN Economic Commission for Europe, like North American states and the former Soviet states, which could make the agreement a Northern hemisphere agreement<sup>87</sup>.

With regard to access to environmental information, Art. 4 develops the approaches of the 1990 Directives and the OSPAR Convention by introducing several innovative elements in addition to the granting of a right of access to relevant information for individuals and NGOs under the standard terms and conditions and grounds of refusal<sup>88</sup>.

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<sup>84</sup> P Sands *op cit* at 858.

<sup>85</sup> A Scheidler *op cit* at 13.

<sup>86</sup> Art. 1.

<sup>87</sup> P Birnie/A Boyle *op cit* at 262, 263.

<sup>88</sup> P Sands *op cit* at 858.

Environmental Information is broadly defined and includes the ‘state of elements of the environment’, ‘factors’, all kinds of administrative and governmental activities likely to affect the elements mentioned as well as the state of human health and safety. Genetically modified organisms as a factor of biodiversity are now expressly included by the definition and a wide range of administrative activities, such as environmental agreements, policies, plans and programmes, are envisaged by Art. 2 (3). The particular information has to be made available as soon as possible and no later than within the reduced period of one month after a request. The exceptional denial of information disclosure can be carried out on formal or substantive grounds. These restrictions, listed as interests possibly being adversely affected, are to be interpreted restrictively, ‘taking into account the public interest served by disclosure’<sup>89</sup>. However, some of these interests are broadly defined and thus bear the risk of a self-serving interpretation and misused discretion in order to circumvent the disclosure of information<sup>90</sup>. Remarkable with regard to the exceptions to the general rule of disclosure is the wording of Art. 4 (3) and (4), incorporating a restrictive interpretation of the grounds of refusal, e.g. requiring that commercial confidentiality exceptions may only be granted where ‘such confidentiality is protected by law in order to protect a legitimate economic interest’ and introducing a legislative presumption on the disclosure of information on emissions ‘which is relevant for the protection of the environment’.

Additionally, the Convention fails to include privately-held information which clearly forms a drawback for the Convention in setting the targets to be implemented by the member states in the European Community<sup>91</sup>.

A second part of obligations on the member states is included in Art. 5, ensuring an ‘adequate flow’ of environmental information in emergency situations by providing for database, active support from officials, national reports and explanatory material. In addition, the registering and organised

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<sup>89</sup> Art. 4 (4).

<sup>90</sup> J Ebbesson ‘Information, Participation and Access to Justice: the Model of the Aarhus Convention’ (2002) Background Paper No. 5 for the Joint UNEP-OHCHR Expert Seminar on Human Rights and Environment, <http://www.unhchr.ch/environment/bp5.html>.

<sup>91</sup> P H Sand ‘The Right to Know: Environmental Information Disclosure by Government and Industry’ (2004) in F Biermann et al *Proceedings of the 2002 Berlin Conference on the Human Dimensions of Global Environmental Change ‘Knowledge for the Sustainable Transition – The Challenge for Social Science’*, at 297.

dissemination of information shall be reached by parties to ‘take steps to progressively establish’ a system like this. However, the provision is regarded as having failed to implement a comprehensive ‘environmental right to know’ for allowing loopholes for the parties by not setting a clear time frame for these obligations and failing to include mandatory elements. Furthermore, the vague and soft language still remains a weakness<sup>92</sup>. Finally, it should be noted that the private sector is also involved through the proposed regular reporting by ‘operators’ whose activities have a significant impact on the environment, although this is not done by establishing any duties and left to the discretion of the member states<sup>93</sup> - a fact which can be a disadvantage as will be mentioned below.

In addition, the Convention provides for access to review in Art. 4 (7) and (9) and imposes the duty on the affected authorities to inform the applicant where information which is not available at the first authority should be applied for in Art. 4 (5). Finally, Art. 4 (6) makes provision for the separation of information being exempted from disclosure as long as it can be separated without affecting the contents of the remaining parts<sup>94</sup>.

The two other pillars of the Convention, public participation in decision-making and access to justice in environmental matters, are interrelated and closely linked to the right of access to environmental information. Broad public participation is ensured by listing all relevant activities and installations in an annex, indicating the applicability of the detailed provisions on public participation, e.g. in respect of power stations, nuclear reactors and installations, chemical plants and waste management installations. Art. 9 requires the member states to make the rights under the Convention enforceable by a national court or independent tribunal and provides for access to justice in case of breaches of national law concerning the environment<sup>95</sup>.

One of the most promising recent innovations built on the framework of the access regime of the 1998 Aarhus Convention is the European Pollutant

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<sup>92</sup> J Ebbesson *op cit*.

<sup>93</sup> Art. 5 (6) and (7).

<sup>94</sup> P Sands *op cit* at 859.

<sup>95</sup> P Birnie/A Boyle *op cit* at 263.

Release and Transfer Register<sup>96</sup> set up by Regulation 166/2006 and being into force since February 2006. This register provides for a publicly accessible electronic database for the benefit of the public to find information on releases of pollutants to air, water and land, as well as transfers of waste and pollutants. This access regime for emission data may become an enforceable right and thus be potentially subject to supranational judicial review beyond the borders of the European Union which is of particular importance for the countries in Central and Eastern Europe for traditionally being denied access to information on environmental risks and ‘which they do not wish to see monopolised again [...]’<sup>97</sup>.

### 6.3. The 2003 Directive

The 1998 Aarhus Convention introduced several innovative elements and far more extensive provisions than incorporated in the old Directive 90/313/EEC which thus had to be conformed. To furnish all affected persons with a consistent and clearly coherent legislative instrument, the conformation was not carried out by an amendment of the old Directive but by the enactment of a new Directive 2003/4/EC by 28 January 2003. At the same time, the old Directive was repealed and the new regime incorporated the innovations of the Convention guided by the main principle of disclosure and advanced availability of information and trying to remove the practical problems of application under the old regime<sup>98</sup>. In addition, the new Directive was elaborated to remove the remaining disparities between the legislation on environmental information in the member states which run the risk of leading to unequal competitive conditions<sup>99</sup>.

The new Directive was adopted to continuously develop and safeguard the process of opening the administrative structures and provide for environmental information as initiated by the first Directive insisting that the disclosure of information shall be the general rule. The orderly availability and dissemination of environmental information was envisaged especially by means

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<sup>96</sup> The PRTR in the following.

<sup>97</sup> P H Sand *op cit* at 297.

<sup>98</sup> M Butt ‘Erweiterter Zugang zu Behoerdlichen Umweltinformationen – die Neue EG-Umweltinformationsrichtlinie’ 2003 NVwZ at 1072.

<sup>99</sup> Deutscher Bundetag Drucksache 15/3406 at 11.

of electronic media and communication technology<sup>100</sup>. The scope of application in comparison with the old Directive is now extended by the introduction of new, even broader definitions of 'environmental information', covering all information in written, visual, aural, electronic or any other material form on the state of the elements of the environment or on administrative and legislative processes, and 'public authority'. This was done since practical experience disclosed widespread refusal of requests on environmental information on the grounds that either the relevant information was not regarded as being 'environmental information' in accordance with the legislation or that the public body denied an obligation to grant any access. The concrete definitions are characterised by the ambition to embrace all information relevant to the protection of the environment. All authorities and organs of the administrative system on the national, regional and local level are obliged to disclose information and there is no restriction on institutions working in the environmental field anymore<sup>101</sup>.

Contrary to these open definitions and broad wordings, the exceptions and grounds of refusal under the new Directive are to be interpreted restrictively and allow a denial of a request for information solely in specific and clearly defined cases, similar to those conditions under the Aarhus Convention, under the requirement to balance the public interests served by the disclosure with the interest served by the refusal<sup>102</sup>. Information is to be provided for the public including organisation, associations and groups in accordance with domestic legislation as soon as possible and at a reasonable charge. Finally, access to justice is given by Art. 6 in cases where a request has been ignored, wrongfully refused or inadequately dealt with<sup>103</sup>.

From a comparative point of view, Europe has caught up with North America which has to be considered as the leading region with regard to freedom of information legislation<sup>104</sup> and illustrates the constant development of a regional regime of access to environmental information. However this process

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<sup>100</sup> A Scheidler *op cit* at 13.

<sup>101</sup> M Butt *op cit* at 1072, 1073.

<sup>102</sup> A Scheidler *op cit* at 13.

<sup>103</sup> A Kiss/D Shelton *op cit* at 672, 673.

<sup>104</sup> The *US Freedom of Information Act of 1966* was the first legislative instrument to give effect to mandatory disclosure of government held information.

and all related negotiations were difficult and it seems rather ironical that it took a long time for the European Union to realise that its organs had enormous problems with the disclosure of information on the environment themselves<sup>105</sup>. Besides, there are still remaining weaknesses to overcome. In contrast to other international agreements like the 1993 Civil Liability Convention, the European regime is still lacking rights of access to environmental information held by private operators which is thus left to the European member states to be elaborated in domestic legislation.

## 7. Conclusion

In accordance with a general trend at the international level, there has been increased recognition of a right to receive information on the surrounding environment for the benefit of the public and the obligation on states to provide for this information as a means to improve efficient environmental government since the early 1980s<sup>106</sup>. Moreover, there seems to be unanimity between the international community that involving the public in governmental work and the efficient flow of relevant information improves the implementation of environmental law and may even contribute to a higher degree of compliance with international environmental agreements<sup>107</sup>.

As illustrated in this overview of the international legislative context, parts of the international regime developed chronologically and gradually in the light of the framework of Principle 10 of the Rio Declaration showing some progressive improvements towards elaborating more and more holistic legislative bodies covering the subject in question. This can be exemplified with regard to the special situation in the European Community.

However, there are still both weak and strong approaches towards disclosing environmental information to the public and balancing the conflicting interests of public and private confidentiality on the one hand and the public and environmental interest of transparency on the other in different ways. Broad formulations in the rather weak provisions of some of the international

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<sup>105</sup> P H Sand *op cit* at 294.

<sup>106</sup> L de la Fayette *op cit* at 263.

<sup>107</sup> J Ebbesson *op cit* <http://www.unhchr.ch/environment/bp5.html>.

agreements leave room for flexibility and administrative discretion. However, this may lead to enormous legislative disparities between member states to a specific convention and provides room for non-implementation of access regimes into national law. Besides, the inclusion of privately held environmental and health risk information is not existent in all access regimes under international conventions and thus some of the currently available legal instruments might solely deal with the 'tip of the iceberg'<sup>108</sup>. Another alarming tendency can be observed in the United States and may be exemplary for an international trend. Due to the events of 11 September 2001 and the idea of potentially vulnerable targets in the chemical or nuclear sector, large parts of governmental information and industrial risk data is now classified as information not suitable for public disclosure which is supported by economic pressure groups like the chemical sector<sup>109</sup>. It remains to be seen if the need for an improved state security results in the cutting of individual rights to environmental information on a global level.

Irrespective of the undesirable differences between the domestic laws as a result of broadly formulated commitments in international agreements, the success of granting access to environmental information in order to contribute to a more efficient protection of the environment basically depends on two other prerequisites: firstly, the member states to international convention need to implement the agreed goals properly and, secondly, the environmentally educated citizens - in those nations providing for access to information - have to make appropriate use of the facilities to ensure and safeguard their participation in the democratic process.

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<sup>108</sup> P H Sand *op cit* at 293.

<sup>109</sup> P H Sand *op cit* at 294.

## Chapter III The South African Perspective

### 1. Introduction

Following the history, there have always been considerable differences between national legislative approaches towards handling information held by the government. The crucial point concerning a public right of access to information is always whether to apply an approach of secrecy or to regard the right of access as the general rule and establish certain limitations as an exception<sup>110</sup>. Most European countries, including Germany, have traditionally applied a secretive regime of disclosure, classifying the right of access to state information as the exception under the legitimate concern of ensuring an efficient government<sup>111</sup>. Besides, the disclosure of information held by governmental organs was regarded as being incompatible with the concept of a 'representative democracy' in contrast to a 'direct democracy'. A major exception to this widespread practice was Sweden and subsequently some other Nordic countries providing early for domestic laws including a right of access to public data<sup>112</sup>. Following the further international development, the Freedom of Information Act of 1966 in the United States was an enormous step towards a radical change of philosophies all over the globe starting to affect common law countries first and spreading towards Europe with a chance to even influence the elaboration of South African constitutional rights. However, the following changing process in most of the European countries was carried out little by little since the old traditional administrative structures seemed hard to replace<sup>113</sup>.

Historically, South Africa, too, belonged to the majority of countries not providing for a holistic domestic system of data disclosure. On the contrary, the restriction of disclosure and dissemination of information was regulated by various acts, such as the Official Secrets Act 2 of 1956, the Protection of Information Act 84 of 1982 or the Publications Act 42 of 1974 created the ideal basis for the abuse of power which was proved by subsequent statements before

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<sup>110</sup> P H Sand *op cit* at 293.

