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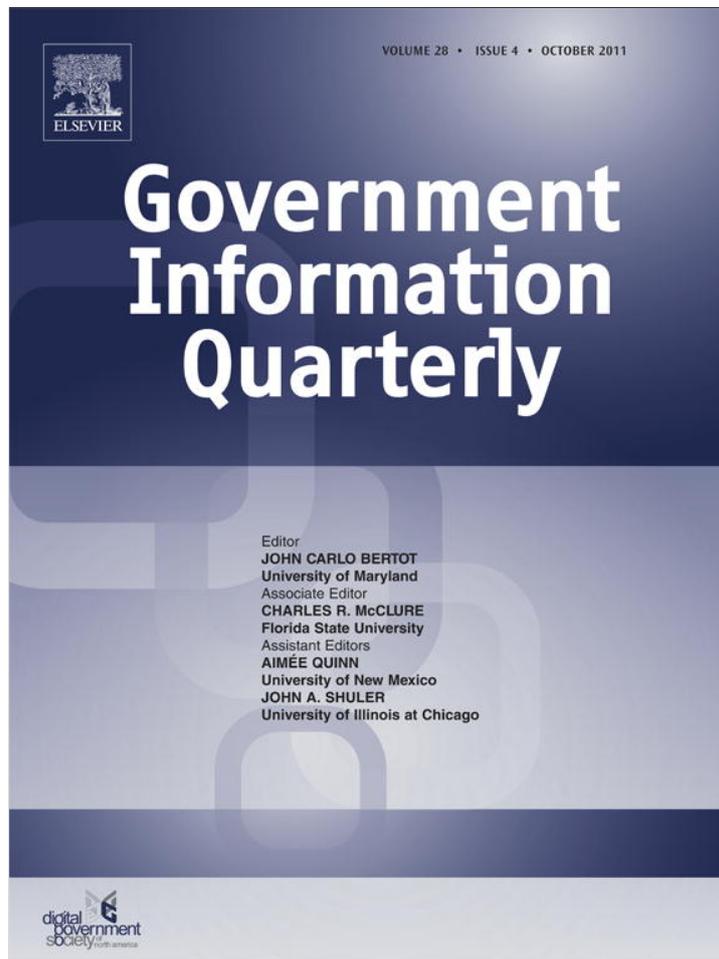
Biowatch South Africa and the challenges in enforcing its constitutional right to access to information

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ABSTRACT

This paper examines the difficulties encountered by Biowatch, a South African civil society environmental organization, in its attempts to obtain access to government information in respect of genetically engineered plants. After establishing the context of South Africa's access to information regime, including a brief discussion of several of its weaknesses, the paper engages in an extended account of the Biowatch case as an exemplar of some of the more pronounced challenges to the effective implementation of the country's access to information legislation. The elaboration of the case is based on interviews conducted with the Director of Biowatch and counsel from the Legal Resources Centre that aided Biowatch, as well as various internal and court documents provided by Biowatch and its lawyers.

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1. Introduction

According to its preamble, the Constitution of the Republic of South Africa, in recognition of the previous injustices inherent under apartheid rule, was developed to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.” In order to give effect to such objectives the Constitution contains an extensive Bill of Rights that, beyond traditional political rights such as freedom and security of the person, freedom of religion, assembly, association, movement, and expression, seeks to safeguard freedom of trade, occupation, and profession, the right to fair labor practices, the right to environmental protection, and the right to adequate housing, healthcare, food, water, education, and social security. The Bill of Rights also outlines rights specific to children and cultural, religious, and linguistic communities (indeed the country has 11 official languages). In addition to enshrining this wide range of political, social, and economic rights designed to respond to the injustices that plagued apartheid-era South Africa, the drafters of the country's 1996 Constitution¹ sought to remedy the widespread lack of transparency and accountability that characterized the previous regime by elevating to constitutional status the right to access to information.

