

Columbia University Press

*Publishers Since 1893*

New York Chichester, West Sussex

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Library of Congress Cataloging-in-Publication Data

The right to know : transparency for an open world /  
edited by Ann Florini.

p. cm. — (Initiative for policy dialogue at Columbia)

Includes bibliographical references and index.

ISBN 978-0-231-14158-1 (cloth : alk. paper)

1. Transparency in government.

2. Freedom of information. I. Florini, Ann.

II. Title. III. Series.

JC598.R547 2007

352.8'8—dc22

2006036068



Columbia University Press books are printed  
on permanent and durable acid-free paper.

This book was printed on paper with  
recycled content.

Printed in the United States of America

c 10 9 8 7 6 5 4 3 2 1

References to Internet Web sites (URLs) were accurate at  
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## Chapter Seven

# Prizing Open the Profit-Making World

Richard Calland

Transparency is now a generally accepted norm for the democratic state, understood to be essential for democracy, of significant instrumental value in enhancing efficiency in public administration, and crucial to the effective exercise of other rights.<sup>1</sup> There has been a huge amount of activity and progress in recent years, with government action matching civil society activism to promote the right to know. More than fifty laws creating some sort of legal right to access public information have been passed since 1995.<sup>2</sup>

This focus on the public sector leaves out large, and growing, amounts of relevant and important information held by private entities. For while the case for transparency in the public sphere has been successfully made and in many places implemented, public power has seeped into a new range of institutions and bodies. Because of the massive trend toward privatization, goods and services once provided by the state, or at least considered to be state responsibilities, are now provided by private firms under various arrangements with governments. As Roberts notes, in the last quarter of the twentieth century “authority has flowed out of the now-familiar bureaucracy

and into a new array of quasi-governmental and private bodies. The relocation of authority has provoked another doctrinal crisis: the old system of administrative controls, built to suit a world in which public power was located within government departments and agencies, no longer seems to fit contemporary realities.”<sup>3</sup> Like archaeologists who finally locate the buried tomb of Egyptian King Rameses II but, when they prize open the door, find that the riches within have been long since looted, advocates for government transparency will now find that much public information has been spirited away into the hands of the private sector.

In addition, there is growing awareness that the public effects of many private sector activities (e.g., environmental effects) warrant public scrutiny, and disclosure is increasingly seen as a potentially effective regulatory tool. Many corporations have begun to operate voluntary disclosure regimes in response to civil society demands and the “corporate social responsibility” (CSR) context. Yet disclosure of private-sector information is haphazard at best, with little consensus on what business should be required to disclose. This presents a significant challenge to the advocates for transparency, from both an instrumental and a philosophical, human rights–based perspective.

These two issues—privatization and the trend toward disclosure of environmental, labor, and other information in the CSR context—raise powerful questions. Should corporations that are playing quasi-public roles and providing public goods and services be held to the same standards of public transparency and accountability as their public sector brethren? Does voluntary disclosure of environmental and other social impact information adequately fill the existing regulatory gap, or should such disclosures be standardized and made mandatory? Who decides, and on what basis?

This chapter addresses these questions in turn. It lays out the history of and reasoning behind corporate secrecy and describes the trends that have occasionally pushed for greater openness. It then takes in turn the concerns raised by privatization and by civil society demands for greater corporate social responsibility. It explores the rapidly changing legal regimes concerning corporate transparency in many parts of the world, with special attention to the case of South Africa, one of the few countries that specifically extends its right-to-know law to cover the private sector.

## The (Old) Case for Corporate Secrecy and the Shift Toward Disclosure

Corporations are bureaucracies, and as such are prone to adopt a culture of secrecy, as often a matter of subconscious impulse as deliberate strategy or policy. As Max Weber argued in his classic essay on bureaucracy, a preoccupation with secrecy is an inherent characteristic. As Weber also notes, secrecy has tended to be regarded by managers and directors as a major power resource in maintaining a competitive advantage over rival organizations.<sup>4</sup> As more farsighted corporations have come to recognize, however, this may be a counterproductive approach. While the control of information may be the *sine qua non* of twentieth-century corporations, as J. K. Galbraith asserted, the modern view is more likely to see disclosure as good for *competition* rather than for *the competition*. Secrecy is the friend of unfair or uneven market access; in contrast, openness supports the search for fair and competitive markets.

The old case for corporate secrecy is built mainly on the dated model for the profit-making world generally. The private sector makes profits, along the way creating jobs and wealth as well as providing goods and services people want, and governments regulate corporate activities to protect workers, communities, shareholders, and the environment. Corporate law, at least in the Anglo-Saxon world, explicitly forbids corporations to pursue anything else but their own self-interest: “Corporate social responsibility is illegal—at least when it is genuine.”<sup>5</sup> But the model is breaking down. Not only was it never very effective at reining in corporations, as a long line of corporate scandals, most recently at Enron and Worldcom, shows, but it is even less effective in the current era of new globalization, where corporations can “shop” for the least onerous regulations and many governments lack the capacity to enforce regulation.

Disclosure in the private sector raises many of the same questions as it does in the public sector. To further the debate on for-profit transparency, it is important to recognize the legitimate concerns of business and the origins of its traditional preference for secrecy over openness. There are also reasonable concerns about cost and the potential damage to reputation that disclosure might cause. And

it is important to recognize that secrecy may serve not only the narrow self-interest of the corporation but also, indirectly perhaps, the interests of society. Some degree of corporate secrecy is necessary to protect concerns touching the general interest: incentives for innovation, the functioning of the market, the integrity of the decision-making process, and personal privacy.<sup>6</sup>

Mary Graham, in her book *Democracy by Disclosure*, characterizes the case for secrecy—or the conflict between competing values and interests, as she puts it—in a similar way, but with important sense of nuance. As with public/government information, there is a spectrum. Some information should clearly be withheld: releasing information about a planned police raid on an organized crime syndicate beforehand would incontrovertibly not be in the public interest. Equally, at the other end of the spectrum, many pieces of information clearly should be provided because no possible or conceivable harm to the public interest could be contemplated.

Thus, the real debate, as with public information, is in the middle ground—the gray areas of information. Corporations have long considered information of this sort as proprietary: “This is a private company, therefore, ipso facto, this information is mine/ours and not yours. I have no duty to disclose it.” This attitude can be traced back to the history of corporations and later developments in jurisprudence that encouraged a culture of secrecy by “humanizing” the corporation.