<sup>111</sup> S Frenzel 'Zugang zu Informationen der Deutschen Behoerden' 2000 Speyerer Arbeitshefte 131 at 2.

<sup>112</sup> P H Sand *op cit* at 293.

<sup>113</sup> P H Sand *op cit* at 294.

the Truth and Reconciliation Commission<sup>114</sup>. In contrast to the situation in most of the European countries, the South African practice of disclosure was guided by the Apartheid regime and thus influenced by political considerations. As a result, the disclosure of information was the exception rather than the rule and there was the need for a change to democratic and participatory governance<sup>115</sup>. There are only few nations in the world having experienced such a dramatic political change like South Africa in the early 1990s which is reflected in the structure and ambitions of its Constitution trying to remove the past imbalances and inequalities<sup>116</sup>.

In accordance with the drastic turn of South Africa's political structure, various special challenges for the body of environmental law came into existence which was historically characterised by the conflict about access to and control of natural resources. First, it has to be outlined that South Africa always presented an above-average variety of biomass and is thus listed as the 'third most biologically diverse country'<sup>117</sup>, especially for being located between two oceans<sup>118</sup>, which poses a challenge concerning its conservation and usage. Secondly, we are faced with South Africa's historical and political background having lead to socio-economical and socio-ecological injustice, an advanced deterioration of the environment due to mismanagement with respect to the use of natural resources, as well as the exclusion of the public from every environmental co-management. Consequently, the introduction of environmental justice was envisaged early and discussed in so-called 'poverty hearings' in 1998<sup>119</sup>. A further challenge was the creation of efficient economic structures to exploit, purchase and trade the natural resources - although South Africa is often being regarded as a rich country, this is only partially true with regard to some mineral resources. Finally, a technical challenge arose from the fact that the environmental law in South Africa was essentially fragmented, both in a

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<sup>114</sup> B Roberts 'Scope of the Promotion of Access to Information Act 2 of 2000: A Comparative Perspective' 2006 *Politeia* at 116.

<sup>115</sup> C Stoffel *op cit* at 66.

<sup>116</sup> C Stoffel *op cit* at 2, 3.

<sup>117</sup> N L Barron 'A Case of Throwing Caution in the Wind: a Critical Analysis of the EIA Provisions Contained in the Genetically Modified Organisms Act of South Africa' (2003) 10 *SAJELP* at 93.

<sup>118</sup> J Glazewski *Environmental Law in South Africa* 2005 at 5.

<sup>119</sup> C Stoffel *op cit* at 6, 7.

legislative sense and with regard to the institutional and administrative structures<sup>120</sup>.

Apparently, the special challenges for the environmental law in South Africa resulted from the interplay of different factors. However, the former exclusion of the public from all participation in the environmental field and decision-making was one major contributor to a less efficient protection of the environment and its sustainable use. As already illustrated, a prerequisite for ensuring public participation in the environmental sector is the existence of a right to access to environmental information. Whether and to what extent South Africa has established such a system will be outlined below.

## 2. The Constitution of South Africa

Considering South Africa's long history of refusing fundamental rights, the strict control of a free flow of information and governmental abuse<sup>121</sup>, the adoption of full participatory rights in the Constitution seems to be groundbreaking. The Constitution of South Africa has established fundamental changes in the field of environmental governance and the relationship of humans and their surrounding environment by giving effect to the idea of environmental issues as a concern of public interest and not of individual ownership<sup>122</sup>. The inclusion of an environmental right 'to an environment that is not harmful to their health of wellbeing' and 'to have the environment protected for the benefit of the present and future generations through reasonable legislative and other measures [...]'<sup>123</sup> forms the fundamental umbrella provision for all domestic environmental law by including internationally accepted principles like the concept of sustainable development and the principle of intergenerational equity<sup>124</sup>. Other constitutional clauses affecting environmental law in South Africa are the property clause<sup>125</sup>,

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<sup>120</sup> D V Cowen 'Toward Distinctive Principles of South African Environmental Law: Some Jurisprudential Perspectives and a Role for Legislation' (1989) 52 THRHR at 3.

<sup>121</sup> L Johannessen 'Freedom of Expression and Information in the New South African Constitution and its Compatibility with International Standards' 1994 SAJHR (10) at 216, 217.

<sup>122</sup> E Bray *op cit* at 122.

<sup>123</sup> Section 24.

<sup>124</sup> J Glazewski *op cit* at 67, 78, 80.

<sup>125</sup> Section 25.

the administrative justice clause<sup>126</sup> and the right of access to information<sup>127</sup> which should be highlighted in particular for being one of the basic rights forming the framework for public participation in a democratic process<sup>128</sup> and furthermore affecting the entire environmental field by its general application. With regard to this, the 1993 Interim Constitution already provided for a comprehensive right of access to information.

### **2.1. Section 23 of the 1993 Interim Constitution**

No other section of Chapter 3 of the Interim Constitution was subject to such an amount of case law in the first year of operation of the Interim Constitution than section 23<sup>129</sup>. This clause provided that ‘Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights’. In the first time, there was ambiguity about the application, the relation to other access regimes and the interpretation of the requirement of a personal and protectable right which was even aggravated by the missing of comparable provisions in foreign constitutions. Since most constitutions do not include a right of access to governmental information, section 23 may have been exceptionally exclusive in providing for a separate right on its own<sup>130</sup>. As a result, the usual approach, integrated in most other countries’ legislation, of applying a statutory right of access to information backed up by a specified variety of exceptions had to be applied by the South African courts with reference to section 23 and the limitation clause in section 33 in the absence of special legislation<sup>131</sup>.

Clearly, the provision only applied vertically between an individual and a governmental organ mentioned which formed a first limitation of the right to information<sup>132</sup>. Moreover, one of the major issues of the interpretation of section 23 was the question whether the Section envisages a ‘right to know’ or limits the

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<sup>126</sup> Section 33.

<sup>127</sup> Section 32.

<sup>128</sup> E Bray *op cit* at 123.

<sup>129</sup> D Davis/H Cheadle/N Haysom *Fundamental Rights in the Constitution 1997* at 146.

<sup>130</sup> L Johannessen *op cit* at 220.

<sup>131</sup> D Davis/H Cheadle/N Haysom *op cit* at 147.

<sup>132</sup> L Johannessen *op cit* at 220.

scope of application to a ‘need to know’. With regard to the clearly worded requirement of information being necessary ‘for the exercise or protection’ of a right, the latter was accepted to be a fact and thus constituted a separate threshold requirement<sup>133</sup>. In more detail, the need of information to be ‘necessary’ was interpreted in many cases but it was not possible to define this phrase precisely. However, it was stated that information ‘does not have to be essential, but certainly has to be more than useful’ and had to be ‘reasonably required’<sup>134</sup>. An additional limitation was imposed by the fact that information had to be required for the ‘exercise or protection’ of a right. The wording allowed both a narrow and a broad conception, on the one hand implying that only the exercise or the protection of rights in courts would have been covered, on the other hand abstaining from the limitation to judicial proceedings which should have been the intended interpretation of the clause<sup>135</sup>.

Moreover, the nature of ‘rights’ embraced by section 23 was not clear and might have been understood as solely covering rights set out in Chapter 3 of the Constitution as done by Van Dijkhorst J<sup>136</sup>. However, this would not have reflected the purpose of a right of access to information held by the government as an independent right to promote a transparent and accountable government. Finally, it remained unclear from the wording of section 23 what kind of information was covered and whether the access regime referred to other data than written information<sup>137</sup>.

At last, it was recognised soon that the right to information could be particularly useful with regard to the judicial review of administrative action, but the exact scope of application and the set of exceptions on the grounds of section 33 never became clear<sup>138</sup>.

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<sup>133</sup> Y Burns *op cit* at 78.

<sup>134</sup> D Davis/H Cheadle/N Haysom *op cit* at 149.

<sup>135</sup> D Davis/H Cheadle/N Haysom *op cit* at 149.

<sup>136</sup> *Directory Advertising v Minister for Post and Telecommunications* 1996 2 All SA 83 (T) at 93.

<sup>137</sup> D Davis/H Cheadle/N Haysom *op cit* at 150.

<sup>138</sup> D Davis/H Cheadle/N Haysom *op cit* at 150, 153.

## 2.2. Section 32 of the 1996 Constitution

The concept of granting access to information under the final Constitution is wider than elaborated under section 23 of the Interim Constitution. Section 32 provides:

- (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.*

As section 32 (2) requires, the right to information under section 32 can only be exercised in terms of national legislation giving effect to the right. Until this had been done, a transitional provision under clause 23 of Schedule 6 of the Constitution postponed the applicability of section 32 and kept alive section 23 of the Interim Constitution for another three years since the coming into force of the final Constitution<sup>139</sup>. Eventually, the Promotion of Access to Information Act 2 of 2000<sup>140</sup> gave effect to the requirements under section 32 (2).

Notably, the importance of this constitutional right and the close linkage to the administrative justice clause in section 33 was recognised soon by the jurisprudence. The right to relevant information was regarded as a necessary prerequisite to determine whether there was a violation of the right to lawful administrative action in an open and transparent legal society<sup>141</sup>. It was recognised that only a state offering access to information held by state organs provides for the necessary transparency to have all administrative activities evaluated and reviewed<sup>142</sup>. In the same way, Judge Froneman pointed at the general importance of a right to access to information as ‘something more than a constitutional right to discovery, but [...] also a necessary adjunct to an open and

<sup>139</sup> D Zeffertt ‘Law of Evidence, Case Law – Access to State Information’ 1997 Annual Survey of South African Law at 719.

<sup>140</sup> The PAIA in the following.

<sup>141</sup> *Aquafund (Pty) Ltd v Premier of the Western Cape* 1997 (7) BCLR 907 at 916 E.

<sup>142</sup> C Stoffel *op cit* at 65.

democratic society committed to the principles of openness and accountability [...],<sup>143</sup>.

The inclusion of an access regime into the Constitution is in line with international law trends and global developments<sup>144</sup> as outlined in Chapter II. However, the special process-related importance of the clause in South Africa arises from the fact that under the *common law* the applicant in a process had to supply full evidence of his submission. Due to the missing of a right of access to information before the enactment of the Interim Constitution, many proceedings failed solely because the applicant could not accredit his submission properly. Section 32 now provides at least for a possibility to collect all necessary information for the legal request and to obtain a general overview of the basis of argumentation<sup>145</sup>.

To examine the innovative elements in section 32 of the final Constitution, the approach of the narrow ‘need to know’ has shifted towards a general ‘right to know’<sup>146</sup>. Contrary to section 23 of the Interim Constitution, the scope of application is not anymore restricted to individuals requiring information in order to exercise or protect certain rights. In fact, every person may seek for access to information held by the state or organs of state defined in section 239 of the Constitution and embracing all governmental departments on the national, provincial and local level, but excluding the courts which are consequently not subject to the disclosure obligation under section 32<sup>147</sup>. In addition, the new provision applies not only vertically, but also for the first time horizontally and includes the right to get access to information held by other persons than the state and its organs. However, this alternative, included in section 32 (1) (b), again underlies the limitation that the requested information is ‘required for the exercise or protection of any rights’. This part of the clause was suspended by the Constitutional Court until the enactment of the PAIA and thus even for a longer period than envisaged by clause 23 of Schedule 6 of the Constitution. This was done to be aware of the necessity to develop legislative details with regard to such far-reaching extensions going deep into the private

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<sup>143</sup> *Quozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) at 642 E.

<sup>144</sup> J Glazewski *op cit* at 94.

<sup>145</sup> C Stoffel *op cit* at 67.

<sup>146</sup> Y Burnes *op cit* at 78.

<sup>147</sup> C Stoffel *op cit* at 68.

sector<sup>148</sup>. With the enactment of the PAIA, the suspension of this part of section 32 was set aside. Consequently, section 32 is horizontally applicable, however subject to various restrictions set out under the PAIA<sup>149</sup>.

Nevertheless, general limitations are applicable to the constitutional right itself in accordance with the limitation clause in section 36. There are a few clear grounds to restrict the disclosure of particular information, such as the involvement of information on state secrets, foreign affairs and diplomatic discourse<sup>150</sup>. Moreover, national security has to be a priority as a susceptible issue which is capable of superseding individual rights even in a democracy. However, the South African courts are expected to carefully revise every attempt to hold back any information on the grounds of national security since this reasoning was often abused under the past Apartheid regime<sup>151</sup>. In addition, the right of privacy, guaranteed by section 14, can be a conflicting position to be balanced against the right of access to information. Finally, commercial information including trade secrets and confidential information represents a possible counterpart to the right of access under section 32 especially with regard to the possibility of juristic persons taking advantage of the rights in the bill of rights. The harmonisation of the conflicting rights of access to information on the one hand and commercial confidentiality on the other has to be achieved by the exercise of discretion of the courts to impose limitations on the right under section 32<sup>152</sup>.