This specifically-articulated constitutional right to access to information already places South Africa among a small number of countries

across the globe that attribute such a fundamental level of importance to this right. Perhaps more astonishing, the constitutional right to access to information in South Africa extends beyond the typical boundary of information held by governments, as found in the majority of other freedom of information laws throughout the world, to also encompass information held by any other person in the country if such information is required to prosecute or protect any of the other rights enunciated in the Constitution.² Again, based on the extensive racial, ethnic, gender, and religious oppression inherent under apartheid rule in South Africa, the presumption is that inclusion in the 1996 Constitution of access rights to information held by the private sector would facilitate not only the advancement of civil and political rights but also the multiple socio-economic rights contained in the Bill of Rights. This extraordinary range of information captured within the purview of South Africa's freedom of information laws has been heralded by at least one commentator as providing the gold standard for access legislation (*Open Democracy Advice Centre, 2005, p. 2*).

Against this general background the present paper seeks to interrogate one important access to information dispute that pitted a small civil society organization against the Government of South Africa and Monsanto, a powerful multinational agricultural biotechnology corporation. From a policy perspective the substance of this case underscores the importance of enforcement of an access to information regime and the consequent difficulties associated with relying on the courts to discharge this function. The empirical evidence marshaled in this paper draws on documentary analysis of

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¹ The *Constitution of the Republic of South Africa, no. 108 of 1996*, was promulgated on 18 December 1996 and entered into force on 4 February 1997. The Final Constitution superseded the provisional Interim Constitution of 1993, which had entered into force on 27 April 1994, the day of the first non-racial general election in South Africa.

² Although as at least one commentator points out (and as is supported by the case study under investigation in this paper), this right in respect to private bodies has yet to be tested in any depth in South Africa (*Harris, 2009*).

affidavits, legal opinions, court judgments, and various other internal documents provided by Biowatch South Africa, as well as interviews conducted with the latter's Director, Rose Williams, and one of the lawyers from the Legal Resource Centre that represented Biowatch at several stages throughout its legal battles with the government. An original draft of the paper was provided to Williams and her colleagues, who provided valuable comments that were incorporated into the final version. Officials at both Monsanto South Africa and the South African Department of Agriculture, Forestry and Fisheries were contacted to solicit their perspective on this case and, although both indicated some initial interest, neither followed through to actually arrange times to speak. In order to establish the broader context within which to elaborate the Biowatch case the following section of the paper will provide a brief, high-level overview of South Africa's access legislation, which was developed to give effect to the constitutional right to access to information. The subsequent section continues to outline several provisions of the law, albeit from a critical perspective that illustrates some of the difficulties encountered thus far in South Africa in actually implementing this gold standard of access. Having sketched out the general contours of the South African access to information regime I will then move on to the substantive focus of the paper, which offers a discussion and analysis of the Biowatch case as it proceeded through the South African courts. By way of conclusion I will tease out briefly some of the lessons to be drawn from this case that re-enforce calls within South Africa to establish an independent and effectively resourced oversight body mandated to enforce the provisions of the country's access legislation.

2. Access to information legislation in South Africa

Everyone has the right of access to—

- a. any information held by the state; and
- b. any information that is held by another person and that is required for the exercise or protection of any rights (*Constitution of the Republic of South Africa, 1996*, ss. 32(1)).

As further stipulated in subsection 32(2) of the Constitution, the government was tasked with the duty to enact national legislation to give effect to these access rights. In order to translate this constitutional requirement into a justiciable right the Parliament of South Africa promulgated the Promotion of Access to Information Act (PAIA) on 2 February 2000, which subsequently entered into force in March 2001.³ As set out in the preamble of PAIA, the Act is intended to “foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information [as set out in section 32 of the Constitution's Bill of Rights]” and to “actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights.” Based upon this latter clause we note that the framers of the Constitution clearly recognized the vital importance of the right to access to information as a fundamental prerequisite to the exercise and enjoyment of all other political and socio-economic rights proclaimed in both the Bill of Rights and the Constitution more broadly. Jagwanth has thus referred to the South African access to information right as a “leverage right” that, while important of its own accord, provides an effective mechanism for the protection and exercise of other rights (as discussed in Calland, 2009). As one prominent access to information scholar and activist in South Africa maintains, “it is when FOI [freedom of information] is used as a leverage right for the protection or promotion of other socio-economic rights that it finds its real meaning in the context of a