Early corporations of the commercial sort—such as the Dutch East India Company—were formed under legal frameworks by state governments to undertake tasks that appeared too risky or too expensive for individuals or governments. Corporations were therefore created as an extension of the government, chartered by the monarch (and later the state) to “promote the general welfare.” Corporations were given privileges such as limited liability because their sole purpose was to improve civic life through such enterprises as building highways and postal service. In short, the public, through its elected representatives in government, created corporations and granted them special legal status. Limited liability proved to be especially important; the role of the for-profit world expanded drastically as a result.<sup>7</sup>

Subsequently, not only was the corporation’s original purpose abandoned, but the constraints that once operated on these entities were forsaken as well when they won “human rights” in a U.S.

Supreme Court ruling in 1886.<sup>8</sup> In contrast, government has never been afforded the same “legal personality.” Making the legal case against governmental secrecy has, therefore, been far easier. In the case of public access to information, laws have sought to deal with the question of where to place the “transparency line” by first identifying categories of exempt records and second, in the better laws, balancing them with what is known as a “public interest override provision.” Public interest overrides declare that if the harm that would be done to the public interest by withholding the information is greater than the harm contemplated by the exemption that justifies withholding the information, then the information should be disclosed.

Conceptually and legally, a similar approach could apply to corporations. Access laws that cover state information are subject to exemptions that capture the public interest in keeping some things secret. If a law were to cover private entities in similar fashion (such as the South African access to information [ATI] law, which is discussed in more detail below), it too could contain exemptions to public disclosure. There are legitimate reasons for keeping some information secret, and this need can be articulated and protected in law. But this is not because the company is a privately owned entity, but because there is a public interest to be protected in permitting the withholding of information.

Because laws dealing with access to information have not generally been extended to cover private entities (see below), there is no guidance as to how to deal with the range of information that they hold and control. But this does not mean that there is no spectrum. Few, if any, would argue against the most obvious legitimate secret of a corporation, namely, its trade secrets. Should Coca-Cola be required to disclose its original recipe? No. To do so would be to totally undermine the impetus and incentive for entrepreneurial endeavor and for the necessary investments in capital that are required to develop new products. But as Graham points out, trade secrets represent a relatively small cluster of data at one end of the spectrum.<sup>9</sup> Personal privacy would occupy a similar location: no one could sensibly or legitimately suggest that the personal health data of an individual employee, his or her HIV status for example, should be disclosed publicly. At the other end, Graham asserts, lies another cluster of data that lies indisputably in the public domain—

basic financial information required by federal and state laws and health, safety, and environmental data required under traditional regulatory regimes.

This reflects the major shift toward transparency that has stealthily but steadily occurred over the past 100 years. Invariably these positive developments have been provoked by a crisis or disaster, and in response to greater understanding of risks to the public. The 1929 stock market crash led to a very detailed program of structured disclosure, in order to reduce financial risks to investors. After the Bhopal disaster in 1984 in India, the U.S. Congress required U.S. manufacturers to begin revealing the amounts of dangerous chemicals they released into the environment. The Toxics Release Inventory (TRI), supported by the Environmental Protection Agency (EPA), represents one of the most striking and now widely imitated examples of government regulation and private sector disclosure (see the chapter by Ramkumar and Petkova in this volume).

The Enron collapse in 2001 has led to a drastic overhaul and strengthening of disclosure requirements by the accounting sector, specifically the far-reaching Sarbanes-Oxley legislation in the United States.<sup>10</sup> Nutritional labeling, airline safety rankings, and reporting of workplace hazards are further examples. As Graham says, “Stated simply, *such strategies employ government authority to require the standardized disclosure of factual information from identified businesses or other organizations about products or practices to reduce risks to the public*” (her emphasis).<sup>11</sup>

There are four observations to be made in response to this background and to this proposition. First, valuable though these regulatory trends are, their piecemeal nature should not be ignored. They do not yet add up to a comprehensive system of transparency in relation to the for-profit world. Second, although the environmental protection disclosure regime is often described, at least in the United States, as a “right to know” system, the derivative history of these laws and regulations means that their philosophical grounding is at best uncertain. In other words, they have come about not because a new social norm, premised on the notion of a human right of access to information, has emerged and prevailed, but because corporations have been compelled to make limited disclosures in response to enunciated risks. Third, this sort of regulatory environment exists and is most likely to succeed in developed societies with relatively

strong state authority and capacity. What about less developed societies and those with very weak state authority and capacity, where often for-profits, especially transnational corporations, exert huge influence over policy, markets, and social and economic conditions?

But there is no broad-based consensus for determining what corporations should disclose from the middle-ground, gray area of the spectrum identified above. This is a pivotal dispute. Are corporations “juristic persons” with “human rights” as the jurisprudential trend has held, with no responsibility to the public interest and with the predominant purpose of maximizing value for their shareholders? Or are corporations social actors, with quasi-governmental responsibilities to disclose information in the public interest? It is an irony of the logic of the argument in favor of transparency in the for-profit sector that in order to protect human dignity in wider society, it may be necessary to “dehumanize” corporations. This is to ensure that when balancing privacy and proprietary ownership with duties to disclose, we do not apply the same approach as we would with a human being. Corporations are not human beings. They have legitimate interests that deserve to be protected, including a responsibility to withhold information in some cases, but they are not *personal* interests—human rights are for people and not bureaucracies, whether governmental or for-profit. So it is to the relationship between people and for-profit corporations that this chapter now turns.

## **The (New) Arguments on Corporate Transparency**

### ***The Impact of Privatization on the Right of Access to Information***

While privatization may take many forms, the philosophy that underpins it has a uniform quality: to remove from direct state control public services and to place them, to some degree, within private control or ownership. Throughout the world, privatization and related, variant policies such as the “contracting out” of public services and so-called “public-private partnerships” (PPPs) have radically altered the landscape of public power.

Local public services, such as waste collection, are now in the hands of private contractors. Major public works and systems are elaborate partnerships between government and large companies:

food services, repossession agencies, drug treatment facilities, road and rail maintenance, personnel record keeping. As has been noted, a “dizzying array of governmental agencies has engaged private entrepreneurs to perform government functions on a for-profit basis.”<sup>12</sup> You name it, somewhere in the world it will have been privatized through contracting out. Even some prisons have been placed in the hands of the private sector. The notorious conduct of employees of private security contractors in the Abu Ghraib prison in Iraq in 2004 provides a potent example of both the range and the dangers of contracting out state functions. Private contractors working side by side with military intelligence officers were responsible for the abuse of prisoners by military police at Abu Ghraib, according to a fifty-three-page report prepared at the direction of the senior U.S. commander in Iraq, Maj. Gen. Ricardo Sanchez, and obtained by Seymour Hersh of *The New Yorker* magazine. The report, written by Maj. Gen. Antonio Taguba, found that there were numerous instances of “sadistic, blatant, and wanton criminal abuses” at Abu Ghraib, and recommended disciplinary action against two CACI International employees, according to the article. The use of private contractors in this role is called “insanity” by former CIA officer Robert Baer, who says, “These are rank amateurs, and there is no legally binding law on these guys as far as I could tell. Why did they let them in the prison?”<sup>13</sup>

Of all privatizations, water delivery has had the biggest impact on people’s ordinary lives and has provoked the most controversy. Because water is so fundamental, some minimal level of access is a basic human right, but rules of privatizations to date have often removed accountability. In many cases, the privatization or contracting out provides the corporation with a monopoly. The user has no exit option. To him or her, the ownership of the service provider is immaterial; central concerns are access and cost. What matters to the individual is whether they and their family can access clean water and be able to afford it. From the green rolling mountains and valleys of the Cochabamba province in Bolivia to the dry, poverty-stricken townships of South Africa, citizens are resisting the increased costs of water that have sometimes followed fast on the heels of privatization.

