



26 August 2019

**BRIEFING NOTE:  
ANALYSIS OF THE PROMOTION OF ACCESS TO INFORMATION AMENDMENT  
BILL**

---

**TABLE OF CONTENTS**

<b>1. INTRODUCTION.....</b>	<b>1</b>
<b>2. PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000.....</b>	<b>1</b>
<b>3. CONSTITUTIONAL COURT JUDGMENT.....</b>	<b>3</b>
<b>4. AMENDING LEGISLATION .....</b>	<b>6</b>
<b>5. SOURCES .....</b>	<b>13</b>

---

**1. INTRODUCTION**

The purpose of the Promotion of Access to Information Amendment Bill, is **to provide for the recordal, preservation and facilitation of access to information on the private funding of political parties and independent candidates**. This came about as a result of the June 2018 Constitutional Court decision in *My Vote Counts NPC v Minister of Justice and Correctional Services*.<sup>1</sup>

**2. PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000**

The Promotion of Access to Information Act 2 of 2000 (PAIA) regulates public access to any recorded information held by either public or private bodies for the exercise or protection of a constitutional right.<sup>2</sup> The Act defines and outlines the scope and content of the right of access to **records** held by public and private bodies.<sup>3</sup>

**2.1 Accessing Party Funding Information**

PAIA, however, is not without defects. One of these defects concerns the access to information regarding the private fundraising activities of political parties. This may be summed up as follows:

---

<sup>1</sup>My Vote Counts NPC v Minister of Justice and Correctional Services(CCT249/17) [2018] ZACC 17; 2018 (8) BCLR 893 (CC); 2018 (5) SA 380 (CC) (21 June 2018) (Accessed at <http://www.saflii.org/za/cases/ZACC/2018/17.html>)

<sup>2</sup> Promotion of Access to Information Act 20 of 2000 section

<sup>3</sup>My Vote Counts, Regulating Access to Political Funding Information (September 2017) (Accessed at <http://www.myvotecounts.org.za/wp-content/uploads/2017/09/The-right-to-know.pdf>)



### Right to Vote and Transparency of Political Party Funding.<sup>4</sup>

1. The right to vote is provided under section 19 of the Constitution.
2. The right to vote is a right to an informed vote.
3. The right to an informed vote extends to being informed in relation to the private funding of political parties, amongst others, because of the centrality of political parties to the democratic process.
4. Step 3, together with section 32(1) of the Constitution (Access to Information) requires a scheme that provides for '*recordal and disclosure of information regarding the private funding of political parties*'.
5. PAIA fails to provide step 4.

Although PAIA does not explicitly prevent anyone from requesting information about the sources of private donations to political parties, the current structure of the Act creates significant challenges for a member of the public seeking access to such information.

- The first challenge relates to the distinction made between public and private bodies resulting in two separate procedures and requirements (forms, payments etc.). However, there are some entities that may **not** be either strictly public or private, but hybrid entities comprising of both public and private elements. Political parties are one such entity. Although they are not public bodies, they play significant public roles. The hybrid nature of political parties can create confusion as to which form and procedure to follow when requesting information.<sup>5</sup>
- The second challenge with PAIA relates to the (lengthy) list of grounds on which a request for access to information can be refused. Once a requester has gone through the procedural requirements of properly completing the forms, paying relevant fees and satisfying the threshold enquiry, the requested record must be released unless a ground of refusal stipulated in the PAIA applies. It is not uncommon for a request for private party funding information, even after meeting all the procedural requirements in terms of PAIA, to be refused.<sup>6</sup> Political parties refuse requests for disclosures of their donation information citing a number of defences, most of which centre around the right to privacy. Whilst there may be legitimate reasons to limit access to information – there are concerns that there is a risk of these exemption provisions being used to conceal unethical dealings under the guise of “sensitive or confidential information”.<sup>7</sup>