developing country” (Dimba, 2008, p. 4). Concurring with this general assessment, the Open Democracy Advice Centre, a non-profit law clinic in South Africa that seeks to establish an emerging corpus of litigation in respect of PAIA, has operationalized its mandate in a way that attempts to leverage the right to access to information in support of broader socio-economic rights.

Although PAIA sets out legislative rights of access to information held by both public and private bodies, the obligations that attach to the former are more stringent than for the latter. Except in the case of specific mandatory and discretionary exemptions contemplated in Chapter 4 of the Act,⁴ section 11 of the Act mandates all public bodies⁵ to provide access to their records⁶ as long as all procedural requirements for filing an access request have been satisfied. In general access requests must be in writing and include enough details to facilitate identification of the records in question; the requestor, including a postal address or fax number; and the preferred form and language of access. Requestors to either public (ss. 25 and 26) or private bodies (ss. 56 and 57) must receive a response within 30 days, although the Act does provide for one 30-day extension if the request involves a large number of records, extended search times, or consultations within and between bodies that hold the relevant information. Requests for access to information from public bodies do not require any reason or justification for the request. The same does not extend to records under the control of private bodies. In addition to the procedural requirements and set of exemptions articulated in Chapter 4 of the Act, section 50 of PAIA sets forth the additional qualification in respect to private bodies that only record “required for the exercise or protection of any rights” are subject to access demands. In subsequent jurisprudence the Supreme Court of Appeals, South Africa's highest court for non-constitutional matters, has adopted a narrow interpretation of this proviso to mean “reasonably required” in order to provide a “substantial advantage” or satisfy an “element of need”.⁷ Put more explicitly, an access request to a private body must combine both specificity and a substantial foundation of need in support of any other right articulated in either the Constitution or legislative statutes.

While the PAIA and its constitutional underpinnings ostensibly appear to warrant the gold standard epithet, actual experience almost 10 years after its commencement betrays a rather disappointing picture.

⁴ Section 12 of the Act further exempts the Cabinet and its committees, individual members of Parliament or provincial legislatures, all courts in the judicial system as stipulated in section 166 of the Constitution, and specified Special Tribunals.

⁵ As defined by PAIA a “public body” means – (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or (b) any other functionary or institution when – (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation.”

⁶ A record, whether under the control of a public or private body, is defined as “any recorded information—(a) regardless of form or medium; (b) in the possession or under the control of that public or private body, respectively; and (c) whether or not it was created by that public or private body, respectively.”

⁷ *Clutchco (Pty) Ltd v Davis* (035/04) [2005] ZASCA 16; [2005] 2 All SA 225 (SCA) (24 March 2005). This interpretation of section 50 of PAIA as relying on the standard of “substantial advantage or element of need” was affirmed in a subsequent case decided by the Supreme Court of Appeals, in which the Court distinguished between “useful and relevant” and “essential or necessary” for the exercise or protection of rights. According to the Court the latter is required. The majority ruling further held that “if the requestor cannot show that the information will be of assistance for the stated purpose, access to that information will be denied” but that “mere compliance with the threshold requirement of assistance will not be enough” *Unitas Hospital v Van Wyk and Another* (231/05) [2006] ZASCA 34; 2006 (4) SA 436 (SCA); [2006] 4 All SA 231 (SCA) (27 March 2006), para. 17. At least one commentator has interpreted this decision as having “set the bar impossibly high” (Allan, 2009a, p. 149).

³ Sections 10, 14, 16, and 51 of PAIA, which outline the obligations of public and private bodies to publish manuals and indexes of records in their possession, did not enter into force until 15 February the following year.