Transparency in the operation of the service becomes even more important, potentially the main breakwater against abuse of the monopoly and protection of the rights of the users, as a South African case involving water privatization in Johannesburg, South Africa’s largest

city, attests. In 2000, the City of Johannesburg decided to privatize its water supplies and put in place a complicated train of corporations that ended with the giant transnational corporation, Suez.

This sort of legal arrangement is common in the sphere of public service privatization, including both the presence of a major multinational (Suez) and an attempt by the public authority to retain some element of control through its share ownership and the management contractual arrangement. An antiprivatization activist requested an array of records from the various entities, including items such as the bid for the management contract, the report of the evaluation committee on the winning bidder, evaluations by two entities established on behalf of the city, the water and wastewater master plans, and the minutes of various meetings. The requests were refused.

The applicant's evidence relies heavily on the history of Suez as a basis for the exercise of the right to access information, specifically with regard to its record of overcharging the citizens of Paris and Buenos Aires. Johannesburg appears to be heading in a similar direction. The latest tariff rates released by Johannesburg Water show that low-end users (i.e., poor communities) face a 30 percent tariff increase, versus a 10 percent increase for high-end users (i.e., rich communities and corporations), which is far above inflation. The applicant's founding affidavit concludes that in this context:

the residents of Johannesburg cannot, if they are dissatisfied with the provision of water and wastewater services, democratically remove those who are responsible. The consequences of outsourcing the provision of these critical municipal services . . . is that this company will continue to perform vital public functions, for as long as the Management Agreement endures. It follows that other means must be found and fostered to ensure that [they] are in some measure accountable to the residents of Johannesburg. That will be achieved by ensuring that there is transparency . . . policies related to the disconnection of water services, including policies regarding pre-paid meters, directly implicate the right to water [contained within the South African constitution]. . . . Access will, furthermore, promote the ability of local communities to properly participate in the setting of key performance indicators and targets in relation to the provision of water and wastewater services.

## ***Civil Society Activism: The Demand for Change and Corporate Social Responsibility***

As *The Economist* noted in 2001, “In the next society, the biggest challenge for the large company—especially the multilateral—may be its social legitimacy, its values, its missions, its vision.” In recent years, there has been increasing civil society activism campaigning for transparency in the corporate sector, often directed to ensure that transparency occupies a pivotal place in the development of the understanding and practice of CSR. Multilateral institutions, and some corporations, have responded positively. The UN Global Compact is an often-cited example of the new, multilateral, macro approach to corporate social responsibility. Principle One of the UN Global Compact states that “Businesses should support and respect the protection of internationally proclaimed human rights.” A tenth principle on anticorruption practice, which reads “Businesses should work against corruption in all its forms, including extortion and bribery,” was adopted in June 2004.

On August 13, 2003, after a four-year consultative and drafting process involving the private sector, academic institutions, human rights nongovernmental organizations, and intergovernmental bodies and states, the UN Sub-Commission on the Promotion of Human Rights adopted resolution 2003/16 (the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights).<sup>14</sup>

The Norms, together with their commentary, form the major product of the Sub-Commission’s Working Group on the Working Methods and Activities of Transnational Corporations. The Norms help to clarify the assertion that business enterprises have human rights obligations. Yet curiously, the draft “Principles Relating to the Human Rights Conduct of Companies” fails to mention either transparency or any right to access information.<sup>15</sup> This shows that although thinking on the multilateral response to the power of the for-profit sector is growing, transparency is not yet a core part of the agenda.

Civil society, however, is further along the conceptual road toward transparency. Pressure from stakeholders for accountability on social and environmental issues is a major driver of companies’ self-interested efforts to be good corporate citizens. Government,

customers, community groups, or nongovernmental organizations (NGOs) can significantly impede a business plan if a company is not responsive. That is why citizenship reports are littered with terms like “license to operate,” “license to grow,” and “license to innovate.” Being good corporate citizens gives companies a license to be successful. The report that accompanies the draft “Principles Relating to the Human Rights Conduct of Companies” refers to the voluntary approach adopted by some companies, often spurred by NGO pressure. The footnote to the section (note 25) refers to around fifty such codes, the majority of which are NGO-inspired. An excellent example of NGO activism on transparency is the work that has been done in recent years by the Publish-What-You-Pay coalition of more than 190 northern and southern NGOs. The coalition is calling for laws to require extractive companies to disclose their payments to all governments. As Global Witness, a key member, argues on its Web site, “This crucial first step would help citizens in resource-rich-but-poor countries to hold their governments to account over the management of revenues. In addition, by a level playing field through regulation, companies’ reputational risks will be mitigated and they will be protected from the threat of having contracts cancelled by corrupt governments.”<sup>16</sup>

The Global Witness report “Time for Transparency—Coming Clean on Oil, Mining and Gas Revenues” starkly illustrates how secrecy provides a perfect cloak to the unscrupulous, on both the host government and the corporations’ side. Examining the cases of Kazakhstan, Congo Brazzaville, Angola, Equatorial Guinea, and Nauru, the report asserts that “In these countries, governments do not provide even basic information about their revenues from natural resources. Nor do oil, mining and gas companies publish any information about payments made to governments.”<sup>17</sup> A theater of the absurd plays out under cover of the opacity: Kazakhstan President Nazarbayev receives US\$78 million in kickbacks from Chevron and Mobil (as they then were). In Congo Brazzaville, Elf Aquitaine (now Total) treated the Congo as its colony, buying off the ruling elite, yet according to the IMF did not pay a single penny into the government’s coffers. In Angola, as much as US\$1 billion per year of the country’s oil revenues—about a quarter of the yearly income—has gone unaccounted for since 1996. In the case of Equatorial Guinea, recent investigations show that major U.S. oil companies simply

paid revenues directly into the personal account of the president at Riggs Bank in downtown Washington, DC in return for mining concessions. Finally, “the opaque and unaccountable management of phosphate reserves has transformed Nauru from the richest nation in the world (per capita) to a bankrupt wasteland.”