---

<sup>4</sup>Tham JC, My Vote Counts, International Standards and Transparency of Political Party Funding: Does the State Have a Duty to Provide for Continuous and Systematic Disclosure? (Accessed at <https://constitutionalcourtreview.co.za/wp-content/uploads/2018/10/4-My-Vote-Counts-International-Standards-and-Transparency-CCR-VIII-2016-3.pdf>)

<sup>5</sup> Ibid

<sup>6</sup> Ibid

<sup>7</sup> Ibid



### 3. CONSTITUTIONAL COURT JUDGMENT

In the matter of *MVC v President of the Republic of South Africa and Others* 2018 (5) SA 380 (CC)<sup>8</sup> Mogoeng CJ, (with Zondo DCJ, Dlodlo AJ, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J concurring), for the majority, held that the State is under an obligation that flows from a proper reading of sections 32 (Access to Information), 19 (Political Rights) and 7(2)<sup>9</sup> of the Constitution to do everything reasonably possible to give practical and meaningful expression to the right of access to information and the right to vote.

According to the Chief Justice this is because **the exercise of the right to vote must be an informed choice**. This means that there is a vital connection between the proper exercise of the right to vote and the right of access to information. Moreover, as was noted by the Court, “it does seem to require a lot of money to run a successful campaign for public office.”<sup>10</sup> Clearly, money is an integral part of politics, since without financial support, a working political system is not feasible. Although the state does provide some funding this falls short of what is required which leads to the need for ‘*substantial monetary aid*’ from the private sector or individuals. Consequently In the words of the Chief Justice, there is a danger that;

“unchecked or secret private funding from all, including other nations, could undermine the fulfilment of constitutional obligations by political parties or independent candidates<sup>11</sup>.....Our freely elected representatives must thus be so free that they would be able to focus and deliver on their core constitutional mandate. They cannot help build a free society if they themselves are not free of potential bondage or captivation.”<sup>12</sup>

Hence the need for the public to have access to information on private funding for political parties and independent candidates.

The Constitutional Court also pointed out that ‘*lack of transparency on private funding provides fertile and well-watered ground for corruption or the deception of voters.*’<sup>13</sup> The Court noted South Africa’s obligations in respect of the following:<sup>14</sup>

- United Nations Convention Against Corruption. Art.5(1) which requires that parties must, in ways best suited to their own legal systems, maintain effective anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability’.

<sup>8</sup>My Vote Counts NPC v Minister of Justice and Correctional Services(CCT249/17) [2018] ZACC 17; 2018 (8) BCLR 893 (CC); 2018 (5) SA 380 (CC) (21 June 2018) (Accessed at <http://www.saflii.org/za/cases/ZACC/2018/17.html>)

<sup>9</sup> Constitution, 1996. Section 7. Rights. (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

<sup>10</sup> MVC v President of the Republic of South Africa and Others 2018 (2) SACR 644 para [2]

<sup>11</sup> Ibid para 41]

<sup>12</sup> Ibid para [41]

<sup>13</sup> Ibid para [48]

<sup>14</sup> Ibid para [49] and [50]



- Article 7(3) requires, in relevant part, that each state party must also ‘consider’ taking appropriate legislative and administrative measures to enhance transparency in the funding of political parties and candidates.
- Article 7(4) requires each state party to ‘... adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest’.
- African Union Convention on Preventing and Combating Corruption, which is even more robust. Accordingly:
  - Art. 9 requires that parties give effect to the right of access to any information that is required to assist in the fight against corruption
  - Art. 10 requires as follows - ‘Funding of Political Parties. Each State Party shall adopt legislative and other measures to: (a) Proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and (b) Incorporate the principle of transparency into funding of political parties.
  - Art. 11(1) and (3) requires the adoption of legislative and other measures specifically to prevent and combat the payment of bribes by private sector to win tenders.

Essentially, the Court concluded that PAIA was deficient because it did **not** provide that information on the private funding of political parties and independent candidates should be;

- (i) recorded and preserved;
- (ii) made reasonably accessible to the public; and
- (iii) independent candidates and all political parties are subject to its provisions.