The importance and the value of section 32 for the environmental field is self-explanatory since the organs of state, other governmental institutions and private bodies are in possession of information about the effects of various activities on the environment and their environmental compatibility<sup>153</sup>. The constitutional guarantee of access to information is apparently significant due to the fact that the implementation of environmental law is basically in the hands of the administrative organs which, for instance, authorise environment-related activities and enforce the conditions. Thus, it is highly important for a public

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<sup>148</sup> C Stoffel *op cit* at 68, 69.

<sup>149</sup> C Stoffel *op cit* at 69.

<sup>150</sup> G E Devenish *A Commentary on the South African Bill of Rights 1999* at 449.

<sup>151</sup> G E Devenish *op cit* at 450.

<sup>152</sup> G E Devenish *op cit* at 450.

<sup>153</sup> C Stoffel *op cit* at 70.

review of the proper exercise of these powers to be furnished with the relevant information<sup>154</sup>.

The Constitution has dramatically changed the field of environmental governance by introducing a cooperative governance strategy, providing for an individual environmental right and a right of access to information. These innovations have affected all national legislation in the following time and clearly have to be regarded as the ‘umbrella’ for all improvements in South African environmental law<sup>155</sup>.

### 2.3. The Application of the Right in the Environmental Context

The constitutional right of access to information has frequently been subject to judicial scrutiny with regard to environmental issues.

In the planning case *Uni Windows CC v East London Municipality*<sup>156</sup> a building developer requested information from a local authority with regard to a rezoning application and succeeded with his attempt with reference to section 23 of the Interim Constitution<sup>157</sup>. In the case *Van Huysteen NO and others v Minister of Environmental Affairs and Tourism and others*<sup>158</sup> the applicant sought for access to all relevant information concerning a contentious plan to develop a steel mill plant at Saldanha Bay held by the Minister. Here, the possibility to restrict the application of the right of access to information by way of qualified conflicting interests in terms of the limitation clause was taken into consideration, but eventually rejected<sup>159</sup>.

A recent example of South African case law with regard to access to environmental information and the interaction of the different legislative grounds with reference to different acts, each providing for a separate access regime, on which access can be sought is the *Trustees, Biowatch Trust v Registrar: Genetic*

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<sup>154</sup> C Loots ‘The Impact of the Constitution on Environmental Law’ 1997 SAJELP 4 at 66.

<sup>155</sup> E Bray *op cit* at 121, 122.

<sup>156</sup> *Uni Windows CC v East London Municipality* 1995 8 BCLR 1091 (E).

<sup>157</sup> J Glazewski *op cit* at 98.

<sup>158</sup> *Van Huysteen NO and others v Minister of Environmental Affairs and Tourism and others* 1995 (9) BCLR1191 (C).

<sup>159</sup> J Glazewski *op cit* at 98.

*Resources and others* case<sup>160</sup>. Here, the applicants requested the court for an order to be granted access to information held by the respondent relating to genetically modified organisms. The court found that the respondent unlawfully failed to provide access to the relevant information to which the applicants were legally entitled and that such behaviour constituted a violation of the ‘umbrella’ provision of the constitutional right under section 32 of the Constitution. However, it was held that some of the requested information was both requested in an overly broad manner and was confidential. Consequently, these parts of the information have therefore not been disclosed<sup>161</sup>.

### 3. The Promotion of Access to Information Act 2 of 2000

As mentioned above, the exclusion of large parts of the public from the participation in decision-making and a general lack of transparency of the governmental work contributed, *inter alia*, to the imbalances and inequalities in South Africa’s past. In the past, state authorities often relied on the state privilege to refuse the disclosure of information, but did not always justify this reasoning with reference to an appropriate ground of refusal, such as state security or international relations. As a result, attempts to challenge the validity and legality of administrative decisions were mainly doomed due to the lack of sufficient information for the submission<sup>162</sup>. The introduction of section 32 and governmental transparency into the Constitution is a clear signal for more openness and constitutional legality abandoning the Apartheid regime<sup>163</sup>. The Preamble of the PAIA, too, recognises the formerly prejudicial situation by stating that ‘the 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 [...]’. Consequently, the importance of public participation in South Africa can not be overestimated and accordingly, the PAIA aims at fostering ‘a culture of transparency and accountability in public and private bodies by giving effect to

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<sup>160</sup> *Trustees, Biowatch Trust v Registrar: Genetic Resources and others* 2005 (4) SA 111 (T).

<sup>161</sup> T Winstanley ‘Environmental Law Update’ (2005) DE REBUS at 52; *Trustees, Biowatch Trust v Registrar: Genetic Resources and others* 2005 (4) SA 111 (T) at 115.

<sup>162</sup> Y Burns *op cit* at 77.

<sup>163</sup> C Stoffel *op cit* at 66.

the right of access to information' as referred to in the Preamble. The Act is based not only on section 32 but also incorporates the ambitions of the constitutional right to access to courts in section 34 and just administrative action in section 33, thus envisaging fair and open government in general<sup>164</sup>.

The PAIA has been promulgated as national legislation to give effect to section 32 of the Constitution and to minimise the financial burden on the state. With regard to the enactment of the PAIA, the question arises whether an applicant can choose to exercise the right to information by direct reference to the constitutional framework and thus ignore the statutory provisions. There is no final solution to this problem of competition, but it would seem to be unjustified to prohibit the direct use of a constitutional clause providing for an explicit right<sup>165</sup>. Individuals may request information relying on the detailed provisions of the Act rather than referring to the terms of section 32, but the possibility for the applicant to rely on section 32 remains in case of a potentially unconstitutional refusal of information<sup>166</sup>. Consequently, the PAIA has to be regarded as the principal piece of legislation embracing the particular right of access to information and its limitations, and the constitutional provision forms a back-up to provide guidelines for interpretation, but is infrequently applied directly<sup>167</sup>.

The Act identifies the nature and scope of the right of access to information, imposes various limitations on the right and establishes methods to give effect to the right<sup>168</sup>. Due to the complexity of the PAIA it is not possible to mention and analyse all mechanisms of the Act. Thus, the provisions relevant in this context, including the scope of the Act and access to records of private and public bodies, will be outlined.

### **3.1. The Scope of the PAIA**

The objectives of the PAIA are laid down in Art. 9 and emphasise, *inter alia*, the implementation of the constitutional right of access to information,

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<sup>164</sup> Y Burns *op cit* at 77.

<sup>165</sup> D Davis/H Cheadle/N Haysom *op cit* at 154.

<sup>166</sup> Y Burns *op cit* at 79.

<sup>167</sup> I Currie/J Klaaren *The Promotion of Access to Information Act - Commentary* 2002 at 26.

<sup>168</sup> B Roberts *op cit* at 117.

subject to justifiable restrictions, in a manner which balances access to information with other rights. Moreover, the promotion of transparency, accountability and effective governance of all public and private bodies, by empowering and educating everyone to effectively scrutinise and participate in decision-making by public bodies that affects their rights, is envisaged<sup>169</sup>. To meet these goals, the Act is subdivided into seven Parts: the first Part covers definitions and determines the objective targets. The second Part embraces access to information held by public bodies, whereas Part three regulates the requirements for the disclosure of information held by private bodies. Part four envisages appeals against the decision in the context of the proceedings under the Act. The fifth Part delegates specific responsibilities and rights to the Human Rights Commission and the remaining two Parts provide for transitional arrangements and regulations covering liability and offences.

The term ‘information’ is neither clearly defined by the Constitution nor by the PAIA. Instead, the PAIA makes use of the phrase ‘record’ as any recorded information, regardless of its form or medium in the possession of or under the control of a public or private institution, whether or not it was created by such institutions<sup>170</sup>. This broad wording allows the inclusion of anything recorded by officials related to their obligations. Accordingly, the application form that must be completed by the applicant for a request to access refers to four categories of records including records in written or printed form, visual images, audible documents and electronic data<sup>171</sup>. Although broad in its wording, the avoidance of the term ‘information’ imposes a limitation on the scope of documents covered by the Act since access is restricted to information in a particular format and unrecorded information may not be requested consequently. This approach was apparently guided by practical concerns of the drafters of the PAIA, trying to avoid an excessive work load on the governmental officials. However, the concept provides for the loophole of deliberately detaining information by neglecting the recording of information with the result that no information in a recorded form is available at all. Besides, there is also the possibility to adulterate or partially retain information leading to a possible vacuum of

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<sup>169</sup> Art. 9 (a), (b), (e) (iii).

<sup>170</sup> Section 1.

<sup>171</sup> B Roberts *op cit* at 117.

information. This weakness could be overcome and avoided by amending the PAIA to include a provision on the accessibility of unrecorded information and thus preventing administrative abuse<sup>172</sup>.

The personal scope of application refers both to public and private institutions, which underlie the obligation to disclose information, and the person who may request information. With regard to the first group, section 1 includes definitions of public and private bodies and includes any department, functionary or institution exercising a public power in terms of any legislation on the public side and any natural or juristic person on the private level. In general, the classification of the institution in possession of the relevant information is related to the function exercised by the relevant body: records relating to a private function of an institution may be regarded as held by a private institution and *vice versa*<sup>173</sup>. As mentioned above, requests for records held by either public or private bodies both fall under different parts of the PAIA and are treated differently. However, the identification of public functionaries and institutions, mentioned in section 1, could cause difficulties concerning this primary classification for apparently including private bodies exercising public functions. Thus, the involvement of universities and institutions like 'Telkom' or 'Transnet' will always require to initially determine whether the request regards public or private information both held by those bodies<sup>174</sup>.

However, some public institutions are explicitly excluded from the scope of application. Section one provides that the PAIA does not apply to records of the Cabinet, records relating to judicial functions performed by the courts and records in possession of members of Parliament or provincial legislature. These limitations apparently try to ensure the efficient work and independence of the judiciary and the legislative organs of state. However, there is still ambiguity about the extent to which the exclusions apply and it seems to be ambivalent that the members of the legislature and the Cabinet are still subject to section 32 of the Constitution<sup>175</sup>. In addition, there is no need to generally refuse access to any

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<sup>172</sup> B Roberts *op cit* at 119, 127.

<sup>173</sup> B Roberts *op cit* at 120.

<sup>174</sup> Y Burns *op cit* at 80, 81.

<sup>175</sup> B Roberts *op cit* at 121, 123, 124.

records provided by parliamentary work since this practice completely prevents any evaluation of the accountability of the legislative<sup>176</sup>.

The person requesting information may be any person, including institutions and functionaries exercising a public power or performing a duty in terms of legislation, in accordance with the definition of 'requester' in section 1. In terms of this provision, a person may also act on behalf of someone else and South African citizenship is not required to make a request for access. With regard to a comparative view to other domestic legislation on access to information, South Africa apparently applies a liberal approach by not placing any restrictions, territorially or concerning citizenship, on persons who may request access to records<sup>177</sup>. Moreover, reasons for the request of information need not be given which is implied in the declaration of section 11(3). However, there is an exception to this general rule contained in section 7 (1) with reference to requests for records for the purpose of criminal or civil proceedings<sup>178</sup>.

### **3.2. The Working of the PAIA**

The core of the Act is found in its Parts 2 and 3 covering access to information held by public and private institutions<sup>179</sup>. Section 11 covers the general right of access to records by public bodies by stating that a requester must be given access to records if all procedural requirements are met and access is not refused on any grounds contained in Chapter 4 of Part 2. The opening section is followed by various detailed sections in Chapter 2 dealing with the publication and availability of certain records of public bodies who have to appoint an 'information officer' in advance for providing particulars of the institution and the details of requesting access to information. Further on, voluntary disclosure of information and the modalities of the access regime are laid down in the following provisions<sup>180</sup>. Additionally, certain grounds of mandatory and discretionary refusal are elaborated in sections 33 to 46. These grounds can be subdivided into different categories in relation to the content of

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<sup>176</sup> B Roberts *op cit* at 127.

<sup>177</sup> B Roberts *op cit* at 125.

<sup>178</sup> B Roberts *op cit* at 126.

<sup>179</sup> I Currie/J Klaaren *op cit* at 1.

<sup>180</sup> Sections 15, 17-32; J Glazewski *op cit* at 96.

information and the connection between the disclosure and an adverse effect to a protected interest<sup>181</sup>. The discretionary grounds, indicated by the use of the word ‘may’, are essentially based on privacy, dignity and personal health aspects, whereas section 36 (1) uses the word ‘must’ with regard to the refusal of requests for the disclosure and thus implies mandatory grounds of refusal. These grounds are linked to contents with potential environmental impacts and demand the protection of third parties’ commercial information by reference to trade secrets, protectable financial, commercial, scientific or technical information or information possibly putting a third party at a disadvantage in negotiations or commercial competition<sup>182</sup>. It might be questionable whether information on emission levels and substances emitted into the environment would fall under the scope of application of section 36 and would thus be protected by this mandatory ground of refusal. However, this wide interpretation does not seem to be justifiable and consequently, access to such information would have to be permitted<sup>183</sup>.