Beyond the anticorruption initiatives, the international community has begun to see disclosure as a useful tool for dealing with what social scientists call externalities—the often negative but unintended social and environmental impacts of corporate behavior. There has been a substantial increase in corporate reporting on nonfinancial performance. Two best practice guidelines have emerged. One, the Global Reporting Initiative (GRI), established in 1997, provides guidance on the substantive issues to be included within a sustainability report, while the second, AccountAbility1000 (AA1000),<sup>18</sup> launched in 1999, provides a framework to guide the establishment of an inclusive engagement process. More than 270 companies and institutions are now using the GRI guidelines.<sup>19</sup>

More recently, the UK government initiated a new forum called the Extractive Industries Transparency Initiative (EITI) to promote action by governments and companies. The principal weakness of the EITI, according to its critics, is that it relies entirely on voluntary reporting. The Publish-What-You-Pay coalition of NGOs continues to call for mandatory reporting based on common norms and standards across home and host countries, and among the companies themselves. In 2004, the London-based NGO Save the Children: UK, a leading member of the Publish-What-You-Pay coalition, developed a set of indicators that attempt to measure transparency across all three actors.<sup>20</sup> By investigating information from each, a triangulation exercise can be performed to help verify information relating to revenue streams in particular. The intention is to assess levels of opacity, identify leaders and laggards, diagnose solutions, and set new standards of good practice. Phase I having conceptualized and piloted the Measuring Transparency Index, phase II of the project tested the transparency of companies in the oil and gas industries and the transparency standards and requirements set by home countries—that is to say, (generally First World or wealthier) countries where oil and gas companies are based.

The project coincides with the biggest reform of accounting standards in more than twenty-five years, following the Enron and

Anderson scandals, prompting significant reviews and reforms in other financial regulations, such as securities. Category A of the index measures transparency in relation to revenue payments, category B measures general corporate reporting (“supportive disclosure”), and category C measures policy, management, and performance of Access to Information laws. The index is two-dimensional, permitting a more diagnostic reading of the data based on an analysis of policy, management systems, and disclosure performance. Twenty-five companies with operations in six countries were assessed, with the Canadian companies Talisman and TransAtlantic Petroleum topping the table, and PetroChina and Petronas, the national petroleum corporations of China and Malaysia respectively, propping it up.

From the index and the data collected, the report makes clear recommendations for reform and lays out an extensive agenda for civil society advocacy. It concludes that, overall, transparency in the oil and gas sector is poor—23 of the 25 companies score less than 30 percent—showing the need for stronger measures, and that home government regulation of company reporting is vital as the “key driver” for disclosure performance. The three Canadian companies included in the study rank first (Talisman), second (TransAtlantic Petroleum), and fifth (Nexen, Inc.). As the report notes, “The strong results for Canadian companies indicate the role that home government regulations can play in increasing transparency in host countries. They demonstrate that at a global level, home government regulation is an efficient way to improve transparency.”<sup>21</sup> In this context, it is noteworthy that in the sister report on home government transparency regulation of companies, Canada ranked first of the ten countries covered and was the only one to score more than 50 percent (58.1), thus inviting the conclusion that there is a compelling causal link between corporate transparency and mandatory regulation by government.

### ***Voluntary Corporate Transparency***

Nonetheless, some corporations are coming to believe that transparency is in their interests. Talisman’s voluntary commitment to openness is evident in its comprehensive and extensive approach to both the scope and the manner and method of its transparency policy,

ensuring, for example, that the disclosed information is presented in clear tables. Open—and accessible—disclosure promotes business confidence, among customers, shareholders, regulators, and investors.<sup>22</sup> It instills a sense of accountability throughout the company, from the most junior employee to the biggest shareholder. Organizations work best when their stakeholders—internal and external—know what is going on. Good communication requires a good information flow. An illuminating example is the British nuclear waste company Nirex, which provides advice on waste treatment and packaging relating to the disposal of nuclear waste—an important and controversial public health and safety issue. Mirroring government-led shifts toward openness, Nirex's own epiphany arose from a commercial and public relations disaster. In the mid-1990s the company aimed to get government permission to investigate whether the underground rock formations near Sellafield—a very beautiful part of the English countryside—were suitable for the safe disposal of nuclear waste. Local communities did not believe that the purpose was exploratory; they believed that Nirex had already made up its mind. In turn, the company was unable to persuade them otherwise and barely made the effort to do so. Just before the 1997 British General Election, the government refused the company's application.

Nirex realized that it was perceived as closed and secretive: it was slow to respond to public requests for information, it communicated badly, and it was unwilling to recognize the importance of social issues. It was seen as too close to the nuclear industry, as part of the problem and not the solution. From this analysis came the revelation that trust was the company's core business, and openness was identified as the means of achieving it. A transparency policy was drawn up, with five specific commitments: fostering openness as a core value, listening as well as talking to people who have an interest, making information readily available under a Publications Policy and responding to requests under a Code of Practice on Access to Information, making key decisions in a way that allows them to be traced so people can see and understand how they were arrived at, and enabling people to have access to and influence on [its] future program.<sup>23</sup> Moreover, the board of directors appointed a Transparency Panel chaired by a leading human rights activist, Jenny Watson, to oversee the operation of the policy and to scrutinize and assess the extent to which Nirex is meeting its five commitments.<sup>24</sup>

The notion of independent, external scrutiny is probably essential for the credibility of a voluntary initiative; otherwise, it may well be regarded as a mere public relations exercise. Where such voluntary initiatives exist and are complied with, they represent a very valuable contribution toward the necessary social consensus that must be found if transparency as a value is to flourish in the private sector. Leadership by champions such as Nirex will be very important in shifting the attitudes of CEOs and their boards. It will also allow the sector to lead the debate and to formulate an approach that takes its legitimate needs for secrecy into account. Nonetheless, there will always be policy advocates who are skeptical of the voluntary effort; they will argue that nothing short of a full legal, mandatory obligation will suffice. But how blunt or sharp can the law be?

## **The Challenge to Freedom of Information Regimes: The Governmental Response**

### ***The Legislative Response Around the World***

Historically, freedom of information acts as they were originally generally termed provided for a “vertical” right of access—that is to say, from the citizens “upward” to the state. The earliest ATI laws tended to only cover “pure” state information, that is to say, the information to which the requester was entitled access was defined narrowly to limit requests to information owned, held, and controlled by the government.