Additionally, it was the view of the Court that no compelling reasons existed to justify these limitations.<sup>15</sup>

As a result the Constitutional Court **ordered** the following:<sup>16</sup>

**The order of constitutional invalidity made by the Western Cape Division of the High Court, Cape Town is confirmed, in these terms:**

**1.1 It is declared that information on the private funding of political parties and independent candidates is essential for the effective exercise of the right to make political choices and to participate in the elections.**

**1.2 It is declared that information on private funding of political parties and independent candidates must be recorded, preserved and made reasonably accessible.**

**1.3 It is also declared that the Promotion of Access to Information Act 2 of 2000 (PAIA) is invalid to the extent of its inconsistency with the Constitution by failing to**

<sup>15</sup> Ibid para [68]

<sup>16</sup> Ibid para [91]



provide for the recordal, preservation and reasonable disclosure of information on the private funding of political parties and independent candidates.

**1.4 Parliament must amend PAIA and take any other measure it deems appropriate to provide for the recordal, preservation and facilitation of reasonable access to information on the private funding of political parties and independent candidates within a period of 18 months.**

It should be noted that, in the matter before the Constitutional Court, MVC also asked the court for **systematic and continuous disclosure of information on private funding**. It wanted this disclosure so that funding information is available at all times and not only upon request.

- **Systematic and Continuous disclosure of information**

However, a majority of the judges in the Constitutional Court found that this would amount to instructing Parliament on how to draft legislation. This would undermine the separation of powers between Parliament, which consists of elected officials, and the courts.<sup>17</sup>

A minority of the judges held that such an order was necessary to give meaning to the right to have access to information on private funding. Froneman J (with Cachalia AJ concurring) was of the view that the recordal and disclosure of information pertaining to the private funding of political parties must be systematic and continuous otherwise it would mean that the obligation imposed is “unsystematic”, “one-off” and “intermittent”. Moreover, the minority expressed the view that the right to vote is the whole citizenry’s right, and to view it only as an atomised individual right diminishes our concept of participatory democracy.<sup>18</sup>

### **3.1 Political Party Funding Act**

It should also be noted that by the time the Constitutional Court heard the My Vote Counts case, Parliament had already introduced a Political Party Funding Bill. Despite this, the court said it must still hear the case because:

- (i) It had a constitutional duty to confirm or reject the order of the High Court;
- (ii) It would only be providing guidance on what the Constitution says about this issue and not deciding the content of any legislation; and
- (iii) In any event, **the case that was presented to the High Court that the Constitutional Court was grappling with, has to do with a frontal attack that was launched on the constitutional validity of PAIA.**<sup>19</sup>

The Court stated that Parliament enjoys functional independence in the discharge of its law making abilities even in relation to the regulation of private funding. Whether it does so though one, two or more pieces of legislation is within its discretionary powers. It may meet that

<sup>17</sup> Ibid para [80]

<sup>18</sup> Ibid para [95]

<sup>19</sup> Ibid para [15]



obligation though a recalibrated PAIA alone, PAIA and other legislation or a different mechanism all together.<sup>20</sup>

However, it may be noted for information purposes that the Political Party Funding Act 6 of 2018, was signed into law by the President in January 2019. The Act provides for the regulation of public and private funding; the establishment and management of a Multi-Party Democracy Fund to fund represented political parties sufficiently; the regulation of the disclosure of donations; and sets out the powers of the Independent Electoral Commission (IEC) in relation to political parties' funding. The new law stipulates that political parties may not accept donations from organs of state or state-owned entities, foreign persons including entities from foreign governments and or their agencies - other than for the purposes of training or skills development of a member of a political party or for policy development by a political party. The new law also states that political parties may not accept donations in excess of a prescribed amount within a financial year and that they may not accept donations that are known or suspected to originate from proceeds of crime.

The Act is not yet operational. Implementation was postponed after the Independent Electoral Commission of South Africa (IEC) received more than 5 000 public comment submissions, following the publication of Proposed (Draft) Regulations.<sup>21</sup> Public hearings were convened in early August 2019.