As an additional criterion for the approval of a request, section 46 imposes a ‘mandatory public interest override’ for the grounds of refusal, thus introduces the possibility to trump the grounds of refusal listed in section 46 which include a reference to section 36 (1) mentioned above<sup>184</sup>. The provision, *inter alia*, mentions the revelation of ‘an imminent and serious public safety or environmental risk’ as a ground for the mandatory disclosure of information. However, this exception does not apply strictly and without any requirements of balancing the conflicting interests. The Open Democracy Bill, presented to the Cabinet in 1996, recommended a flexible and qualified approach towards an override section: if evidence of such a revelation of a particular risk which has to pass the threshold of being imminent and serious is present, the benefit to the public interest must be set off against and outweigh the interests in the retention of the relevant information<sup>185</sup>. This requirement is reflected in section 46 (b).

The access to records of private bodies is envisaged by Part 3 of the PAIA which provides for a general right of access to records in section 50,

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<sup>181</sup> I Currie/K Klaaren *op cit* at 99.

<sup>182</sup> Y Burns *op cit* at 81, 82.

<sup>183</sup> J Glazewski *op cit* at 96.

<sup>184</sup> I Currie/J Klaaren *op cit* at 107, 108; J Glazewski *op cit* at 96.

<sup>185</sup> Clause 44 (2) of the Open Democracy Bill; I Currie/J Klaaren *op cit* at 109.

stating that a requester must be given access if the record is required for the exercise or protection of any rights, all procedural requirements are complied with and access is not refused in terms of any grounds mentioned in Chapter 4 of Part 3. Apparently, the additional requirement in section 50 to exercise or protect a right by requesting the disclosure of relevant information gives effect to the specifications of the constitutional right of access to information held by private bodies<sup>186</sup>. Again, the following provisions deal with the publication and availability of certain records, the manner of access and grounds of refusal of access to records. The grounds of refusal are laid down in sections 63 to 70 and, *inter alia*, refer to commercial information of a private body. This type of information has to be protected by refusal on the same grounds as determined under section 36. However, section 68 provides that a record may not be refused insofar as it contains information about the result of any product or environmental testing supplied by or carried out by the private body and its disclosure would reveal a serious public safety or environmental risk. In addition, section 70 establishes an overriding section similar to that applied to the grounds of refusal of requests to information held by public bodies and again includes the reference to possible threats to public safety or the environment by non-disclosure of records<sup>187</sup>.

### **3.3. Environmental Information**

With regard to environmental information in particular, the Act does not distinguish between environmental and other types of information. Nevertheless, environmental concerns are mentioned in different sections with regard to ‘public safety or environmental risk’<sup>188</sup>. This term is defined in section 1 as a harm or risk to the environment or the public associated with a product or service available to the public, a substance released into the environment, a substance intended for consumption, a means of public transport or an installation or manufacturing process. As referred to above, the reference to ‘public safety or environmental risk’ is basically made in provisions even trumping the grounds of

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<sup>186</sup> Y Burns *op cit* at 82.

<sup>187</sup> J Glazewski *op cit* at 97.

<sup>188</sup> J Glazewski *op cit* at 95.

refusal which have to be ignored under specific circumstances, thus declaring these values as particularly protectable. In this context, especially the reference to substances released into the environment includes excessive implications for the protection of the environment since in these cases, the emitter of substances of unexplained composition and bearing a potentially detrimental impact on the environment may be requested to disclose information about these substances<sup>189</sup>. Besides, the inclusion of substances intended for consumption clearly embraces genetically modified organisms<sup>190</sup> which seems to be of high value due to the still existing lack of scientific knowledge of the long-term effects of these substances.

### 3.4. Evaluation

The PAIA gives effect to the broad ambitions of section 32 of the Constitution and provides a detailed and comprehensive regime of granting or refusing access to information. It is evident by the interaction of a general right, the possible, but exceptional limitations and the overriding sections superseding the exceptions that the target of the Act is to set off all involved interests, especially confidentiality and commercial interests, against the public interests of transparency. Interestingly, environmental concerns are explicitly included in the process of balancing interests which reflects the particular importance of access to information in the environmental context considering the amount of governmental decision-making with a direct or indirect effect on the environment<sup>191</sup>. However, there are still some structural weaknesses and ambiguities remaining whose removal would require an amendment of the relevant provisions as illustrated above.

Nevertheless, the PAIA is justly regarded as being one of the ‘most critical pieces of legislation in South Africa’<sup>192</sup> and entitled as a ‘powerful tool’<sup>193</sup> in the context of efforts to obtain information.

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<sup>189</sup> C Stoffel *op cit* at 71.

<sup>190</sup> J Glazewski *op cit* at 95.

<sup>191</sup> J Glazewski *op cit* at 95.

<sup>192</sup> B Roberts *op cit* at 117.

<sup>193</sup> W Mostert ‘Finding out what You Need to Know’ 2003 Without Prejudice at 25.

#### 4. The National Environmental Management Act 107 of 1998

The centrepiece of environmental legislation in South Africa is formed by the National Environmental Management Act 107 of 1998<sup>194</sup> providing a framework and embracing all three fields of environmental law, giving effect to the constitutional demand for the provision of ‘reasonable legislative measures’ and underlying the internationally accepted principle of sustainable development<sup>195</sup>. Civil-based instruments are frequently implemented into the NEMA which is known for its wide extend of civil-based arrangements<sup>196</sup>. A comprehensive system of environmental management and governance built on the concept of including external influences is reached by the introduction of provisions covering environmental education, public awareness and public participation, an increased *locus standi*, the protection of whistleblowers and particularly by establishing an access to environmental information regime<sup>197</sup>. With this, the civil society is not only in the position to influence governmental decision-making, but even adopts the role of a ‘co-governor’ or ‘co-manager’<sup>198</sup>.

Interestingly, the enactment process of the NEMA itself involved extensive public participation after the lengthy development of national environmental policies resulting in the final White Paper on Environmental Management Policy for South Africa in 1998<sup>199</sup>.

##### 4.1. The Relevant NEMA Principles

The heart of the NEMA is formed by chapter 1, consisting only of one section, which seems to underline the significance of the general principles included<sup>200</sup>. Section 2 of the NEMA describes various principles which shall apply alongside all other appropriate and relevant considerations<sup>201</sup>, serve as a

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<sup>194</sup> The NEMA in the following.

<sup>195</sup> J Glazewski *op cit* at 137.

<sup>196</sup> J Nel/W du Plessis ‘An Evaluation of NEMA Based on a Generic Framework for Environmental Framework Legislation’ 2001 8 SALJEP at 31.

<sup>197</sup> Sections 2 (4) (h), (f), (g), 32, 31 (3)-(8).

<sup>198</sup> J Nel/W du Plessis *op cit* at 31.

<sup>199</sup> M Kidd ‘The National Environmental Management Act and Public Participation’ 1999 SAJELP 6 at 24.

<sup>200</sup> C Stoffel *op cit* at 104.

<sup>201</sup> Section 2 (1) (a).

framework and as guidelines for the decision-making of governmental organs<sup>202</sup> and finally give guidance for the interpretation, administration and implementation of the Act and other environmental law<sup>203</sup>. With regard to the realisation of the overall concept of sustainable development, set out in section 2 (3), the principles laid down in section 2 (4) have to be considered.

With reference to public participation and access to environmental information, the NEMA principles recognise the importance of the participation of the interested and affected public in environmental law which is a requisite for all environmental impact assessments and incorporated in other environmental legislation<sup>204</sup>. Explicit reference to the need to provide for access to environmental information is made by section 2 (4) (k) pointing at the importance of transparent decision-making. It is recognised that the broad and generally applicable ambitions under the PAIA have to be backed up by a right of access to information relating solely to the environment to fill the wide scope of the framework legislation<sup>205</sup>. By acknowledging the need for public participation and a special regime for access to environmental information, the principles reflect the ambition that ‘environmental management must place people and their needs at the forefront of its concern’<sup>206</sup>.

#### **4.2. The Access Regime**

The NEMA provides for detailed provisions covering the access to environmental information in its section 31, dealing with a comprehensive and tailor-made access regime and the protection of whistle-blowers which is a closely linked issue. The NEMA was enacted a year before the PAIA and consequently the question about the relationship and competition of these two Acts has to be raised first. It could be assumed that now that the PAIA has been adopted to give effect to section 32 (2) of the Constitution, section 31 (1) has ceased to apply because of the wording ‘Access to information [...] is governed

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<sup>202</sup> Section 2 (1) (b) and (c).

<sup>203</sup> Section 2 (1) (e).

<sup>204</sup> P G W Henderson ‘Some Thoughts on Distinctive Principles of South African Environmental Law’ 2001 SAJELP 8 at 167.

<sup>205</sup> P G W Henderson *op cit* at 169.

<sup>206</sup> Section 2 (2).

by the statute contemplated under section 32 (2) of the Constitution: provided that pending the promulgation of such statute, the following provisions shall apply'. However, section 6 of the PAIA in connection with Parts 1 and 2 of its Schedule explicitly maintains the applicability of section 31 (1) and (2) of the NEMA with the consequence that there is a choice for any requester to rely either on the relevant section of the PAIA or on the NEMA<sup>207</sup>. Moreover, the PAIA and the NEMA, being the only piece of legislation in this context listed in the Schedule of the PAIA, have to be read complementarily and in addition to each other with the result that even if a request under the PAIA may be refused, a further request can be made in accordance with the NEMA<sup>208</sup>.

The exhaustive section 31 firstly provides for access to information held by the state and its organs, defined in section 1, which relates to any environmental law, the state of the environment or any threats to the environment generated by emissions or hazardous substances<sup>209</sup>. This right is available to 'every person' including both natural and juristic persons like civil societies<sup>210</sup>. It might be argued that the broad formulation of this public right implies an obligation on the governmental organs to disclose any information if there is reasonable evidence for this particular information indicating a public safety or environmental risk<sup>211</sup>.

In addition to the wide ranging right for the benefit of the public, the section conversely establishes a right for organs of state to have access to environmental information held by any person subject to the condition that this information is necessary for the public institution to carry out its obligations concerned with the protection of the environment or the sustainable use of natural resources<sup>212</sup>.

Finally, there is the possibility for the Minister to make regulations regarding the public access to privately held environment related information in accordance with section 31 (2) and (3). Consequently, all three possible ways of granting access to information are covered by the NEMA which introduces an

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<sup>207</sup> J Glazewski *op cit* at 156.

<sup>208</sup> I Currie/J Klaaren *op cit* at 33.

<sup>209</sup> Section 31 (1) (a).

<sup>210</sup> Section 31 (1) (a) in connection with section 1.

<sup>211</sup> E Bray *op cit* at 127.

<sup>212</sup> Section 31 (1) (b); J Glazewski *op cit* at 99.

advanced approach of holistically designing an access regime. However, access to information held by private persons is left to the discretion of the Minister who ‘may’ make regulations with regard to this direction of the flow of information. To date, no such regulations have been made<sup>213</sup>. As a result, this provision clearly underachieves the targets envisaged by the Constitution which are appropriately given effect by the PAIA as illustrated above<sup>214</sup>.

The section goes on to impose certain limitations of the right by defining grounds of refusal mainly concerned with unreasonable requests, the protection of public and private interests like national security, commercially confidential information or personal privacy and possible dangers to the environment caused by the disclosure of relevant data<sup>215</sup>.

Closely related to the right of access to environmental information in section 31 of the NEMA is the protection of persons who disclose any information revealing an imminent and serious threat to the environment in good faith and in accordance with specifically defined circumstances<sup>216</sup>. The innovative provisions prohibit any civil or criminal liability or further dismissal, disciplinary action and prejudice against the whistleblowers<sup>217</sup>. The protection clause contributes to an efficient and advanced flow of information on environmental risks and discloses relevant data for the benefit of an informed public. Apparently, whistleblowers play an important role in increasing public awareness of environmental concerns and informing affected parts of the public of their contribution in environmental governance<sup>218</sup>.

Finally, the NEMA establishes the principle of Integrated Environmental Management, including the task of ensuring disclosure of information to protect people’s environmental right, e.g. by means of participation in environmental impact assessments, an important tool to guarantee public participation in

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<sup>213</sup> J Klaaren ‘The New Access to Information Regulation in South Africa’ <http://www.lawandsocietysummerinstitutes.org/workshop06/documents/klaaren.pdf> at 11.

<sup>214</sup> M Kidd *op cit* at 27.

<sup>215</sup> Section 31 (1) (c).

<sup>216</sup> Sections 31 (4) to (8).

<sup>217</sup> J Glazewski *op cit* at 156.

<sup>218</sup> E Bray *op cit* at 128.

environmental decision-making in which access to the relevant information clearly forms a prerequisite<sup>219</sup>.