3. Assessing the gold standard

Although sparse, the existing comparative empirical evidence places South Africa well behind other developing countries in terms of promoting and facilitating access to information. For example, a report based on a 2003 pilot study conducted by the Open Society Justice Initiative across five countries reveals that South Africa responded to only 23% of all access to information requests. More problematic was the high level of mute refusals (52% of all attempted requests and 62% of those requests that could be submitted successfully), which is the category used to capture those instances when an official body provides neither a response nor any information within the timeframes established by its corresponding legislative framework (Open Society Justice Initiative, 2004). Based upon interviews with public officials, the study's authors point to general weaknesses in the necessary bureaucratic internal mechanisms for dealing with access requests in South Africa. In particular, South African public officials bemoaned the complexities of PAIA and the attendant difficulties of navigating the exemptions chapter of the Act.

In 2004 the Open Society Justice Initiative expanded on its initial pilot study by including 14 countries in its research. The situation had failed to improve in South Africa, where government officials again indicated a lack of training and internal capacity to receive and process access requests. Compounding this problem was the perceived complex and onerous nature of PAIA (the exemptions section of the law was again articulated as being a significant source of complexity and confusion), which apparently has fostered a climate of procrastination among some government officials when dealing with access requests. Although South Africa scored better results than the other four African countries (none of which had access to information legislation) included in the expanded study, a mere 19% of all requests submitted received a compliant response and only 13% received the requested information. These results confirmed those of the previous year and left unchanged South Africa's lowest rank in terms of compliance among countries with access to information legislation (Open Society Justice Initiative, 2006).

In its latest annual report the South African Human Rights Commission (SAHRC), which is mandated by section 84 of PAIA to report annual usage statistics to Parliament, notes the continuation of the following trends within government bodies that inhibit the consolidation of a robust access to information regime in the country. One of the most pressing shortcomings remains an overwhelming lack of Executive and senior management buy-in to the principles and spirit of PAIA, which, perhaps not surprisingly, has led to the internalization of a mindset among some personnel that equates information sharing with risk and vulnerability for their employer.⁸ Similar to what researchers at the Open Society Justice Initiative found, SAHRC points to a superficial level of familiarity and corresponding lack of expertise in respect to the legislation among large swaths of public sector employees and institutions, which ultimately can be traced to a lack of managerial commitment. With a merely perfunctory awareness and appreciation of the legislation comes a corresponding minimal commitment to the creation of an effective enabling environment for implementation of the Act. This regrettable lack of zeal for PAIA within the South African bureaucracy is similarly made manifest in the limited amount of resources made available for its implementation. Rather than create positions designed to deal exclusively with access to information requests most government departments at the national, provincial, and municipal levels tend to assign PAIA duties to their respective

personnel on an ad hoc basis in addition to main job responsibilities (South African Human Rights Commission, 2009). In a rather candid admission, a representative from the Office of the President told other delegates at an annual meeting of the Deputy Information Officers' Forum in September 2007 that "PAIA is seen as something that is an 'add-on' to our other responsibilities and which is, frankly, seen as a nuisance" (as cited in Calland, 2009, p. 12; on these issues see also Darch & Underwood, 2005, citing Pickover & Harris, 2001).

This failure to appoint full-time staff dedicated to access to information requests exercises additional knock-on effects that impede full implementation of the Act. For example, section 14 of PAIA requires the information officer of all public bodies to compile a manual in at least three official languages that, among other things, provides: contact details for the body; a description of its structure and functions; details on how to submit an access request; a description of the subjects on which the particular body holds information as well as the categories of records for each subject; the categories of records held by the body that are available without the need for a formal access request; a description of the services available from that body; and, a description of all remedies available in respect to an act or a failure to act by that body. This required manual of functions and "index of records" held by each public body is meant to facilitate the access rights of citizens by making it easier to locate records of interest and their respective government controller.⁹ In practice, however, lack of dedicated resources and widespread poor records management practices have combined to hinder the development of these mandated manuals/indexes by the majority of all public bodies—as low as five percent compliance according to Chantal Kisson, Head of the PAIA Unit at SAHRC (Kisson, 2010; South African Human Rights Commission, 2009). Based upon its findings the overall assessment articulated by SAHRC points to "clear evidence of the lack of awareness and commitment within the sector to deliver on access rights, and begs questions of service delivery, transparency and commitment...eight years after the enactment of the PAIA legislation" (South African Human Rights Commission, 2009, p. 158).¹⁰