#### 4. AMENDING LEGISLATION

Effectively then, the Constitutional Court held that it is critical for PAIA to provide specifically for record keeping, preservation and reasonable disclosure of private funding for political parties and independent candidates. It was also important that reasonable access to these records should be "institutionalised".<sup>22</sup>

The Court did, however, acknowledge that:

- (i) It could **not** prescribe to Parliament whether the recordal, preservation and disclosure of all information relating to private funding should be regulated in terms of PAIA, or PAIA and another legislation or PAIA and other measures. That is a decision to be taken by Parliament.<sup>23</sup>
- (ii) The Courts duty is to provide 'broad guidelines' on what could be considered by Parliamentarians in developing a fitting regulatory framework in this connection.<sup>24</sup> The fundamental principle that must be underscored here is that information on the

---

<sup>20</sup> Ibid para [17]

<sup>21</sup> Mitchley A, Political Party Funding Act: IEC postpones implementation weeks before elections (Accessed at <https://www.news24.com/SouthAfrica/News/political-party-funding-act-iec-postpones-implementation-weeks-before-elections-20190404>)

<sup>22</sup> Ibid para [70]

<sup>23</sup> Ibid para [76]

<sup>24</sup> Ibid para [76]



private funding of political parties and independent candidates must be “held” or “recorded”, preserved and be reasonably accessible.<sup>25</sup>

In response, to address the gaps in the legislation a Committee Bill has been drafted which seeks to:

*‘amend the Promotion of Access to Information Act, 2000, so as to provide for information on the private funding of political parties and independent candidates to be recorded, preserved and made available; and to provide for matters connected therewith.’*

#### 4.1 Provisions of the Bill

The amendment Bill proposes the insertion in the PAIA of a new Chapter 2A entitled ‘Publication and Availability of Certain Records of Political Parties.’ This includes proposed new definitions as follows:

##### Definitions

**52A.** In this Chapter, unless the context otherwise indicates—

**‘accounting officer’** of, or in relation to, a political party means—

- (a) in the case of a party referred to in paragraph (a) or (b) of the definition of “political party” the person who has been appointed as such in terms of section 12(1)(c) of the Political Party Funding Act, 2018 (Act No. 18 of 2018); and
- (b) in the case of an independent candidate referred to in paragraph (c) of the definition of “political party” that candidate or a person duly authorised by the candidate concerned; and

**‘political party’** means—

- (a) any entity that accepts donations principally to support or oppose any registered political party or its candidates, in an election as defined in section 1 of the Electoral Act, 1998 (Act No. 73 of 1998);
- (b) a party with representation in the national or provincial legislatures; and
- (c) an independent candidate;”.

##### **Comment**

- **The Constitutional Court judgment had expressed the view that the definitions section of PAIA was not broad enough.**<sup>26</sup> The Amendment Bill provides for a new Chapter with two new definitions for ‘accounting officer’ and ‘political party’ respectively. The Committee may wish to consider the following:
  - Does the new definition section deal adequately with the Courts concern that independent candidates and certain political parties are not covered by PAIA because they are excluded from the definition of *‘private body’* in terms of the

<sup>25</sup> Ibid para [76]

<sup>26</sup> Ibid para [63]



Act.<sup>27</sup> It was the view of the Court this made PAIA “constitutionally defective” and “constitutionally deficient.”<sup>28</sup> Is this issue addressed adequately by the proposed amendments?

- Further clarification may be sought on the inclusion in the proposed new Chapter of the definition of ‘accounting officer’. This term is provided for in section 12(1)(c) of the Political Party Funding Act 6 of 2018.<sup>29</sup> However, this term is not used anywhere else in PAIA, for example the definitions section of PAIA refers to the ‘head’ of a private body. Is it appropriate to incorporate the regime provided for by the Political Party Funding Act 6 of 2018 directly into the legal framework established by PAIA?