### **4.3. Evaluation**

The possibility of public participation in the environmental field by way of access to environmental information can be regarded as being improved by the NEMA principles and the access regime itself. The specificity of provisions like section 31 of the NEMA provide for the opportunity for the public to play an even more active role and make more informed decisions in the environmental sector<sup>220</sup>. Despite some problems of shortcomings in the enactment process, the NEMA clearly includes a broad commitment to public participation through access to environmental information. Thus, it can be regarded as 'breaking new grounds' especially in the field of involving public interests and keeping all affected individuals on an informed level about their surrounding environment<sup>221</sup>.

However, there are some weaknesses remaining which need attention. Especially the missing of a comprehensive inclusion of access to information held by private individuals has to be envisaged. Moreover, both the PAIA and the NEMA are lacking provisions dealing with informal disclosure as referred to below.

### **5. Informal Disclosure**

As illustrated above, the PAIA, inter alia, envisages the supplementary application of legislation permitting access to environmental information<sup>222</sup>. Apart from that, the handling of a significant issue, the regulation of the informal disclosure of information by governmental organs outside the procedures of any legislation, is missing both in the PAIA and in the NEMA<sup>223</sup>. A provision, permitting the perpetuation of customary practice of disclosure of governmental data, would clarify the possibility to make informal requests for information

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<sup>219</sup> E Bray *op cit* at 128, 129.

<sup>220</sup> E Bray *op cit* at 128.

<sup>221</sup> M Kidd *op cit* at 26, 31.

<sup>222</sup> Section 6 in connection with Parts 1 and 2 of the Schedule to the PAIA.

<sup>223</sup> I Currie/J Klaaren *op cit* at 36.

outside the scope of application of legislation<sup>224</sup>. This would provide for the opportunity for a more flexible and spontaneous way of disclosure including the option to impose specific conditions on a disclosure such as the prohibition of publication<sup>225</sup>.

With reference to the intention of the PAIA and the NEMA to promote access to information rather than hampering its disclosure, it should be possible for both public and private bodies to supply information through an informal channel besides applying the discussed legislation. However, the mandatory grounds of refusal imposed by the legislation and thus especially the protection of third parties' rights must not be circumvented and consultation of the affected individuals should be carried out in the relevant cases<sup>226</sup>.

## **6. The Case of *Earthlife Africa v Eskom Holdings Ltd***

As already illustrated with regard to the international framework of access to environmental information, the nuclear power sector is exemplifying the importance of providing for access since it constitutes a possible threat to the public and the environment and thus attracts significant attention. With regard to the South African situation, this sector was formerly characterised by underlying a regime of considerable secrecy which rarely allowed access to any related information as illustrated by the Nuclear Energy Act 131 of 1993<sup>227</sup>.

An example of recent case law referring to access to information relating to the development and usage of nuclear energy is the case of *Earth Life Africa (Cape Town Branch) v Eskom Holdings Ltd*<sup>228</sup> which illustrates the manner in which information may be requested and refused under the PAIA. The applicant, Earthlife Africa, sought leave to appeal against the dismissal of the application for the setting aside of the respondent's refusal of access to information requested in terms of the PAIA. The relevant documents included business plans, as well as technical and financial reports concerning a Pebble Bed Modular

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<sup>224</sup> I Currie/J Klaaren *op cit* at 37.

<sup>225</sup> I Currie/J Klaaren *op cit* at 38.

<sup>226</sup> I Currie/ J Klaaren *op cit* at 37, 38.

<sup>227</sup> C Loots *op cit* at 67.

<sup>228</sup> *Earth Life Africa (Cape Town Branch) v Eskom Holdings Ltd* 2006 All SA 2 at 632 (W).

Reactor<sup>229</sup>. The applicant, relying both on the constitutional right to information in section 32 (1) and to the right established by section 11 of the PAIA, was an environmental organisation and opponent to nuclear energy, whereas the respondent was providing for over ninety percent of the nation's energy supply and thus there were conflicting interests involved<sup>230</sup>. After having granted access to some of the requested information on the PBMR, the respondent relied on the exclusion clauses under the PAIA to refuse access, particularly to minutes of the board meetings. Consequently, the core issue of the case was to classify the information as either to be granted under section 11 of the PAIA or to be refused under Chapter 4 of Part 2 of the Act which had to be proved by the respondent<sup>231</sup>. With regard to the reference to the constitutional right of access to information made by the applicant, the court held that there was no dispute on the general existence of such a right. However, the central question was to figure out whether the respondent was entitled to refuse access under the PAIA giving effect to the constitutional right<sup>232</sup>.

In particular, the respondent relied on the grounds of refusal covering trade secrets and the involvement of potentially sensitive information the disclosure of which could place the respondent at a commercial disadvantage. Thus, the court had to balance the conflicting rights and initially declared the applicant's informational right as not being absolute<sup>233</sup>. Due to the fact that the matter involved detailed technical information and material, the court referred to the necessity of guidance by qualified experts. With regard to this, the court ascertained that, in fact, the respondent's scientific evidence was made by an undisputable expert whose evidence concerning the information being subject to the limitations under Chapter 4 of Part 2 of the PAIA was not to be challenged. On the other hand, the applicant's expert evidence was not present<sup>234</sup>. By indicating that the determination of confidential information is a matter of fact, the court refused the granting of relief sought by the applicant since no evidence

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<sup>229</sup> The PBMR in the following; N Kirby 'South Africa: Refusing Information In Terms Of The Promotion Of Access To Information Act No. 2 Of 2000: Earthlife Africa (Cape Town Branch) v Eskom Holdings Limited' 2006

<http://www.mondaq.com/article.asp?articleid=37980&searchresults=1>.

<sup>230</sup> 2006 All SA 2 at 633 (W).

<sup>231</sup> 2006 All SA 2 at 636, 637 (W).

<sup>232</sup> 2006 All SA 2 at 637 (W).

<sup>233</sup> 2006 All SA 2 at 632 (W).

<sup>234</sup> 2006 All SA 2 at 635 (W).

had been submitted which qualified the requested information in an alternative way so as to grant Earth Life access to the records<sup>235</sup>.

In fact, the court applied a careful approach of interpreting the exception clauses of the PAIA by acknowledging that access should only be refused where it is clearly justified under the Act. Moreover, it was held that the Act provided for clearly expressed limitations which can not be extended or limited even by recognising their narrow structure<sup>236</sup>. However, it can be assumed that the judgement obviously solely focused on the clear classification of the information as being subject to the limitations under the PAIA by the respondent, and leaving out environmental considerations such as the question whether or not the public overriding clause in section 46 of the PAIA should apply<sup>237</sup>.

## 7. Conclusion

The integration of informational rights in the South African legislation and the environmental sector has to be appreciated ‘against the historical background of the apartheid state’s obsession with official secrecy’<sup>238</sup>. Having recognised these circumstances, the existence of section 32 of the Constitution as the umbrella provision and the subsequently enacted PAIA and the NEMA, giving effect to the constitutional ambitions, clearly form an advanced and coherent body of legislation covering access to information, particularly in the environmental context. The interaction and correspondence of the involved provisions apparently result in a logical structure, starting to be applied in a general and universal manner and resulting in an environmentally tailor-made scope of application. Although, both the PAIA and the NEMA show some remaining weaknesses to overcome, the comprehensive regime covering access to environmental information as a means to promote public participation in open and transparent governance reflects South Africa’s commitment to a constitutional democracy. As a necessary prerequisite, ‘freedom of information is an indispensable part of the human rights culture which South Africa tries to

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<sup>235</sup> 2006 All SA 2 at 635 (W); N Kirby *op cit*

<http://www.mondaq.com/article.asp?articleid=37980&searchresults=1>.

<sup>236</sup> N Kirby *op cit* <http://www.mondaq.com/article.asp?articleid=37980&searchresults=1>.

<sup>237</sup> N Kirby *op cit* <http://www.mondaq.com/article.asp?articleid=37980&searchresults=1>.

<sup>238</sup> I Currie/J Klaaren *op cit* at 2.

establish'<sup>239</sup>. Nevertheless, an excessive financial burden imposed by high fees for the access to government-held information to discourage unreasonable requests can hamper the implementation of the right to information in practice and thus has to be prevented especially with regard to those parts of the society in South Africa which primarily need informational rights<sup>240</sup>.

From a general point of view, the special situation in South Africa requires a particularly broad understanding of an access to information regime, leaving behind the narrow classification of access to information as a means to solely promote good governance behind and taking into consideration the possible contribution to assist with the transformation of the South African society<sup>241</sup>. However, it has to be recognised that there are certain general challenges in South Africa which affect the efficient work of the legal structures providing for access to information in practice. Apart from the fact that environmental education and thus the public presence of environmental issues is understandably overshadowed by major problems of existence, the lack of financial and human resources is a significant problem which prevents an advanced legislative structure like the South African from working efficiently and is thus regarded as a 'paper tiger'<sup>242</sup>.

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<sup>239</sup> G E Devenish *op cit* at 454.

<sup>240</sup> G E Devenish *op cit* at 454.

<sup>241</sup> J Klaaren *op cit*

<http://www.lawandsocietysummerinstitutes.org/workshop06/documents/klaaren.pdf> at 1.

<sup>242</sup> E Bray *op cit* at 137, 138.

## Chapter IV The German Perspective

### 1. Introduction

In Germany, it has eventually been recognised that the state has to provide for sufficient environmental information before expecting its citizens to become conscious of the environment in their own thoughts and actions. Access to environmental information is now acknowledged as a means of indirect control by raising public awareness towards protecting the environment and as an opportunity to exploit the individual as a supervisory body<sup>243</sup>.

To a broad extent, however, the preventive character of access to information was traditionally regulated by limitations and restrictions on the one hand and by the right to informational self-determination on the other, embodied in the German ‘Grundgesetz’<sup>244</sup> – a difficult constellation which was on the verge of squeezing out the state responsibility to provide for information altogether<sup>245</sup>. This concept was mainly determined by the fact that, formerly, the administrative system did not include any general rights of access to information and that the concept of a transparent government did not exist yet. In general, neither the public nor the involved individuals were to be granted access to governmental data<sup>246</sup>. Historically, the governmental work in Germany was embossed by the principle of secrecy of governmental information based on the constitutional structures in the 16<sup>th</sup> century, putting great emphasis on the discreetness of public servants. Due to the absence of a sovereign for the whole state territory, governmental relations operated between landlords and their attendants who were obliged to observe strict loyalty and discreetness<sup>247</sup>.

Access to information was hitherto regulated according to the principle of restricted publicity of governmental records, incorporated in section 29 of the amended ‘Verwaltungsverfahrensgesetz’<sup>248</sup>, providing access to relevant

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<sup>243</sup> M Kloepfer *Umweltrecht* 1998 at 271.

<sup>244</sup> The Basic Constitutional Law of the Federal Republic of Germany of 1949; the GG in the following.

<sup>245</sup> M Kloepfer *op cit* at 269.

<sup>246</sup> J Weber *Der Anspruch nach § 4 Abs. 1 UIG und seine Beschränkung zum Schutz öffentlicher Belange* 1997 at 37.

<sup>247</sup> S Frenzel *op cit* at 2.

<sup>248</sup> The Administrative Proceedings Act of 2003; the VwVfG in the following.

information solely for participants in administrative proceedings. The absence of a general right of access to information was always explained with reference to the traditional structures as well as with the risk of imposing an excessive overburden on the governmental organs<sup>249</sup>. Accordingly, the disclosure of governmental information was strictly regulated by specific legislation solely for particular fields of law. However, not even in these cases the involved individuals were guaranteed broad access rights<sup>250</sup>. For instance, restricted informational rights were embodied in different acts managing admission and approval procedures by requirements of the public display of approval documents<sup>251</sup>. The restrictive legal approach, as illustrated above, did not meet any significant opposition, as it was broadly accepted by the scientific and legal practice. As a result, not even the enactment of freedom of information acts in other parts of the world could influence the situation<sup>252</sup>.

Little by little, the perception of an access regime as a means to ensure transparent governance and to disburden the governmental organs by introducing co-operative structures became accepted especially with regard to the environmental field<sup>253</sup>. However, it was primarily the influence and initiative of EC legislation, as illustrated in Chapter II, to promote the establishment of advanced transparency of administrative activities and to introduce general rights of access to information<sup>254</sup>.

Nonetheless, the recent legislative development reveals comprehensive improvements with regard to access to information, particularly in the context of the environment, as illustrated below.

## **2. The Constitutional Impact**

With regard to the German Constitution, the question has to be raised whether the GG incorporates a general right of access to information, comparable to section 32 of the South African Constitution. In case of the absence of such a

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<sup>249</sup> J Weber *op cit* at 41.

<sup>250</sup> J Weber *op cit* at 38.

<sup>251</sup> S Frenzel *op cit* at 3.

<sup>252</sup> J Weber *op cit* at 40.

<sup>253</sup> M Kloepfer *op cit* at 276.

<sup>254</sup> J Fluck *op cit* at 407.

right, the possible conflict between a statutory right of access to information and other interests protected by the GG has to be highlighted, as their balancing is a necessary prerequisite for the consistency of every statute within the GG.