Aside from recommending specific remedial measures to address each of the above-articulated weaknesses in South Africa's access to information regime, SAHRC has also long advocated for the creation of an independent oversight body with sufficient power to compel compliance with PAIA in both the public and private sectors.¹¹ Instead the courts are responsible for adjudicating disputes over access to information requests between requestors and public and private

⁹ At least one commentator points out that the term "index of records" contained in section 14 of PAIA is somewhat of a misnomer since the provisions contained here require public bodies to provide "descriptions of subjects" and "categories of records" rather than a more precise actual index. Although the section does require "sufficient detail to facilitate a request," this legislative formulation is criticized by the same commentator as being imprecise and subject to a broad interpretation such that it typically renders little help to people making access requests (Allan, 2009a).

¹⁰ This assessment dashes the more sanguine pronouncement delivered 8 years ago by other researchers examining the status of access to government information in South Africa, who wrote that "[s]ince the advent of democracy South Africa has made significant progress in respect of freedom of expression and freedom of access to information. This reflects a change in the style of governmental decision-making, in the direction of greater transparency and public participation" (Lor & van As, 2002, p. 117). Their general level of optimism notwithstanding, these same authors did highlight the very real and continuing impediments to the establishment and maintenance of a robust access to information regime such as lack of co-ordination, championing, and sufficient resourcing.

¹¹ An independent oversight body would presumably also be tasked with the promotion, monitoring, and protection functions currently assigned to SAHRC by sections 10 and 83 of the Act, albeit with hopefully effective enforcement mechanisms. At the time of the development of PAIA the Department of Justice and Constitutional Development was requested to investigate and report on the feasibility of establishing an Information Commissioner within 12 months of the enactment of the Act (Tilley, 2010, p. 6). To date no action on this has been undertaken.

⁸ A number of the contributors to Allan's (2009b) edited collection bemoan a continued culture of secrecy and opacity rooted in South Africa's apartheid and anti-apartheid past that seriously undermines the development of a vigorous access to information system.

bodies.¹² As currently set out in section 74 of the Act, if a requestor is dissatisfied with the response, or lack thereof, provided by a public body s/he is required to lodge an internal appeal against the decision of the information officer. If the internal appeal procedure fails to resolve the issue, section 78 provides the requestor with the right to apply to the courts for relief. As might be expected, judicial oversight for enforcement of PAIA continues to provoke a substantial degree of criticism given the relatively long time frames, complexity, and high costs associated with legal processes. Indeed, as several civil society organizations, including the Open Democracy Advice Centre and the South African History Archive, have pointed out, the resource intensiveness (both time and money) associated with resolution through the courts has meant that in practice they are unable to litigate all instances of refused access. Such concerns assume additional force in a country plagued by high illiteracy, low education, and widespread poverty rates, which at an individual level place judicial remedy even further out of reach for large segments of the population. One of the to-date most prominent and precedent-setting cases in South African jurisprudence in respect to access to information confirms precisely these critiques of relying on the courts to interpret and enforce the provisions of PAIA. This case, to which attention now turns, involved attempts by a non-governmental organization, Biowatch, to secure information from the government about field trials and regulatory applications for various genetically engineered plants.

4. Biowatch South Africa and its travails to access information

Biowatch South Africa is a national non-governmental organization (NGO) established in 1997 to research, monitor, and publicize issues around genetic engineering as well as promote biological diversity, biosafety, food sovereignty, and social justice. As an environmental NGO Biowatch has tasked itself with the following mission:

Biowatch South Africa strives to prevent biological diversity from being privatised for corporate gain. We aspire to an environment where people control their food supply systems, where the benefits from commercial use of biological resources are fairly shared and where ordinary citizens are encouraged to help make policy choices about new technologies, such as, genetic modification. We are working towards a future where there is no hunger, where there is social justice and where our land, water and air is protected. (<http://www.biowatch.org.za/main.asp?include=about/about.html>).