The Bill also provides for the insertion of a new clause 52B as follows:

**Recording, preservation and disclosure of records on the private funding of political parties**

**52B. (1) The accounting officer of a political party must—**

**(a) create and keep records of—**

- (i) the identity of and the amounts of money paid by all persons or entities who donate more than R100 000 per financial year, as defined in section 1 of the Political Party Funding Act, 2018, to the party concerned;**
- (ii) any money lent to the political party whether on commercial terms or not;**
- (iii) any money paid on behalf of the political party for any expenses incurred directly or indirectly by that political party;**
- (iv) the provision of assets, services or facilities for the use or benefit of a political party whether on commercial terms or not; and**
- (v) any sponsorships provided to the political party, excluding services rendered personally by volunteers; and**

**(b) subject to subsection (2), on a quarterly basis make the records available on the social media platforms of the political party concerned.**

**(2) The accounting officer of a political party must ensure that the records referred to in subsection (1) are updated and made available on the social media platforms of the political party concerned at least two months prior to—**

- (a) an election of the National Assembly or the provincial legislature as regulated in terms of the Electoral Act, 1998 (Act No. 73 of 1998);**
- (b) municipal elections as regulated in terms of the Local Government: Municipal Electoral Act, 2000 (Act No. 27 of 2000); or**
- (c) a referendum as regulated in terms of the Referendum Act, 1983 (Act No. 108 of 1983).**

<sup>27</sup> Ibid para's [62], [63], [64] and [65]

<sup>28</sup> Ibid para [63] and [65]

<sup>29</sup> Section 12. Political party to account for income

12. (1) A political party must—

(c) appoint an office-bearer or official of that political party as its accounting officer;



(3) The records referred to in subsection (1) must be kept for a period of at least five years after the records concerned have been created.”

#### Comment

- The Constitutional Court raised concerns around the following ‘defects’ in the Act:
  - PAIA’s procedure for requesting information is laborious. **According to the court sections 18 and 53 of PAIA (which provide for the Form of requests for access to information from public and private bodies respectively) do not pass muster.**<sup>30</sup> In terms of these sections information on private funding would have to be requested from a particular political party for a specific purpose or as and when it is needed. It is a cumbersome process that many would not be able to follow.<sup>31</sup> PAIA does not impose any obligation to record information on the private funding of political parties and independent candidates but even if it did, provision was not made for reasonable access.<sup>32</sup> *(It appears from the judgment that reasonable access must be institutionalised.)*
  - PAIA’s procedure for requesting information requires a fee payment. Millions of voting South Africans are unemployed. And even those who are employed need every Rand they earn to meet their basic necessities. **Those who stand to benefit from these people’s vote or participation in the elections ought to be able to access a regulatory framework that facilitates the recordal, preservation and reasonable access to information.**<sup>33</sup> *(It appears from the judgment that no fee payment should be required.)*
  - PAIA also enables a request to be easily rejected on a variety of grounds. For example, a request for private funding information could be rejected because the information is likely to harm the commercial or financial interests of a private body. **So PAIA does not make political funding information easily accessible.**<sup>34</sup> *(It appears from the judgment that the information should be easily accessible.)*
- **Pointers within PAIA.** The Constitutional Court did express the view that there are ‘some good and strong pointers in PAIA itself as to what could possibly be done to properly record and make information on the private funding of political parties or independent candidates easily or reasonably accessible.’<sup>35</sup> The Court referred specifically to the following sections in PAIA, which refer to access to records of ‘private bodies’:
  - Section 52. Voluntary disclosure and automatic availability of certain records;<sup>36</sup> and

<sup>30</sup> Ibid para [66]

<sup>31</sup> Ibid para [66]

<sup>32</sup> Ibid para [66]

<sup>33</sup> Ibid para [72]

<sup>34</sup> Ibid para [70]

<sup>35</sup> Ibid para [71]

<sup>36</sup> Section 52. Voluntary disclosure and automatic availability of certain records

(1) The head of a private body may, on a voluntary and periodic basis, submit to the Minister a description of-

(a) the categories of records of the private body that are automatically available without a person having to request access in terms of this Act, including such categories available-