### **2.1. A General Right of Access to Information?**

In its section 5 (1), the GG provides for a general right to information as long as this information is contained in a ‘generally accessible source’. However, documents of governmental and administrative bodies are not regarded as being generally accessible and section 5 (1) does not provide for an individual right of publicity concerning the work of administrative institutions<sup>255</sup>. Especially governmental records shall be kept enclosed in accordance with statutory law and section 5 (1) does not include any obligation for the legislative organs to amend the relevant provisions such as to change governmental records to qualify as a ‘generally accessible source’. The evolutionary history of section 5 (1) proves the intention to solely protect the unobstructed access to already accessible records, but not to provide for a basis to claim for extended access rights<sup>256</sup>.

Furthermore, the principle of democracy embodied in section 20 (1) of the GG does not constitute a general principle of openness and transparency<sup>257</sup>. In a similar way, neither section 17, establishing the right of filing petitions, nor section 19 (4), embracing the right of efficient legal protection, can be interpreted in a manner as to include general rights of access to information. Section 17 solely imposes an obligation on the competent authority to receive and accept a petition and excludes the granting of a subjective informational right<sup>258</sup>. Indeed, section 19 (4) constitutes an individual right of efficient and comprehensive legal protection. However, a right of access to information can solely be derived from this under exceptional circumstances, such as the probability of impeding judicial proceedings without guaranteeing access<sup>259</sup>.

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<sup>255</sup> H D Jarass/B Pieroth *Grundgesetz fuer die Bundesrepublik Deutschland - Kommentar* 2000 § 5 at 16.

<sup>256</sup> J Weber *op cit* at 44.

<sup>257</sup> S Frenzel *op cit* at 20.

<sup>258</sup> J Weber *op cit* at 45.

<sup>259</sup> J Weber *op cit* at 46.

As a consequence, the German constitution does not provide for a general right of access to governmental records. Such a right may neither be created with reference to the constitutional principles nor with regard to particular guarantees of basic rights - an issue which has been the subject of various cases since 1980<sup>260</sup> as illustrated above. However, as a reaction to the recent development towards open and transparent governmental structures and their incorporation into constitutional law, the Constitution of the Federal State of Brandenburg has for the first time introduced a general right of access to administrative records which is, nevertheless, still a rare exception on the federal state level<sup>261</sup>.

## 2.2. Conflicting Interests under the Constitution

However, the possible clash between constitutionally guaranteed rights and a statutory right of access to information has to be examined to figure out whether the formulation of a general right of access to information, including such a right in the environmental sector, would be in consistency with the GG. Firstly, tension is created between the right of informational self-determination in section 2 (1) in connection with section 1 (1) of the GG and the interest of disclosure of information since the 'Bundesverfassungsgericht'<sup>262</sup> acknowledged the general competence of the individual to decide when and to what extent personal data should be disclosed<sup>263</sup>. Thus, both freedom of information and confidentiality would have to be guaranteed under an access regime and the conflicting interests would have to be set off against each other. As a result of the constitutional demands, statutory provisions may exclude the access to records to protect essential interests of third parties<sup>264</sup>.

The same approach has to be followed with regard to commercially secretive information and economic confidentiality. In these cases, there have to be provisions balancing the diverse values in accordance with the principle of proportionality and reasonability. An example of statutory law incorporating these requirements with reference to the specific field of the approval of

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<sup>260</sup> J Weber *op cit* at 43.

<sup>261</sup> J Weber *op cit* at 47.

<sup>262</sup> The Constitutional Court of the Federal Republic of Germany; the BVerfG in the following.

<sup>263</sup> BVerfG vom 15.12.1983, BVerfGE 65, 1 at 42.

<sup>264</sup> S Frenzel *op cit* at 21.

installations dangerous to the environment is the ‘Bundesimmissionsschutzgesetz’<sup>265</sup>. Section 10 (2) of the BImSchG requires all documents possibly containing commercially confidential information to be identified, marked and submitted separately from all other data<sup>266</sup>.

Consequently, the GG does not prohibit the introduction of a general right of access to information by statute. Opposing arguments emphasising the adverse influence on the efficiency of governmental work or the anonymity of the employees of administrative institutions are not persuasive due to contrary experiences in other countries applying comparable provisions<sup>267</sup>. However, a general right can not be guaranteed in an absolute, unqualified manner with regard to the conflicting constitutional values.

Apart from the existing conflicting interests embodied in the GG which have to be respected in terms of establishing statutory rights of access to information, the ambitions and demands of EC legislation have to be taken into account. Thus, especially restrictions and limitations on such rights are subject to European legislation<sup>268</sup> as will become clear from the following presentation.

As a consequence, the German situation with regard to a right of access to information incorporated in the Constitution is not comparable to the South African in that it does not embody a general right of access to information and thus relies even more on national and federal state legislation.

### **3. The ‘Informationsfreiheitsgesetz’ of 2005<sup>269</sup>**

By adopting the IFG in 2005, a necessary statute has been placed onto the federal level which has been overdue for a long time and contributes to an advanced transparency in Germany’s democratic structures by providing for public access to governmental information at the federal level for the first time.

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<sup>265</sup> The Pollution Protection Act of the Federal Republic of Germany of 2002; the BImSchG in the following.

<sup>266</sup> S Frenzel *op cit* at 21.

<sup>267</sup> S Frenzel *op cit* at 22.

<sup>268</sup> T Schomerus *op cit* at 138.

<sup>269</sup> The Freedom of Information Act of the Federal Republic of Germany of 2005 which came into force on 1 January 2006; the IFG in the following.

As already recognised, an individual right of access to information held by the government and its administrative organs strengthens the position of the citizens towards the authorities<sup>270</sup>. Accordingly, the structure of the Act reflects the ambition to invert the traditional strategy of secrecy of administrative information towards the opposite – the exception shall now be the refusal of access to relevant information<sup>271</sup>. Indeed, some federal states have already provided for comparable legislation on the federal state level<sup>272</sup> regulating access to information held by the administrative organs of the federal state involved<sup>273</sup>, but the federal sector itself only now catches up with the international legal development<sup>274</sup>. Though, the UIG of 1994 already made available a right of access to environmental information, illustrated in detail below, but the IFG now introduces a general approach which is not restricted to a certain field of governmental work such as the environmental sector<sup>275</sup> and is thus comparable with the PAIA.

The following examination of the regulations and especially the limitations on the right will reveal both strengths and remaining weaknesses of this Act.

### **3.1. The Scope and Application of the IFG**

The centrepiece of the IFG is section 1 (1) which provides for access to official information held by the administrative organs on the federal level. This entitlement is granted without any further requirements and may be claimed by way of informal application. There is no obligation to prove any special personal interest or the affection of any individual rights. Moreover, the person requesting access may be every natural person irrespective of nationality or every juristic person under civil law<sup>276</sup>. However, civil groups and associations are excluded from the personal scope of application. This restriction remains highly doubtful

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<sup>270</sup> D Kugelmann 'Das Informationsfreiheitsgesetz des Bundes' 2005 NJW 50 at 3609.

<sup>271</sup> C Schrader 'UIG und IFG – Umweltinformationsgesetz und Informationsfreiheitsgesetz im Vergleich' 2005 Zeitschrift fuer Umweltrecht at 571.

<sup>272</sup> This level would be comparable to the provincial level in South Africa.

<sup>273</sup> E.g. the federal states of Berlin, Brandenburg and Schleswig-Holstein.

<sup>274</sup> D Kugelmann *op cit* at 3610.

<sup>275</sup> J Fluck *op cit* at 382..

<sup>276</sup> D Kugelmann *op cit* at 3610.

for these groups exercise important democratic functions and co-operate between the government and the citizens<sup>277</sup>. The right in section 1 was created to give effect to the principles of democracy, to establish an instrument to contribute to the control and review of governmental work as a means to combat corruption and finally to implement the progressive legislative innovations of most European countries<sup>278</sup>.

The Act defines 'official information' in section 2 (1) as every record disposed for official purposes held by authorities or any other person carrying out any governmental function. Thus, any official records, such as written information, letters, emails, maps and pictures, are embraced since the IFG does not require any specific form of recording<sup>279</sup>. However, the missing of the inclusion of unrecorded information causes the same problem as referred to with regard to the scope of the PAIA.

The addressee of a claim for access to the relevant information is every organ of state on the federal level exercising a public function and thus access to information held by authorities of the federal states is left to federal state legislation which may underlie regional differences with regard to the scope and application of the freedom of information acts. For instance, some legislation solely refers to 'files' held by governmental organs and thus applies a narrower approach than the IFG<sup>280</sup>.

Section 1 (3) regulates the priority of access regimes provided by other pieces of legislation. However, the general rule of section 29 VwVfG, implying the restriction of providing access to relevant information solely for participants in administrative proceedings, is explicitly excluded from that and consequently applicable besides the IFG. This supplementary combination and the parallel applicability of the two Acts result in a logical antagonism and a contradiction in valuation: during the administrative proceedings, access to information is restricted to persons involved who, in addition, have to prove a special interest in the disclosure. However, before and after the proceedings, the IFG applies and guarantees informational rights for everyone. As a result, solely interested parties

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<sup>277</sup> C Schrader *op cit* at 571.

<sup>278</sup> C Schrader *op cit* at 571.

<sup>279</sup> D Kugelmann *op cit* at 3611.

<sup>280</sup> J Fluck *op cit* at 384.

are granted broader access guarantees than the directly involved individuals<sup>281</sup>. Obviously, this structure is not bearable and thus has to be improved by the amendment of the relevant provisions.

The request shall be granted within one month at the latest and has to be granted to the broadest extent. Access may even be allowed with regard to parts of information which are not to be kept enclosed<sup>282</sup>. A general and unqualified provision establishing the possibility to refuse irrational or abusive requests is missing in the IFG, but section 9 (3) provides for a sufficient ground of refusal for these cases by considering alternative and reasonable methods of individual access to information, e.g. with regard to information generally provided by the authorities in an electronic form in accordance with section 11<sup>283</sup>. Administrative and judicial review in the case of a refusal of a request is provided for in section 9 (4).

### **3.2. The Exceptions and Limitations of the Right under the IFG**

The broad access right in section 1 of the IFG is not limited by any special requirements and provides for a wide informational guarantee. Thus the scope of the right is defined by the scope of the exceptions imposed by sections 3 to 6 of the IFG including the protection of personal data, commercial confidentiality and special public interests, especially with regard to the efficiency of the administration. The existing conflicting interests have to be set off against each other by the relevant authority with special regard to the rights and interests embodied in the GG<sup>284</sup> as referred to above. This balancing process can be influenced by some regulations already setting priorities in favour of involved interests such as specific personal data<sup>285</sup>.

With reference to public interests, section 3 introduces several limitations on the general right of access to information. *Inter alia*, the adverse effect of the disclosure on international relations, military secrets, matters of public security,

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<sup>281</sup> D Kugelmann *op cit* at 3611.

<sup>282</sup> Section 7 (2).

<sup>283</sup> D Kugelmann *op cit* at 3613.

<sup>284</sup> C Schrader *op cit* at 572; D Kugelmann *op cit* at 3611.

<sup>285</sup> Section 5 (1) of the IFG only allows the disclosure of some personal data under the consent of the affected person.

the confidentiality of diplomatic relations or fiscal interests of the state are covered. A balancing of interests is not carried out in these cases; the request is refused. Section 4 is dedicated to the protection of governmental decision-making proceedings. Accordingly, requests for access to documents concerning the direct preparation of administrative decisions are refused. The envisaged protection of the efficiency of governmental work is a value which is even confirmed amongst the interests of disclosure for finally protecting the common welfare and the public<sup>286</sup>. The various grounds of refusal in section 3 reflect the diverse concerns of many governmental organs to disclose 'their' information and can therefore be regarded as an enumeration of exceptions which lack clarity and distinctiveness<sup>287</sup>. The open formulation of these protectable interests is clearly bearing the risk of being interpreted in a broad manner instead of applying a restrictive approach and consequently it is the task for the legal practice and the judicature to give meaning to the exceptions and, in addition, to ensure the implementation of the legislative goals of openness and transparency<sup>288</sup>.

The protection of private interests is envisaged by sections 5 and 6 of the IFG in different ways. In the case of the involvement of personal data in terms of section 5, a balancing process is triggered, whereas the protection of intellectual property and commercial confidentiality is carried out strictly and without any consideration of the interests of disclosure<sup>289</sup>. The balancing process with regard to personal data in section 5 is characterised by widely including not only citizens' personal data, but especially those of public servants and officers – a decision which, once again, is meant to ensure an efficient work of the administrative organs<sup>290</sup>. The regulation in section 6 obviously acknowledges the economic sector and protects trade secrets and intellectual property in an absolute, stringent and apparently overemphasised way, solely allowing access to relevant information with the consent of the person involved. However, a possible disclosure of information in terms of section 6 might be obtained by applying section 29 of the VwVfG. Again, this supplementary right leads to

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<sup>286</sup> D Kugelmann *op cit* at 3612.