The United States has one of the oldest freedom of information laws and arguably the most developed and effective system for facilitating citizen access to public documents, although it has been undermined by chronic delays in handling requests. The country also has extensive experience of a diverse range of privatization efforts. Its federal structure means that there have been an equally wide range of attempts to deal with the policy consequences, which provides some useful lessons. During the first main wave of privatization in the United States, little attention was paid to the freedom of information problems that might arise.<sup>25</sup> But later studies indicate an obvious difficulty: “Professors Matthew Bunker and Charles Davis have pointed out that by creating, maintaining, and controlling previously public records,

private companies are controlling access, and that they are often ‘at odds with the very purpose of public records laws.’”

As the media has argued, “once-public information has disappeared behind the curtain of corporate privacy”;<sup>26</sup> Bunker and Davis note that corporations performing privatized governmental functions have attempted to deny the public access to a wide variety of records.<sup>27</sup> They cite a private contractor transporting pupils to and from public schools in Atlanta, the capital of the U.S. state of Georgia, unsuccessfully fighting a request for the personal driving records of its bus drivers (in terms of criminal convictions). In California, a waste disposal company contracted by a municipal government attempted to halt the release of financial records used to evaluate a rate increase that city officials granted it. In South Africa, a large, formerly publicly owned steel utility, ISCOR, attempted (albeit unsuccessfully<sup>28</sup>) to use its new, private legal status as a shield to avoid releasing documents relating to its environmental performance during the apartheid era.

Moreover, in the United States, the effect has been not only generally but also unequally negative; information flows depend on where exactly the person makes the request. Because of the failure of legislatures to meet the problem head-on—although all fifty U.S. states have right to know statutes, state legislatures have universally failed to amend their laws in the face of privatization—courts have had to interpret state openness laws and have done so in different ways in different states. “These decisions have ranged from flexible, access-favoring applications of freedom of information statutes to more restrictive, access-limited applications due to more explicit definitions found within the statutes themselves.”<sup>29</sup>

The general failure of the (U.S.) courts to hold private entities accountable under the Freedom of Information Act means that government can frustrate the public disclosure purposes behind the act by delegating services to the private sector. This represents a major threat to transparency and to the exercise of the right of access to information. In terms of the traditional policy response, of the eight<sup>30</sup> countries to have passed laws prior to 1990, only one, New Zealand, passed a law that provided for a right of access to records other than “pure” public documents. In its interpretation chapter, the New Zealand Official Information Act 1982 offers a convoluted expansion of “pure” official information, to include state-owned corporations

and public quangos (regulatory agencies organized outside the civil service but appointed and financed by the government, such as unincorporated advisory boards).

The explosion of access to information laws after 1990 was a part of the new “good governance” agenda and, in some cases, a response to citizen demands for openness. Of the new wave of ATI laws, two of the first batch—those of Italy and the Netherlands—contain provisions that offer at least some semblance of “partial” access to nonstate information. Article 23 of the 1990 Italian law states the right of access to information applies to “the administrative bodies of the state, including special and autonomous bodies, public entities and the providers of public services, as well as guarantee and supervisory bodies.” This is far from clear or explicit in its intentions. Section 3(1) of the Dutch law is clearer. It states that “anyone may apply to an administrative authority or an agency, service, or company carrying out work for which it is accountable to an administrative authority for information contained in documents concerning an administrative matter.”

This is the first reference in an ATI law that captures the concept of public accountability in the context of privately held information. Since then, a significant trend has emerged. Of the forty-six ATI laws surveyed for the purposes of this chapter, only seventeen have partial coverage of this sort, thirteen of them in laws passed since 1999. Eight of the thirteen are from the Central and Eastern European region, an area that has, of course, seen massive structural adjustments to the state and huge amounts of privatization of public services since the political changes of the post-Berlin Wall early 1990s.

The laws offering “partial coverage” do so in variety of ways, all variations on the core theme of public accountability. The Slovak law, for example, covers entities that “manage public funds or operate with state property or the property of municipalities.”<sup>31</sup> The Finnish law covers private entities “appointed for the performance of a public task on the basis of an Act, a Decree or provision or order issued by virtue of an Act or Decree, when they exercise public authority.”<sup>32</sup> The Bulgarian law goes further: article 2(1) defines public information as “any information of public significance, which relates to the public life in the Republic of Bulgaria”; article 2(3) states that the right to access extends to “public information relating to such public services, which are provided by either natural persons or legal entities, and are financed by the state budget or budget funds.”

The Jamaican law offers a rather different approach. Section 5(3)(b) of its Access to Information Act 2002 gives the responsible minister the authority to declare that the act's right of access apply to "any other body or organization which provides services of a public nature which are essential to the welfare of the Jamaican society." The Jamaican law has only recently come into effect (January 5, 2004) and so there are no examples yet of the minister exercising his or her discretion in this way.

### ***A Comprehensive Right of Access to Private Information: The South African Experiment***

The South African law adopts a unique policy solution to the problem. It goes far further than any other ATI law, providing for a comprehensive right to all private information where access to the information is necessary for the protection or exercise of another right. Although it is still relatively early in the implementation of the law to draw detailed conclusions, the experience so far provides a glimpse into how a comprehensive legal right to access private information might transform requirements for disclosure by the profit-making sector and how such a regime would work in practice.

The first democratic election in South Africa in 1994 that swept Nelson Mandela into power marked the beginning of a halcyon age in constitutionalism and human rights. In the two years that followed, South Africa's entire political and governance structure was reformed and placed within the framework of a new Constitution, whose purpose is to drive a profound social and economic transformation away from the brutal iniquities of the apartheid era. Between 1994 and 1996, a special Constitutional Assembly met to write the new founding document. An interim Constitution, agreed upon during the all-party negotiations that led to the 1994 election, included a right to access public information where access was necessary to protect or exercise another right.

During the public participation process of the Constitutional Assembly, the Open Democracy Campaign Group argued for an open-ended right to public information and, moreover, the inclusion of a right to private information. This argument proved attractive to key members of the ruling African National Congress (ANC)'s

representation in the Constitutional Assembly committees. They were alert to structural changes in state power around the world, cognizant of the fact that their own government was embarking on a course of privatization, and acutely aware of the immense wealth and power of both South African corporations and transnational companies. For one of the members of the campaign group, the umbrella trade union organization Congress of South African Trade Unions (COSATU), it was an issue of fundamental political and strategic importance. As its representative, Oupa Bodibe has argued: "Workers require information to exercise and protect their rights. If unions or workers could request information vital to the protection or exercise of the right to fair labour practices . . . this would strengthen the enforcement of human rights throughout South Africa. . . . Information is required to exercise and protect the right to equality, to ensure the absence of discrimination in hiring, promotion and salaries, and generally to promote democratization of the workplace."<sup>33</sup>

Thus, the version of the access to information right that emerged in the final Constitution represented a radical new path: section 32 provides for a right to access not only "any information held by the state" but also "any information that is held by another person and that is required for the exercise or protection of any rights." Elsewhere, "another person" is defined to include both natural and juristic persons, so section 32 unequivocally covers private companies. The Constitution required that national legislation be passed to give effect to the right; accordingly, in 2000, the Promotion of Access to Information Act was passed.