- (i) for inspection in terms of legislation other than this Act;
- (ii) for purchase or copying from the private body; and
- (iii) from the private body free of charge; and



- Section 70. Mandatory disclosure in public interest. The public interest override provides for mandatory disclosures of information irrespective of any of the listed grounds for refusals.<sup>37</sup> (However, it should be noted that the override provisions in PAIA have been criticised for being too narrow to rely on to access information. Mandatory disclosures can only occur in instances where the record would reveal evidence of illicit acts and/or serious public safety or environmental risk. Critics of this section contend that these requirements essentially render the override provisions ineffective due to the cost implications and difficulties associated with proving such an allegation.)
- **Issues for consideration.** In respect of the proposed new clause 52B the following may be considered:
  - The reference in clause 52B(1) of the Amendment Bill to private funding ‘records’ which must ‘created’ and ‘kept’ reflect exactly the ‘*donations in kind*’ provided for in section 1 of the Political Party Funding Act 6 of 2018. (In terms of this Act “donation in kind”— (a) includes— (i) any money lent to the political party other than on commercial terms; (ii) any money paid on behalf of the political party for any expenses incurred directly or indirectly by that political party; (iii) the provision of assets, services or facilities for the use or benefit of a political party other than on commercial terms; or (iv) a sponsorship provided to the political party; but (b) does not include services rendered personally by a volunteer.) It may be noted, however, that unlike the section in the Political Party Funding Act the amendment to PAIA provides for a ‘closed list’ of records.
  - A direct reference in section 52B(1)(a)(i) of the Bill to the Political Party Funding Act<sup>38</sup> which is set out as follows:

‘(1) The accounting officer of a political party must— (a) create and keep records of— (i) the identity of and the amounts of money paid by all persons or entities who donate more than R100 000 per financial year, as defined in section 1 of the Political Party Funding Act, 2018, to the party concerned.’

However, the reference to the ‘*prescribed threshold*’ (in terms of the Act the threshold referred to is R100 000 within a financial year) is in fact set out in section 9(1)(a) of the Political Party Funding Act. (This section must be cross-referenced with Regulation 9 in Schedule 2 of the Act.)

(b) how to obtain access to such records

<sup>37</sup> Section 70 Mandatory disclosure in public interest

Despite any other provision of this Chapter, the head of a private body must grant a request for access to a record of the body contemplated in section 63 (1)(Mandatory protection of privacy of third party who is natural person), 64 (1) (Mandatory protection of commercial information of third party), 65 (Mandatory protection of certain confidential information of third party), 66 (a) or (b) (Mandatory protection of safety of individuals, and protection of Property), 67 (Mandatory protection of records privileged from production in legal Proceedings), 68 (1) (Commercial information of private body) or 69 (1) or (2) Mandatory protection of research information of third party, and protection of research information of private body) if-

(a) the disclosure of the record would reveal evidence of-

- (i) a substantial contravention of, or failure to comply with, the law; or
- (ii) imminent and serious public safety or environmental risk; and

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

<sup>38</sup> The Political Party Funding Act has been signed into law by President Ramaphosa, but it has not taken effect in practice yet because the Independent Electoral Commission (IEC) needs to draft the required regulations after a process of public participation.