<sup>287</sup> D Kugelmann *op cit* at 3611.

<sup>288</sup> D Kugelmann *op cit* at 3612.

<sup>289</sup> C Schrader *op cit* at 572.

<sup>290</sup> C Schrader *op cit* at 572; D Kugelmann *op cit* at 3612.

illegitimate results since information might be disclosed by application of the VwVfG which has to be protected under the IFG<sup>291</sup>.

### 3.3. Evaluation

The mere existence of the IFG constitutes the most obvious progression in the field of public informational rights in Germany. The importance of an individual right of access to state information in a democracy and its contribution to transparency and a modern administrative system was finally recognised and implemented into national legislation without any direct pressure by the enactment of European legislation<sup>292</sup>.

However, the particulars of the IFG still leave some weaknesses and ambiguities to overcome. Especially the catalogue of grounds of refusal with reference to public interests lacks clarity and is likely to create confusion. The protection of commercial confidentiality and intellectual property is carried out in a too strict and broad sense, particularly with regard to the less stringent protection of personal data<sup>293</sup>. In addition, the absence of a right of access to information held by private bodies not performing any public function, comparable to the provisions in Part 3 of the PAIA, does not contribute to the creation of a holistic approach of regulating access to information in general. Finally, environmental concerns are not to be found in the IFG. However, the UIG provides for an own regime for the field of environmental information as discussed below.

## 4. The ‘Umweltinformationsgesetz’

The UIG fills the legal gap left by the IFG and provides for a specific regime covering the field of access to environmental information in particular. Consequently, its approach may be compared to the relevant sections in the NEMA. The Act tries to improve the public acceptance of administrative decision-making in the environmental context by providing for an instrument to

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<sup>291</sup> D Kugelmann *op cit* at 3612.

<sup>292</sup> C Schrader *op cit* at 574.

<sup>293</sup> D Kugelmann *op cit* at 3613.

promote the active participation of the citizens in the protection of the environment. National and regional authorities are in possession of large quantities of data referring to the actual condition of the environment and to the extent and causation of environmental impacts. Thus, the citizenship is able to partially take responsibility and improve efficiency and control of the administration in terms of the precautionary principle by obtaining knowledge about relevant environmental factors<sup>294</sup>.

As outlined in Chapter II, the EC enacted a first Directive 90/313/EEC on access to environmental information in 1990 followed by a subsequent Directive 2003/4/EC to give effect to the outcomes of the 1998 Aarhus Convention. The German legislative transformed these standards into national legislation by the enactment of the first UIG of 1994 and later the UIG of 2005. As referred to above, the turn of Germany's administrative structures towards openness and transparency in environmental concerns was not caused by any domestic change of attitude, but by the European legislation as the 'engine' of the new legislative development<sup>295</sup>. This significant fact should be kept in mind when examining the German legislation covering the subject in question, especially with regard to a comparison with the South African situation.

#### **4.1. The UIG of 1994**

Following the Directive 90/313/EEC, section 4 (1) of the UIG of 1994 established a general right of access to environmental information for everyone irrespective of nationality. The question of whether this right was to be granted for juristic persons was decided so as to include juristic persons under civil law in accordance with the Directive and to exclude juristic persons under public law since the general rules of administrative assistance and existing internal rights of access to data were regarded as being sufficient for these cases<sup>296</sup>.

The respondents to the request under the old regime were all authorities exercising functions in the sector of environmental protection which was

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<sup>294</sup> S Frenzel *op cit* at 5.

<sup>295</sup> T Schomerus *op cit* at 14, 15.

<sup>296</sup> M Kloepfer *op cit* at 278.

interpreted in a broad manner by the legal practice<sup>297</sup>. Moreover, private bodies carrying out public powers, such as waste management companies, were embraced by section 2<sup>298</sup>. The definition of 'environmental information' was included in section 3 (2) and followed the wording of the Directive. However, all data had to be recorded in a specific form, whereas the kind of recording was not relevant. Thus, the Act served the dissemination of already existing records rather than the production of information<sup>299</sup>.

The further requirements of access to environmental information of the UIG of 1994 were set restrictively and included wide discretionary powers of the authorities running the risk to undermine the European ambitions, for instance by providing for alternative ways to grant the requested information in section 4 (1)<sup>300</sup>. Finally, sections 7 and 8 imposed exceptions on the general right of access to information by referring both to public and private interests. Public interests, such as the national security or the confidentiality of governmental data, were mainly concerned with maintaining the efficiency of the work of the administrative organs and administrative proceedings, but apparently formulated in a very broad wording and thus open to abuse<sup>301</sup>. The limitations on the grounds of private interests, including the confidentiality of personal or commercial data and intellectual property, contained insecurities too and lacked concrete definitions. However, the provision required a specific assessment of the conflicting interests with regard to their environmental value and provided for room to negate the protection of private interests due to more significant environmental concerns<sup>302</sup>. A final practical restriction on the exercise of the right was imposed by section 10 and the allowance to waive fees for official acts under the UIG. These fees could reach an unreasonable and far too excessive level and thus often imposed not only a limitation of the right but a ban in practice<sup>303</sup>.

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<sup>297</sup> J O Merten 'Umwelthinformationsgesetz und privatrechtliches Handeln der Verwaltung' 2005 NVwZ 10 at 1158.

<sup>298</sup> T Schomerus *op cit* at 61.

<sup>299</sup> M Kloepfer *op cit* at 279.

<sup>300</sup> M Kloepfer *op cit* at 279.

<sup>301</sup> J Weber *op cit* at 200; T Schomerus *op cit* at 257.

<sup>302</sup> M Kloepfer *op cit* at 280.

<sup>303</sup> J Weber *op cit* at 169; M Kloepfer *op cit* at 281.

To summarise the outcomes, the UIG provided for the prerequisite for active public participation in environmental matters. However, many weaknesses and ambiguities were an obvious part of the old regime and there remains doubt about the way the UIG of 1994 implemented or circumvented the ambitions of Directive 90/313/EEC.

## **4.2. The UIG of 2005**

Since 1994, the administrative institutions were gaining experience with the access regime under the UIG of 1994. It was quite understandable that the ECJ recognised the old UIG as implementing the targets of the Directive 90/313/EEC in a far too restrictive way and as reducing its scope of application<sup>304</sup>. With regard to these considerations, and due to the fact that the EC, in 2003, concluded an extended Directive 2003/4/EC dealing with access to environmental information, Germany enacted a completely renewed UIG in 2005 which came into force on 1 January 2006. The new legislation is built upon the old regime, but adapted to the innovative and progressive elements of Directive 2003/4/EC<sup>305</sup>.

### **4.2.1. The Scope of the UIG of 2005**

In contrast to the UIG of 1994, all administrative institutions holding environmental information are regarded to be official places obliged to provide information in terms of section 2 (1). Additionally, private individuals and juristic persons under civil law are covered by the Act as being obliged to grant access to environmental information as long as they exercise public powers under the supervision of a governmental organ<sup>306</sup>. This provision clearly prevents an ‘escape into private law’ by governmental organs to circumvent their obligations imposed by the UIG<sup>307</sup>. In addition, civil action groups and associations are included as long as they are built upon an adequate

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<sup>304</sup> C Schrader *op cit* at 569.

<sup>305</sup> J Fluck *op cit* at 397; A Scheidler *op cit* at 14.

<sup>306</sup> Section 2 (2).

<sup>307</sup> J O Merten *op cit* at 1159.

organisational structure to allow a uniform formation of opinion<sup>308</sup>. However, the new regime solely addresses official organs on the federal administrative level with the result that Directive 2003/4/EC has to be transformed onto the level of the federal states by federal state legislation. Until this has been done, the Directive is directly applicable with regard to requests concerning federal state authorities<sup>309</sup>.

The scope of application of the UIG is still limited to 'environmental information'. However, this term was extended in comparison to the old UIG and now embraces all information on the state of the environment, factors and activities affecting the environment, such as emissions, or data on the interaction of different elements with regard to effects on the environment<sup>310</sup>.

To avoid a conflicting situation with regard to the application of either the IFG or the UIG, there are regulations covering the competition. As a result and due to the compulsory declarations made by Directive 2003/4/EC, the specific regime under the UIG sets a minimum-standard with regard to the right of access to environmental information, only allowing a broader application of the more general IFG<sup>311</sup>.

#### **4.2.2. The Access Regime**

Section 3 (1) provides for the right of access to environmental information without having to prove a legal interest and without implying any differences to the right under section 4 (1) of the UIG of 1994. Requests for information provided for under other legislation exist besides the UIG as stated in section 3 (1) (i).

One of the former weak points, namely the possibility for the authorities to refer the request to alternative, possibly less meaningful, sources of information has been removed by specifying the circumstances for the

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<sup>308</sup> C Schrader *op cit* at 569.

<sup>309</sup> A Scheidler *op cit* at 14.

<sup>310</sup> Section 2 (3).

<sup>311</sup> Section 3 (2) of the UIG, section 1 (3) of the IFG; C Schrader *op cit* at 572, 573.

application of this rule, such as the necessary existence of significantly increased administrative efforts<sup>312</sup>.

The right of free access to relevant information is still limited by conflicting public and private concerns<sup>313</sup> which are, in contrast to the implications of the old regime, to be interpreted in a restrictive manner as demanded by Directive 2003/4/EC<sup>314</sup>. However, this requirement is not explicitly incorporated into the formulation of the relevant sections and thus the new UIG too is at risk to be objected to by the ECJ<sup>315</sup>. In case of the existence of one of the enumerated grounds of refusal, the request generally has to be denied. In both cases, however, the UIG provides for a clause enabling the competent authority to consider the matters of the particular case and to reason that the public interest of disclosure is outweighing the contrary interest involved<sup>316</sup>. To be able to identify this superior interest, it has to be specified by the applicant who, consequently, underlies a factual obligation to disclose a specific interest which is actually not a requirement under the UIG as outlined above<sup>317</sup>. In the case of a ground of refusal prevailing in the discretionary process of balancing the conflicting interests, a possibly remaining part of the information whose disclosure does not affect an interest in terms of sections 8 and 9 has still to be made available<sup>318</sup>. The various grounds of refusal are similar to those established under the old regime, but additionally, they embrace the presence of obviously abusive requests in section 8 (2). This scenario might be at hand in the case of information being already in possession of the applicant or an obvious attempt to delay administrative proceedings<sup>319</sup>.

The request can still be made by informal application and the former time limit of granting access within two months at the latest has been narrowed down to one month<sup>320</sup>.

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<sup>312</sup> Section 3 (2); A Scheidler *op cit* at 15.

<sup>313</sup> The grounds of refusal are set out by sections 8 and 9.

<sup>314</sup> Deutscher Bundestag Drucksache 15/3406 at 21; the Directive 2003/4/EC explicitly demands a restrictive interpretation of the grounds of refusal.

<sup>315</sup> C Schrader *op cit* at 570.

<sup>316</sup> C Schrader *op cit* at 570.

<sup>317</sup> A Scheidler *op cit* at 15.

<sup>318</sup> Section 5 (3); A Scheidler *op cit* at 15.

<sup>319</sup> Deutscher Bundestag Drucksache 15/3406 at 19.

<sup>320</sup> Sections 4 (1) and (2), 3 (3); A Scheidler *op cit* at 16.

### 4.3. Evaluation

Although the initiatives for the establishment of a regime of access to environmental information in particular were produced by European legislation, the outcomes, leading to a breach of traditions in Germany, are to be appreciated. Especially in the European context, an advanced control of governmental work in the environmental field by a well-informed public plays a major role since the EC always had the problem of inadequate implementation of environmental goals and non-compliance by member states<sup>321</sup>.

Moreover, initial weaknesses and ambiguities of the UIG of 1994 have been overcome by the adoption of the UIG of 2005 to a broad extent. Namely, the extended definition of 'environmental information', the specification of the grounds of refusal and the clarification of the addressee of a request have to be highlighted. However, the administrative organs in Germany are still struggling to accept and implement the new approach of openness and transparency. A still remaining weakness clearly lies in the missing of the incorporation of environmental information held by private individuals or companies who do not exercise any public functions.

### 5. The Case of the Nuclear Power Plant of *Brunsbüttel*

Due to the fact that both the IFG and the UIG are new pieces of legislation, there is not much specific case law with regard to the application of the access regulations embodied by the Acts. However, a recent discussion exemplifies, once again, the significance and importance of efficient instruments of access to environmental information as a means to promote public participation and awareness with reference to the nuclear sector.