Despite its potential, usage of the South African act has been limited in relation to private records. Awareness of the legislation generally is poor, and understanding the potential in relation to private power, even more so. The Open Democracy Advice Centre (ODAC), a specialized NGO established in 2000 to help ensure effective implementation of the act, operates as a public interest law center and has been involved in a number of cases that test the "horizontal" reach of the act. In *Pretorius v. Nedcor Bank*, a former senior officer in the South African army sought the records relating to the bank's policy when evaluating loan applications. Pretorius had applied for a loan and had been turned down without any explanation. He wanted to know why. ODAC's interest was in testing the private information provisions of the law in order to establish a precedent

that would be valuable for people who suspected they were subject to what is known as “redlining”—discrimination against particular communities or social groups. In South Africa, it is suspected that banks and other credit agencies discriminate against certain areas that they regard as high risk. Risk aversion is, of course, a perfectly legitimate commercial strategy. Blanket discrimination against people from a particular area or social group offends the South African Constitution’s right to equal access, however, and the right to not be unfairly discriminated against. In the Pretorius case, the bank, having taken counsel’s opinion, were anxious not to go to court and settled the case by providing the applicant with a range of papers setting out their policy and the reasons for the refusal in his case.

In another, more complicated case, on behalf of indigent fisherfolk, ODAC obtained the “transformation plans” of a number of fishing companies that had been set up to win contracts for fishing quotas, the main economic driver along the western and southern coasts of South Africa. In essence, a series of old, white-owned fish companies had executed a neat “legal fraud” by reconstituting through subsidiaries as “empowerment” companies—companies owned by blacks and/or with substantial black shareholding—in order to win quotas that had been earmarked for empowerment companies as a part of the new government’s general strategy of economic transformation. Black fishermen and women had been duped into signing the shareholding forms and had received absolutely nothing in return. Accessing the “transformation plans” that set out the details of their black empowerment exposed the companies’ fraud, revealed it to the fisherfolk so they could seek legal remedy, and reported it to Marine Coastal Management, the government’s regulatory body. A national investigative television program, *Special Assignment*, reported on the fraud and the effort to unravel it. Transparency has compelled accountability for a series of local communities; without the right to access private information, it would not have been possible for ODAC to have prompted the exposé.

Secrecy is used to hide the hidden influence of big business over democratic politics. In a third case, ODAC is acting as attorney for one of its founder NGOs, the Institute for Democracy in South Africa (IDASA). IDASA is running a campaign calling for regulation of party political funding. At present, there is no regulation whatsoever; despite attempts to develop an anticorruption infrastructure, there

is a lacuna in which a number of funding scandals have erupted. In one, the Italian millionaire industrialist Count Agusta entered into a plea bargain with the National Prosecutor, admitting in 2002 paying a R400,000 (about US\$70,000) bribe to get planning permission for a golf estate. The bribe was paid into the coffers of the National Party, which was then in power in Western Cape provincial government. In a more serious scandal, a former ANC Member of Parliament (MP), Andrew Feinstein, told Swedish television and radio that a consortium between the Swedish company SAAB and the UK company British Aerospace, which in 1999 won a massive contract to supply fighter aircraft to South Africa, had paid the ruling ANC a US\$35 million inducement.

In late 2002, IDASA made a series of requests under the Access to Information Act for records of private donations made by the biggest thirteen companies in South Africa to the thirteen political parties represented in the National Assembly. None of the political parties acceded to the request, but three of the companies accepted their duty to disclose and supplied records of donations that they had made since 1994. Another company, AngloGold Ashanti, has responded by compiling a voluntary code of disclosure. After that ground-breaking step, in the first quarter of 2004 in the run-up to the April general election, a further twelve major corporations followed suit, disclosing donations worth approximately R40 million (\$5 million).

Very few cases have been heard in the High Court. As part of its campaign, in late 2003 IDASA launched proceedings under the Access to Information Act against the four biggest political parties—the ANC, the National Party, the Democratic Alliance, and the Inkatha Freedom Party—claiming the public's right to know about the private donations in order to be able to make an informed choice at election time and seeking a declaration of the principle of transparency in relation to substantial private donations and an order requiring disclosure of donations of R50,000 or more since January 1, 2003. A fifth party, the African Christian Democrat Party (ACDP), agreed shortly before the launch of the proceedings to open its books to public scrutiny and thereby declared the identity of all its recent substantial private donors. The case raised important, ground-breaking issues related to private transparency and attracted considerable international attention. In its April 2005 judgment, the Cape High

Court held that political bodies are private bodies but, applying the test very narrowly, found that access to the donations records was not necessary to protect and exercise the right to political freedom contained in section 19 of the South African Constitution. Nonetheless, as part of its submissions to the court, the ruling ANC introduced legislation to regulate private funding on the basis of the principle of transparency (in line with Article 10 of the African Union Anti-Corruption Convention, ratified by South Africa in November 2005). In the light of this undertaking, IDASA decided not to appeal the judgment, despite its restrictive interpretation of the right.

In another case, *Davis v. Clutcho (Pty) Ltd.*,<sup>34</sup> a minority shareholder requested access to certain company accounts for the purpose of determining the value of his shares. Although the case concerns a modest-sized car repair business, the principle involved has very far-reaching implications for businesses of any size: when majority and minority shareholders fall out, as they often do, what rights of access to information can the minority fall back on? In *Clutcho*, the applicant became concerned about the manner in which the respondent was being managed when he discovered that various companies had closed the respondent's credit facilities. Existing company law was of little use to the minority shareholder; in fact, it had been used against him: he had been lawfully removed as a director of the company by resolution of the majority shareholders, which cut off his main supply of information. At the hearing, the respondent argued that in order to fulfill the need to show that the information was "required for the exercise or protection of any rights," the applicant needed to show an antecedent legal right to such information. Carefully cataloguing the various company law provisions that might apply, the respondent's counsel concluded that there was no such statutory right to information. Judge Meer disagreed and ruled that:

The Companies Act cannot . . . limit the right of access to information at section 32 of the Constitution . . . and nor can it be interpreted to exclude such right, which would thus be contrary to the spirit of the Bill of Rights. To the extent that the Companies Act does not provide for access to information, section 32 of the Constitution, and the Act, must be read into the Companies Act. It could never have been the intention of the legislature that a shareholder aggrieved by financial statements, as in this case, should be barred from access to the information

required to shed light on such statements in order to exercise his rights to sell shares or even prosecute a case against the company in terms of the remedies available to him in terms of either the Companies Act or the common law.<sup>35</sup>

## **Shifting the Legal and Human Rights Paradigm**

This line of legal authority has potentially far-reaching implications for corporate transparency in South Africa and in other countries grappling with similar issues. In short, it is likely that the traditional approach of the law to the legal personality of a corporation will be tempered by the normative imperative of the Constitution. The application of the principle of the right to know in cases such as these articulates a potentially different legal and political paradigm from the one that prevailed in the nineteenth century and that constituted the foundation upon which corporate secrecy was built. Then, in contrast to the traditional view of the vertical relationship between citizens and the state, relationships in the private sphere were regarded as being based on a degree of parity between free and autonomous parties. Politics and ideology contributed to the dominance of this paradigm, and legal theory mirrored these traditions.