- The issue of capping the amount at R100 000. The Bill provides for the ‘*creating and keeping of records of the identity of and the amounts of money paid by all persons or entities who donate more than R100 000 per financial year.*’ (This is in line with the ‘prescribed threshold’ currently set out in the Political Party Funding Act.) The Committee may wish to note that:
  - The Constitutional Court stated that as a general rule, no information on private funding may be destroyed at the discretion of the holder of that information.<sup>39</sup> However, Parliament would still have discretion to decide whether access to information on negligible contributions, for example a R10 donation, may be excluded. The Court acknowledged that it is arguably an incredibly tedious exercise to have to record and disclose every quantifiable assistance or support, given to a political party or independent candidate, however negligible.<sup>40</sup> Other democracies single out for attention “large contributions and expenditures” and “most generous supporters”.<sup>41</sup> However, the Court was clear that the matter was best left to Parliament to reflect and decide on.
  - The Committee may also be interested in the possibility of multiple donations intended to find a way around the threshold set in line with the Political Party Funding Act 6 of 2018.
- The Bill proposes in clause 52B(1)(b) that the records must be made available by the ‘*accounting officer*’ on ‘*a quarterly basis*’ on the ‘**social media platforms**’ of the political party concerned. Furthermore, in clause 52B(2) these records must be updated and be made available by the accounting officer on these social media platforms two months before the election of the National Assembly or provincial legislature; municipal elections; or a referendum. The Committee may be interested to note that:
  - In respect of disclosure and publication, section 9 of the Political Party Funding Act provides that a political party must ‘disclose’ to the Independent Electoral Commission (IEC) all donations received (above the threshold of R100 000 within a financial year)<sup>42</sup> and in the ‘prescribed form and manner’. The IEC must then ‘publish’ the donations disclosed to it on a quarterly basis in the ‘prescribed form and manner.’ Section 9(4) of the Act provides that: “**Nothing in this section detracts from rights given effect to by the Promotion of Access to Information Act 2 of 2000.**”
  - The ‘prescribed form and manner’ for disclosure and publication is set out in the Proposed (Draft) Regulations to the Act. (*It is important to note that the Proposed (Draft) Regulations still need to be finalised, following comments received during a process of public hearings facilitated by the IEC.*) However, currently the Draft Regulations provide that:

<sup>39</sup> Ibid para [75]

<sup>40</sup> Ibid para [75]

<sup>41</sup> Ibid para [75]

<sup>42</sup> The prescribed amount is set out in Regulation 9 of Schedule 2 to the Political Party Funding Act.



**Regulation 8: Disclosure of Donations received by Political Parties in terms of Section 9(1)**

(5) A record of all disclosures made as provided for in this Regulation 8 shall be kept by the Commission and shall be available for inspection by any Person during normal business hours at the office of the Commission. *(It may be noted that some of the comments on the Draft Regulations expressed concern about the inaccessibility of the record of party disclosures and the impracticality for interested persons to have to physically inspect the record at IEC offices (particularly as this is only available during ordinary business hours)).*<sup>43</sup>

**Regulation 9: Disclosure of Donations made by Juristic Persons in terms of Section 9 (2) of the Act.**

(4) The Commission shall keep a record of all disclosures made as provided for in this Regulation 9 which shall be available for inspection by any Person during normal business hours at the office of the Commission.

**Regulation 10. Publication of Donations in terms of Section 9(3) of the Act.**

The Commission must publish a list of all Donations made and received as contemplated in Section 9(1) and 9(2) of the Act in the Government Gazette on a quarterly basis in each Financial Year. *(It is unclear, however, how accessible the Government Gazette is to the average South African citizen.)*

- According to the IEC among the activities which will now be prioritised by the Commission include: The development and launch of an online system of disclosure for donors and recipients;<sup>44</sup>
- o The Committee may wish to consider in respect of the proposed amendments:
  - (i) Whether the use of 'social media platforms' is a feasible option?
  - (ii) Whether there is a need for a definition of social media platforms?
  - (iii) What was the basis for the decision to use social media as a platform for 'publication' of these 'records (as opposed to for example the party website)?
  - (iv) Whether the decision to use 'social media platforms' was based on comparative examples from other jurisdictions;
  - (v) The extent and scope of the disclosure, given (i) the careful balance needed between transparency and safeguarding the rights/personal information of third parties who make donations; and (ii) whether there may be any implications for the 'publication' of these records via social media platforms in respect of the provisions of the Protection of Personal Information Act 4 of 2013;

<sup>43</sup>IEC, Submissions on the Draft Regulations on Political Party Funding (Accessed at <http://www.elections.org.za/content/Parties/Submissions-on-the-Draft-Regulations-on-Political-Party-Funding/>)

<sup>44</sup>IEC News, Conclusion of public hearings into Political Party Funding Act Regulations (Accessed at <http://www.elections.org.za/content/About-Us/News/Conclusion-of-public-hearings-into-Political-Party-Funding-Act-Regulations/>)