After a serious incident in the nuclear power plant of *Brunsbüttel* in December 2001, an environmental organisation sought access to the relevant data concerning the incident held by the operator of the plant. For this, the organisation relied both on the UIG and on the IFG of the involved federal state

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<sup>321</sup> C Schrader *op cit* at 569.

and was permitted access by the competent governmental Department of Energy<sup>322</sup>. However, the operator managed to delay and obstruct the disclosure by relying on the trade secret exceptions provided for by both Acts, although a risk of disclosure of data relevant for competing companies did not exist since the plant was operating under an old technological concept. In the absence of an order for the direct enforcement of the granted right, the operator started legal proceedings to prevent the disclosure. This conduct generally allows the further delay, possibly for years, until a decision is made by a court of ultimate resort and thus the disclosure did not take place before the nuclear power plant of *Brunsbuettel* resumed its operation after the incident<sup>323</sup>.

Five years later in 2006, the existence of a list of weak spots of the power plant was disclosed, held by the competent department of the federal state. The list contained several open factors especially with regard to both evident and hidden defects of the emergency power system of the nuclear plant which had apparently been subject to a non-public dispute between the operator of the plant and the authority responsible for the control and supervision of nuclear power for a long time<sup>324</sup>. The environmental organisation now requesting the disclosure of this list both under the IFG and the UIG argues that the information included is either harmless and it would therefore be out of all reason to keep the list enclosed or the list reveals obvious security defects which impose a public risk and should consequently result in the immediate shutdown of the plant. Until now, the environmental organisation has been trying to enforce the disclosure through judicial proceedings without success. Once again, the operator relies on grounds of trade secrets to justify the non-disclosure. With regard to this, the risk of revealing the actual value of the plant, thus being at a disadvantage when it comes to negotiations on the sale of the plant, is quoted as a statement. Again,

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<sup>322</sup> Greenpeace Deutschland Redaktion 'Brunsbuettel: Stoerfall als Betriebsgeheimnis' 2003 [http://www.greenpeace.de/themen/atomkraft/presseerklaerungen/artikel/brunsbuettel\\_stoerfall\\_als\\_betriebsgeheimnis/](http://www.greenpeace.de/themen/atomkraft/presseerklaerungen/artikel/brunsbuettel_stoerfall_als_betriebsgeheimnis/).

<sup>323</sup> Greenpeace Deutschland Redaktion *op cit* [http://www.greenpeace.de/themen/atomkraft/presseerklaerungen/artikel/brunsbuettel\\_stoerfall\\_als\\_betriebsgeheimnis/](http://www.greenpeace.de/themen/atomkraft/presseerklaerungen/artikel/brunsbuettel_stoerfall_als_betriebsgeheimnis/).

<sup>324</sup> Deutsche Umwelthilfe e.V. 'Atomkraft: Brunsbuettel-Schwachstellenliste veroeffentlichen' 2006 <http://ruegenbote.de/wordpress/2006/09/01/atomkraft-brunsbuettel-schwachstellenliste-veroeffentlichen/>.

judicial proceedings in response to the legal request of the environmental organisation delay and factually prevent the disclosure under the UIG and IFG<sup>325</sup>.

This exemplary case obviously reveals a practical problem with reference to the application of the rights and exceptions of the involved Acts under the overall regime of administrative law in Germany. It is disillusioning to see that even in the case of incidents and possible weak spots in nuclear power plants, disclosure of the relevant data and thus the dissemination of possible public risks may be delayed or even prevented by the operator under existing law. Consequently, the innovative approaches of the IFG and the UIG may be circumvented by the structures of the German administrative legal system.

## 6. Conclusion

Along with the transformation of European legislation, a breach of tradition and a structural turn were introduced into the German legislation dealing with access to information, particularly with regard to environmental information. Although not being backed up by a constitutional right, innovative and progressive legislation was enacted in this field which may contribute to transparency and control of the administrative system by means of furnishing the public with necessary information to participate in a democratic process of decision-making and the protection of the environment.

However, the administrative and governmental bodies are still struggling with the drastic changes of the philosophy towards granting information and they mainly regard this turn with scepticism<sup>326</sup>. Nevertheless, the enactment of the old UIG has neither resulted in an extensive workload for the administrative organs nor in industrial spying and commercial damage to companies. Consequently, it is expected that even a general right under the IFG and the extended UIG of 2005 will not cause any negative effects in these fields<sup>327</sup>. Overall, it has to be recognised that the IFG and the new UIG have been in force for a short period by now, and some patience is required with regard to the complete implementation

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<sup>325</sup> Deutsche Umwelthilfe e.V. 'Press Release of 22 June 2007'

[http://www.presseportal.de/pm/22521/1006033/deutsche\\_umwelthilfe\\_e\\_v](http://www.presseportal.de/pm/22521/1006033/deutsche_umwelthilfe_e_v).

<sup>326</sup> A Scheidler *op cit* at 16; J Fluck *op cit* at 407.

<sup>327</sup> M Schmillen *Das Umweltinformationsrecht zwischen Anspruch und Wirklichkeit* 2003 at 140.

of this reorientation. Besides, the efficiency of the new regime will largely depend on the actual exercise of the granted right by the environmentally aware public<sup>328</sup>.

Apart from these structural difficulties, there are still some legislative tasks remaining, such as the integration of information held by private bodies and rights in favour of state organs as well as efforts to level out the legislation at the federal and the federal state level.

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<sup>328</sup> A Scheidler *op cit* at 17.

## **Chapter V Assessment**

### **1. A Comparative Review**

Having critically considered the international framework in Chapter II and outlined both the South African and German legal context in Chapters III and IV with regard to access to environmental information, there should be a final critical review with a focus on what the two national approaches could learn from one another to continue the improvement of the situation.

What has to be recognised first is the fact that even though both countries were traditionally characterised by a policy of secrecy and discretion towards the disclosure of government-held information, the historical background and the reasons for this approach differ from each other significantly. In South Africa, the former white minority regime got in the way of free access to information, whereas Germany had a long constitutional tradition of discretion of governmental work. However, the resulting challenges for both legal systems were the same.

Moreover, a major factor for any legal implementation of informational access rights is a basis for the innovative development which reveals the obvious difference between the two legal systems in question: the Constitution of South Africa of 1996 provides for the umbrella section 32 which includes a separate right of access to information even with regard to privately held information and forms a framework demanding subsequent legislation and influencing its scope. In contrast, the German Constitution does not incorporate a similar provision and a right to information may not be obtained by interpreting constitutional rights or clauses. As a consequence, the incentives for the enactment of national legislation covering the subject had to be created by the EC, primarily in the context of access to environmental information.

With regard to the legislation embodying a general right of access to information, the PAIA and the IFG follow similar approaches by providing for a broad right of access to information subject to limitations with regard to conflicting public and private interests. In South Africa, the PAIA gives effect to the constitutional demands and thus embraces both information held by public

bodies and, under certain circumstances, by private persons which is a strength of this Act since it tries to establish a holistic approach to cover all relevant information. Unfortunately, the inclusion of privately held information is missing in the IFG and, in addition, the scope of this German Act only allows an application on the federal level which leaves a gap on the federal state level. The interaction of the granted right, the defined limitations and the overriding section, *inter alia* explicitly including environmental concerns, under the PAIA seems to be well developed. However, problems remain concerning the scope of application with reference to the type of information covered which result in unjustified limitations on the right and furthermore create a loophole for administrative abuse. As illustrated, the same issues exist under German law when evaluating the IFG. Besides, the PAIA struggles with the identification of public and private bodies and excludes all information concerning parliamentary work. The latter weakness is avoided by the IFG since it deals with these records in a more qualified and detailed manner. However, the grounds of refusal incorporated in the IFG are formulated in a too broad wording, lacking clarity and setting wrong priorities. As a consequence, the provisions under German law run the risk of being abused by the respondents to requests for information. This issue is dealt with in a more comprehensible way under the PAIA. Finally, the possibility to apply an alternative right of access to information in addition to the one embodied in the IFG creates illogic outcomes and confusion as illustrated above. This mismanagement of competition under German law is avoided under South African law.

With regard to the specific regimes covering access to environmental information, both the NEMA and the UIG provide for advanced means to get access to relevant records. Both Acts are characterised by a broad definition of 'environmental information' and the far-reaching inclusion of all organs of state as the addressees of requests. However, in the South African context, the application of the PAIA and the NEMA is stipulated in a supplementary way, allowing the PAIA to deal with environmental concerns in the same way as with all other issues. The approach under the UIG seems to be more qualified and thus preferable: the UIG sets a minimum standard of protecting the public interest in the disclosure of environmentally relevant information and consequently, the IFG

may only be applied in a broader way when there are environmental concerns in question. Another difference between the NEMA and the UIG are the 'directions' of granting access rights. Under the NEMA, both access for private individuals to information held by the government and access for state organs to information held by private institutions is embraced. In addition, there is the opportunity for the enactment of regulations to deal with access for the members of the public to privately held information. However, this is left to the discretion of the competent Minister and thus constitutes a weak spot. Nevertheless, the German approach in the UIG is even short of these elements for solely providing an access right for private individuals to information held by the state. What both the NEMA and the UIG have in common, is the missing formulation of an explicit requirement to restrictively interpret the grounds of refusal which are established by both Acts to a broad extent. However, with regard to the German situation, this requisite is determined under EC law and thus has to be applied on the national level. In South Africa, this interpretation is left to the courts.

To sum up, the introduction of a system of statutory general rights of access to information in combination with a specific regime with regard to environmental information seems to result in a coherent and logical body of law. The existence of a separate constitutional right in this context, acting as a backup provision, is obviously advantageous. However, the missing of such a section in the German Constitution is compensated by legislative demands initiated by the EC.

With regard to the particular strengths and weaknesses (as outlined above), the two countries might learn from one another with a view to amending the relevant legislation in order to overcome the weak spots still existing. However, there are challenges remaining for both countries, such as the advanced inclusion of privately held information, which have to be faced. In addition, a broader analysis reveals external factors influencing the efficient work of the access regimes in the two countries, which need to be considered at first to be able to deal with any specific problems of the acts. Here, the lack of environmentally sound education and essential problems of existence, squeezing

out environmental awareness in public<sup>329</sup>, or the adverse influence of procedural administrative law, as illustrated with regard to the discussion about the nuclear plant *Brunsbuettel*, may be exemplary.

Finally, and this affects both countries, there remain unclear matters in practice which are to be evaluated at a later stage after having gained enough experience and data concerning the new legislative system of granting informational rights. At first, these include the question about the actual increase of direct administrative labour caused by the use of individual access rights. However, existing data collection with regard to the application of the old UIG in Germany shows that the emergence of an excessive workload is not to be expected<sup>330</sup>. Closely linked to this, these data collections revealed the fact that the access rights were actually rarely used by individuals, but by companies to a broader extent<sup>331</sup>. This outcome apparently emphasises once again the supranational challenge of promoting environmental education and public awareness of environmental concerns. Finally, another factor to keep the public from using its access rights is the charge of administrative handling fees which have been imposed in Germany in a significant manner under the old UIG. To handle this issue, it should be ensured that the fees do not reach an unreasonable and excessive level and, additionally, are solely charged in the case of an actual disclosure of data and its transmission to the requester<sup>332</sup>.

## 2. Final Conclusion

The above survey of the international regime dealing with access to environmental information and the subsequent comparative analysis of the South African and German perspective clearly acknowledges the relevance of informational rights in the environmental context as a means to promote public participation and to finally allow a more efficient protection of the environment. Concerning this matter, international agreements, such as the 1993 Civil Liability Convention or the regional 1992 OSPAR Convention, both embody own access rights on the supranational level and provide for broad framework regulations to

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<sup>329</sup> E Bray *op cit* at 137, 138.

<sup>330</sup> M Schmillen *op cit* at 140; A Scheidler *op cit* at 16.

<sup>331</sup> M Schmillen *op cit* at 139.

<sup>332</sup> M Schmillen *op cit* at 139.

guide domestic implementation in member states. However, the applicability of any international convention is limited to state member parties and its efficiency largely depends on the willingness of state parties to implement the agreed ambitions. In addition, there are both strong and weak approaches existing on the international level providing for different qualities of access rights, thus resulting in the establishment of diverse national standards which is a general flaw of public international law.

With regard to the South African and German perspectives, the embodiment of informational access rights in the environmental context is either triggered by constitutional demands or by external influences. The subsequent interaction of different legislation is contributing to an open, transparent and thus more democratic administrative system and provides for means to control the government and promote public participation in environmental decision-making. However, it creates an additional workload for the administrative organs which is, nevertheless, not expected to reach an excessive and counterproductive level. Both legal bodies in South Africa and Germany covering the subject in question illustrate a progressive but different improvement of the situation in the respective country. Some of the remaining weaknesses may be remedied with a comparative view to the strengths of the other system. However, there are challenges for both nations remaining to be faced. Overall, the efficiency of domestic forms of informational access rights depends on the appropriate usage of the provided privileges by an environmentally educated and aware public.

The context of nuclear power development has served as an example to illustrate the significance and importance of an access regime with regard to environmental risk information both on the international and the domestic level. With regard to this, the establishment and adequate application of access rights may clearly improve the handling of environmental risks to the public as well as the prevention and mitigation of harm to the environment.

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