A fresh look at the relationship between human rights instruments and protections and corporate legal identity is needed. It is important to take account of the nature of the right and the nature of the duty imposed. The right to dignity, to freedom of security and person (tort), to privacy, to a clean environment, to property, and children's rights all "infringe" upon the private sphere without any or much controversy.<sup>36</sup> The fact that legislation is commonly used to give effect to rights assists this inquiry, for example in the case of antidiscrimination rights, which intrude on labor relations and on the "private nature" of the employer-employee relationship.

The idea of universal human rights is premised on the notion of correcting inequalities of power so as to prevent harm and protect people from abuse, thus enabling them to sustain their human dignity. The concept of human rights has traditionally been applied to relations in the public sphere. The dominant view has been that the state/individual relationship involves unequal power dynamics between parties. A state's potential to abuse its position of authority to the detriment of an indi-

vidual's interests was the basis for human rights to insulate the latter against state interference.<sup>37</sup> Muddying the waters, confusion between *personal* information and *private* information has served to constrain fresh approaches. There may be natural and appropriate concerns that rights of access to private information should not breach the right to privacy. But personal information is a legally defined category, generally exempt from right of access (whether in the public or private sphere). *Personal* information—such as an individual's HIV status or personal credit card details—must be carefully distinguished from private information where access is needed to protect or exercise a right—such as information about the side effects of an antiretroviral drug produced and sold by a multinational pharmaceutical company.

### **Conclusion: Crossing the Rubicon**

Concepts of human rights first arose in an age of relative state omnipotence. Limiting the application of human rights to vertical relationships between the individual and the state is no longer sufficient to ensure their protection. The public sphere has changed dramatically in the past twenty-five years. Democratic control of public resources and goods and services became ideologically unfashionable. Much public power has, as a result of the policies of privatization and contracting out, been ceded to privately owned entities. The relative impact of the for-profit sector has grown, as has understanding of the harm as well as the good that the private sector can do to the lives of ordinary citizens everywhere and to their environment.

A great surge in access to information legislation around the world has largely failed to provide for granting access to information essential to citizens wanting to enforce accountability from the entities that affect their daily lives—through the provision of water and health services, transportation, waste collection and other local services, and telecommunications and financial services. Some laws have tried to adapt by defining “public records” in such a way as to cover entities fulfilling a public function. In the United States, state-level courts have applied a wide variety of tests to try to ensure that the public policy intentions of access to information laws are not defeated by structural changes in government.

An earlier trend in regulating private corporations in response to crisis and disaster has resulted in a plethora—at least in developed societies—of piecemeal law and regulation requiring disclosure of information controlled by for-profit entities in relation to specific identified social risks.

But these efforts approach the problem from the wrong angle. Even if the state could foresee all the possible risks that may arise and effectively require relevant disclosure in advance of disaster or crisis, few states and societies around the world could cope with the demands that such a regulatory responsibility would place on their capacity, resources, and weak authority. Equally, rather than attempting to extend coverage with convoluted legal gymnastics intended to cover the multitude of possible forms that “public, private information” may take, a more comprehensive approach is needed. As Alasdair Roberts argues, this requires a departure from the liberal framework that drives a wedge between public and private and insists on differential treatment of the two spheres.<sup>38</sup>

Once attention switches to the idea of unjustifiable harm and whether countervailing mechanisms such as disclosure and transparency requirements could prevent it, a paradigmatic evolution can gather pace. The South African experiment is a significant departure from the old paradigm. In essence, it says: why should private entities be ring-fenced from the same sort of responsibilities to which public entities are subjected, since they can have just as much, sometimes more, negative impact on the human dignity of citizens? When they pollute rivers, discriminate against social groups, fix prices in cartels, they undermine many human rights—the right to a clean environment, the right to equal treatment and equality, the right to water. This new thinking attaches the right to access information not to any evaluation of the functionality of the information or the entity that owns or control it, but instead to the need to protect or exercise a right.

Whatever the final, chosen formulation, the Rubicon must first be crossed. The psychological and legal barriers that have hitherto tended to encourage opacity deserve to be reconsidered in the light of corporate social responsibility trends and new global standards for disclosure and reporting. The arrangements society has made to encourage capital to multiply and create wealth—namely, the legal notion of the for-profit corporation—should not operate as a justification for continued secrecy. Corporate leaders are recognizing their

responsibilities in this regard, sometimes as a result of NGO activist pressure and sometimes out of enlightened self-interest: there is growing understanding that trust is a precious commodity and that transparency can strengthen it and thereby protect or build reputation and brand. The voluntary approach of companies such as Nirex exemplifies this new thinking. In other words, there is also a strong business case for transparency.

Transparency has a profound instrumental value as a bridge to other rights. Accessing information so that social actors can play a full part in a vibrant society and economy is the underlying purpose. This is the case for extending the right to access information to information held not just by the state but also by the for-profit, private sector. Both activists and policy makers are finding that it is crucial to end what has become a false divide, increasingly irrelevant and confusing given the blurred lines between the two sectors and the transfer of power, functions, and responsibilities from one to the other.

## NOTES

1. Richard Calland and A. Tilley, eds., *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice* (Cape Town: ODAC, 2002).

2. Thomas Blanton, "The World's Right to Know," *Foreign Policy* 131 (2002): 50; David Banisar, "Freedom of Information and Access to Government Records Around the World" (Washington, DC: freedominfo.org, 2004), [http://www.freedominfo.org/survey/global\\_survey2004.pdf](http://www.freedominfo.org/survey/global_survey2004.pdf).

3. Alasdair Roberts, "Structural Pluralism and the Right to Information," in Richard Calland and A. Tilley, eds., *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice* (Cape Town: ODAC, 2002), 42.

4. Mark Nadel, "Corporate Secrecy and Political Accountability," *Public Administration Review* 35 (1975): 15.

5. Joel Bakan, *The Corporation* (New York: Free Press, 2004), 37.

6. R. Stevenson, "How Much Privacy Does Business Need?," *Business and Society Review* (2001):47.

7. See also Ann Florini's reference to the history of corporations in *The Coming Democracy: New Rules for Running the World* (Washington, DC: Island Press, 2003), 94-99.