- (vi) Whether this is aligned with section 52 of PAIA which provides for<sup>45</sup> - *Voluntary disclosure and automatic availability of certain records* - for instance, it should be noted that this section only applies in respect of a 'private body' and through submission to the Justice Minister.
- (vii) Whether it may be a concern that no guidance is provided to ensure the records are made available in a readable, accessible and standardised format. A hard copy of a financial report in PDF format is different from a database with all financial records available for download. For disclosure of information to make sense and inform citizens it must be organised in an intelligible and user friendly way.<sup>46</sup>
  - Clause 52B(3) of the Bill provides that the records referred to must be kept for a period of at least five years. Is this in line with the judgment of the Constitutional Court which stated that "*as a general rule, no information on private funding may be destroyed at the discretion of the holder of that information*"?<sup>47</sup>
  - The Committee may be aware that there is currently no legislative or policy framework to regulate intra-party political funding.
- **Consultation.** The Bill notes that the Department of Justice and Constitutional Development reportedly circulated the Bill in order to solicit the comments of interested parties. The Committee may be interested to know; (i) to which 'interested parties' the Bill was circulated (for example, did this include the Information Regulator); (ii) whether any comments were received; and (iii) whether any amendments were made in response to these comments.

## 5. SOURCES

IEC, Submissions on the Draft Regulations on Political Party Funding (Accessed at <http://www.elections.org.za/content/Parties/Submissions-on-the-Draft-Regulations-on-Political-Party-Funding/>)

IEC News, Conclusion of public hearings into Political Party Funding Act Regulations (Accessed at <http://www.elections.org.za/content/About-Us/News/Conclusion-of-public-hearings-into-Political-Party-Funding-Act-Regulations/>)

My Vote Counts NPC v Minister of Justice and Correctional Services and Another 2018 (5) SA 380 (CC)

<sup>45</sup> Section 52. Voluntary disclosure and automatic availability of certain records

(1) The head of a private body may, on a voluntary and periodic basis, submit to the Minister a description of-

(a) the categories of records of the private body that are automatically available without a person having to request access in terms of this Act, including such categories available-

(i) for inspection in terms of legislation other than this Act;

(ii) for purchase or copying from the private body; and

(iii) from the private body free of charge; and

(b) how to obtain access to such records

<sup>46</sup> OECD (2016), Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture, OECD Public Governance Reviews, OECD Publishing, Paris, page 72 (Accessed at [https://read.oecd-ilibrary.org/governance/financing-democracy\\_9789264249455-en#](https://read.oecd-ilibrary.org/governance/financing-democracy_9789264249455-en#))

<sup>47</sup> My Vote Counts NPC v Minister of Justice and Correctional Services(CCT249/17) [2018] ZACC 17; 2018 (8) BCLR 893 (CC); 2018 (5) SA 380 (CC) (21 June 2018), para [75] (Accessed at <http://saflii.org/za/cases/ZAWCHC/2017/105.html>)



My Vote Counts, Regulating Access to Political Funding Information (September 2017)  
(Accessed at <http://www.myvotecounts.org.za/wp-content/uploads/2017/09/The-right-to-know.pdf>)

OECD (2016), Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture, OECD Public Governance Reviews, OECD Publishing, Paris, page 72 (Accessed at [https://read.oecd-ilibrary.org/governance/financing-democracy\\_9789264249455-en#](https://read.oecd-ilibrary.org/governance/financing-democracy_9789264249455-en#))

Promotion of Access to Information Act 2 of 2000

Political Party Funding Act 6 of 2018

Tham JC, My Vote Counts, International Standards and Transparency of Political Party Funding: Does the State Have a Duty to Provide for Continuous and Systematic Disclosure? (Accessed at <https://constitutionalcourtreview.co.za/wp-content/uploads/2018/10/4-My-Vote-Counts-International-Standards-and-Transparency-CCR-VIII-2016-3.pdf>)