An underlying premise driving the work of Biowatch is that the South African regulatory regime in respect to genetically engineered plants¹³

¹² Although section 79 of PAIA sets out the requirement that rules of procedure for courts be implemented within 12 months after the commencement of this section, it was not until 16 November 2009 that rules of procedure were enacted to permit enforcement of access to information requests through Magistrates' Courts. Prior to this, judicial remedy had to be sought through the High Courts (s. 79) ("Rules of procedure for application to courts in terms of the Promotion of Access to Information Act 2 of 2000, Government Notice No. R. 965"). As is the case in many other countries, higher courts tend to be less accessible to the majority of the population than is the case with regional and district courts so information advocates in the country, while nonetheless still lamenting the lack of an independent information commissioner, did welcome this change (Klaaren, 2010).

¹³ As established by the Genetically Modified Organisms Act, no. 15 of 1997, which came into effect on 1 December 1999. Set out in broad strokes, Biowatch is critical of South Africa's legislation for omitting the "precautionary principle," which demands that in the absence of definitive data proving the benefits and safety of something, regulators should assume the potential problems are real and address them accordingly. The polluter pays principle is similarly absent. The Act contains no mechanism for liability and redress when manufacturers of genetically engineered seed contravene legislation. There is no clear and obligatory procedure and mechanism for meaningful public participation and access to information around how decisions are made to approve genetically engineered products. Finally, regulators rely too heavily on self-regulation by industry. In addition to the demand for a more stringent and transparent regulatory framework, Biowatch articulated the need for a moratorium on future authorizations until such time as the shortcomings of the current system had been addressed.

is inherently flawed and that approvals for field trials and commercial release of such crops thus represent a substantial risk to the environment and human health. In order to begin chinking away at the broader regulatory bastion, Biowatch recognized the need to prepare for and initiate what were ultimately expected to be judicial and hopefully precedent-setting challenges to particular approvals of specific crops. The rationale behind this line of attack was that increased transparency would help to demonstrate not only the risks involved in genetically engineered plants but also the fact that they had not adequately been considered during the regulatory decision-making process. The requisite preparation for this strategy relied on assembling as much information as possible about not only how regulatory authorities make their decisions to issue permits in respect to genetically engineered crops but also upon what original information such decisions rely.

In order to prosecute this plan Biowatch, on at least three occasions throughout 2000, submitted to the National Department of Agriculture (NDA)¹⁴ written requests for access to information about the status of genetically engineered crops in South Africa, including such things as permitting information, copies of permit applications, and supporting documentation such as risk assessments. Although Dr. Shadrack Moephuli, a member of the Genetic Resources Directorate in the NDA, did provide some initial information it was mainly inadequate or non-responsive to the substantive issues being queried by Biowatch. Given the dearth of information forthcoming from the NDA Biowatch sought and received legal advice in early 2001. The timing here is important. Recall that although PAIA was promulgated in 2000, it did not commence until March 2001. Based upon the interpretation of its counsel, part of which was informed by unnamed sources at the Department of Justice, in the interim period Biowatch's right to access to information held by the State was governed by subsection 32(1) of the Constitution.¹⁵ In this specific instance the constitutional right to access to information was purported to be further strengthened by the environmental rights similarly enshrined in section 24 of the Constitution, which provides citizens of South Africa with the right to a healthy and sustainably-developed environment. Perhaps more importantly, at least for purposes of the present paper, Biowatch's legal advisors also challenged section 18 of the Genetically Modified Organisms Act, a confidentiality clause for third party information that NDA officials had previously invoked to avoid disclosure of the information requested by Biowatch. At its most basic level, section 18 violates the broad section 32 constitutional right of "access to any information held by the state" (emphasis added). A more extensive construction of the access to information right must also consider the limitations clause (s. 36) of the Constitution, which states that

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

¹⁴ This department has subsequently been renamed as the Department of Agriculture, Forestry and Fisheries to reflect an expansion of its policy purview.