8. Corporations are legal fictions that exist for the sole purpose of building wealth. They can live forever, change identity in a day when it suits

them, live without a real home, own others, cut off parts of themselves, and grow new parts (Thom Hartmann, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights* [Emmaus, PA: Rodale Books, 2002]). But should they have the rights of the individual if they do not behave like individuals? Since the Supreme Court ruling, corporations have assumed the Bill of Rights for themselves, pushing in court for the right to free speech, which allows them to contribute money to politicians and political parties and effectively buy votes and rewrite laws for their benefit. They have won the right to privacy, which allows them to deny government agencies access to their papers and properties and, he says, hide crimes in the process. They have also secured the Fifth Amendment right against self-incrimination and the Fourteenth Amendment right of equal protection, allowing them to exist even in a community that objects to their presence on the grounds that they destroy small businesses.

9. Mary Graham, *Democracy by Disclosure: The Rise of Technopopulism* (Washington, DC: Brookings Institute Press, 2002), 147.

10. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. Among other things, the act limits the extent to which an accountancy firm can serve as both an auditor of and consultant to the same corporation, due to the intense conflict-of-interests difficulties that arise.

11. Graham, *Democracy by Disclosure*, 138.

12. Matthew Bunker and C. Davis, "Privatized Government Functions and Freedom of Information: Public Accountability in an Age of Private Governance," *Journalism and Mass Communication Quarterly* 75 (3) (1998): 465.

13. Seymour Hersh, "Torture at Abu Ghraib," *The New Yorker*, May 10, 2004.

14. Sihaka Tsemo, speech on privatization of basic services, democracy, and human rights at Conference on Privatization and Human Rights, University of Western Cape, South Africa, December 2003.

On June 24, 2004, UN Secretary-General Kofi Annan added a tenth principle to the UN global compact not specific to transparency but nevertheless showing a commitment by the UN: "Businesses should work against corruption in all its forms, including extortion and bribery."

15. E/CN.4/Sub.2/2000.WG.2/WP.1.

16. "Time for Transparency—Coming Clean on Oil, Mining and Gas Revenues," *Global Witness* (March 2004):6, <http://www.globalwitness.org/reports>.

17. *Ibid.*, 1.

18. <http://www.accountability.org.uk>.

19. Global Reporting Initiative (GRI), "Organisations Using the GRI Guidelines," <http://www.globalreporting.org>.

20. Save the Children UK, "Beyond the Rhetoric: Measuring Revenue Transparency: Company Performance in the Oil and Gas Industries," *Save the Children UK*, March 17, 2005. Published in tandem with a second report focusing on home government transparency: "Beyond the Rhetoric: Measuring Revenue Transparency: Home Government Requirements for Disclosure in the Oil and Gas Industries." Note: the Measuring Transparency Index was developed by the writer, with another consultant, Mohammed Ali, during an earlier phase of the project, and the Access to Information component of the home government report was undertaken by him and his colleague at the Institute for Democracy in South Africa (IDASA), Catherine Masuva.

21. Save the Children UK, "Beyond the Rhetoric: Measuring Revenue Transparency: Company Performance in the Oil and Gas Industries," 33.

22. As an example, see the first principle of ethical investment enunciated by Fraters Asset Management in South Africa: Communication and Disclosure: <http://www.fraters.co.za/principles>.

23. <http://www.nirex.co.uk/index/ifo.htm>.

24. The panel is now chaired by Andrew Puddephatt, another prominent human rights activist and former Executive Director of the international freedom of information NGO, ARTICLE 19. Its other two members are Professor Patrick Birkenshaw, a freedom of information academic, and James Amos, who works for an NGO specializing in constitutional reform.

25. Craig Feiser, "Protecting the Public's Right to Know: The Debate Over Privatization and Access to Government Information Under State Law," *Florida State University Law Review* 27 (2000).

26. Don Noel, "Privatization Shouldn't Reduce Public Information," *Hartford Courant*, April 16, 1997, A11.

27. Bunker and Davis, "Privatized Government," 465.

29. In a judgment handed down by the Pretoria High Court in early 2005 (*Hlatshwayo v. Iscor Limited*), it was ruled that at the time that the documents were created, ISCOR was performing a public function by virtue of the extent of state control and that it could not use its new privatized status to keep the documents secret.

29. Feiser, "Protecting the Public's Right to Know," 836. Feiser's analysis of the response of U.S. state courts to the problem demonstrates the extent and depth of the confusion; seven different approaches have been taken by the courts of the thirty-four states in which cases have been decided. In

conclusion, Feiser lists the seven approaches thus, from the most favorable to public access to the least favorable (Feiser 2000:864):

- The nature of records approach (six states): allowing access to records as long as the records pertain to some aspect of government;
- The public function approach (ten states): allowing access when the private entity is performing a government function;
- The totality of factors approach (six states): allowing access as long as the presence of certain factors outweighs the absence of other factors (such as public funding, control, independence, etc.);
- The public funds approach (six states): limiting access to those cases where the requisite level of public funds is present;
- The public control approach (one state): limiting access to those cases where the requisite level of government control is present;
- The possession approach (one state): limiting access to those cases where the public entity is in possession of the documents;
- The prior legal determination approach (four states): limiting access to those cases where there has been a legal determination (statutory or constitutional) that the entity should be subject to access.

30. Sweden, USA, Norway, France, Australia, New Zealand, Canada, Denmark.

31. Section 2(3), Act on Free Access to Information and Amendments of Certain Acts, 2000.

32. Section 4(9), Act on the Openness of Government Authorities, 1999.

33. Calland and Tilley, *The Right to Know*, 109.

34. *Andrew Christopher Davis vs. Clutchco (Pty) Ltd.*, in the High Court of South Africa, Cape of Good Hope Provincial Division. Unreported; judgment June 10, 2003.

35. *Ibid.*, at page 16 of the Judgment.

36. Halton Cheadle and D. Davis, "The Application of the 1996 Constitution in the Private Sphere," *South African Journal on Human Rights* 13 (1997): 44.

37. Danwood Chirwa, "Non-state Actors' Responsibility for Socio-economic Rights: The Nature of Their Obligations Under the South African Constitution," *ESR Review* 3 (3) (2002) (University of Western Cape, Community Law Centre), [http://www.communitylawcentre.org.za/ser/esr2002/2002nov\\_nonstate.php#nonstate](http://www.communitylawcentre.org.za/ser/esr2002/2002nov_nonstate.php#nonstate).

38. Roberts, "Structural Pluralism," 29.