¹⁵ "Everyone has the right of access to (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights."

The test for limiting constitutional rights thus demands that any overriding law must at a minimum apply to all and must serve a purpose considered legitimate by all reasonable citizens in a constitutional democracy (i.e. it may not be arbitrary). The section 18 limitation, according to Biowatch's lawyers, not only failed to meet these threshold requirements but as constructed is actually unconstitutional.

On the basis of this legal reasoning on 26 February 2001 Biowatch's lawyers submitted to the Genetic Resources Directorate in the NDA a letter that specified the legal basis for the following eleven categories of information requested on behalf of Biowatch:

1. All data relating to risk assessments accompanying requests for trial and commercial release of GMOs, including but not limited to, field trial risk assessments, commodity import-animal consumption risk assessments, and the following Conditional General Releases:
 - i. 1996 Monsanto Bt Cotton;
 - ii. March 1997 Monsanto Bt Maize;
 - iii. September 1997 PHI Bt Maize; and
 - iv. August 1998 AgrEvo Glufosinate Resistant Oilseed Rape, Maize and Soyabean.
2. All data relating to RR [Roundup Ready] Wheat.
3. Copies of all applications for permits, approvals and other authorizations submitted in terms of the GMO Act and/or the regulations promulgated under it.
4. Full details of all permits and/or approvals and/or other authorizations granted and all applications pending in respect of imports, exports, field trials and/or general releases. At the very least, the details furnished in this regard should comply with the requirements set out in section 18(2) of the GMO Act, namely:
 - i. The description of the GMO, the name and address of the applicant, and the purpose of the contained use or release and the location of use;
 - ii. The methods and plans for the monitoring of the genetically modified organisms and for emergency measures in the case of an accident; and
 - iii. The evaluation of foreseeable impacts, in particular any pathogenic or ecologically disruptive impacts.
5. Full details of public participation since the commencement of the GMO Act, including, but not limited to, the State's policy in regard to public participation and copies of all advertisements, notices and comments received in terms of Regulation 6 of the Regulations promulgated under the GMO Act.
6. Details of exact locations of field trials and commercial releases (for reasons outlined in the letter to which this schedule is annexed, you are not entitled to withhold details of these locations).
7. Full details of registered academic and research institutions for the years 1999 to 2001.
8. Copies of the Minutes of all meetings of the Executive Council of Genetically Modified Organisms and the Advisory Committee to date.
9. Copies of all internal, inter-departmental, inter-state departmental and/or external letters, telefaxes, e-mails, circulars, memoranda and similar documents which relate to the development, production, use and application of GMOs.
10. Full details (including contact details) of all persons currently represented on the Advisory Committee, and confirmation that members of the public sector have been appointed to the Committee.
11. Any other recorded information held by the State relating to the development, production, use and application of GMOs.

Aside from some confirmations of receipt the only response forthcoming from the NDA was a letter dated 5 March 2001 indicating

that the Genetic Resources Directorate would first need to obtain a decision directive from the Executive Council for Genetically Modified Organisms before it would disclose any of the requested information. Despite several follow-up letters sent by Biowatch's lawyers the NDA failed to provide any substantive response, thus prompting the NGO to serve court papers on the Minister for Agriculture,¹⁶ the Executive Council for Genetically Modified Organisms,¹⁷ and the Registrar, Genetic Resources¹⁸ in August 2002 to compel release of the requested information under section 32 of the Constitution and section 31 of the National Environmental Management Act (no. 107 of 1998; NEMA), which sets out a right to access to environmental information.

4.1. Biowatch at the High Court

The case was heard by Justice Dunn in May 2004 in the North Gauteng High Court (or Pretoria High Court as it then was)—almost 2 years after the application was submitted to the Court. During the phase of evidence gathering and delivery of affidavits in 2003 Monsanto South Africa sought and was granted leave to join the proceedings as a fourth respondent. Two other seed companies, Stoneville Pedigreed Seed Company (subsequently re-named Emergent Genetics USA, Inc.) and D&PL South Africa were admitted to the proceedings as fifth and sixth respondents, respectively. Justice Dunn delivered his judgment on 23 February 2005. The respondents to the case raised five main points in defence of the government position not to release the information sought by Biowatch. First, it was contended that PAIA was applicable to the access requests and that because Biowatch had failed to exhaust the internal appeal procedures set out in the Act (Chapter 1 of Part 4 (ss. 74–78)) the court proceedings were premature.¹⁹ Second, Biowatch purportedly did not comply with the procedural requirements stipulated in PAIA and therefore failed to make out a *prima facie* case for the relief it claimed. Third, the information sought by Biowatch was claimed to be commercial information provided in confidence to the government and thus exempt from disclosure. Monsanto was particularly vehement in asserting this defence, relying on section 18 of the GMO Act (confidentiality), sections 36 (mandatory protection of commercial information of a third party), 37 (mandatory and discretionary protection of confidential information from a third party), and 43(1) of PAIA (mandatory protection of research information of a third party), and section 36 of the Constitution (limitations on the rights articulated in the Bill of Rights, as elaborated above). Fourth, Biowatch was accused of failing to properly articulate the information to which it sought access. Finally, the respondents maintained that an order for the mandatory provision of such information would not constitute “appropriate relief” as contemplated by section 38 of the Constitution (“*Trustees, Biowatch Trust v Registrar: Genetic Resources, and Others 2005 (4) SA 111 (T)*”).

In addressing the first defence raised, namely the applicability of PAIA, it is worth recalling that Biowatch submitted all of its requests for information prior to the Act coming into force. Despite this, Monsanto sought, unsuccessfully, to argue that Biowatch's actual right to access to information only crystallized once it launched its formal application with the courts on 22 August 2002, at which time PAIA had

¹⁶ The information sought by Biowatch is held within the custody of the department headed by this Minister.

¹⁷ The Executive Council, composed of members from eight national government departments, has an advisory function in respect of the GMO Act, including providing advice to the Registrar for Genetic Resources on all aspects relating to genetically engineered organisms. It is similarly vested with certain powers and duties in respect to the disclosure of information that is not of a confidential nature, as set out by section 18 of the GMO Act.

¹⁸ The Registrar administers the GMO Act and may also exercise powers and functions assigned by the Executive Council.

¹⁹ There are no internal appeal requirements in respect to access requests refused by private bodies. If the requestor is dissatisfied with the refusal s/he must apply to the civil courts for relief (PAIA, para. 56(3)(c)).

commenced. Ultimately Justice Dunn rejected the retrospective arguments advanced by the respondents, contending not only that the legislation does not expressly state that its provisions apply retrospectively but moreover that such an application of PAIA would interfere with Biowatch's existing rights at the time it submitted its requests for information. This finding also defeated the second contention articulated by all the respondents that Biowatch failed to exhaust all internal remedies. Obviously if PAIA cannot be applied retrospectively then Biowatch cannot be expected to adhere to the internal appeal procedures set out in sections 74–78 of the Act. Thus the respondents' claim that a court application was premature was also rejected by Justice Dunn. The respondents, however, also tried to assert that Biowatch similarly failed to exhaust the internal remedies set out in section 19 of the GMO Act before launching its application with the courts. Justice Dunn, however, pointed out that there are no provisions in this latter Act that would preclude a resort to the courts absent the final disposition of an appeal launched in terms of section 19. For these reasons Justice Dunn found that Biowatch's failure to adhere to the appeal procedures established in section 19 of the GMO Act did not preclude the relief it sought in the present application to the courts.

With respect to the articulated defence of confidential business information Justice Dunn ruled that although PAIA cannot be applied retrospectively to nullify the validity of Biowatch's requests for information, a retrospective application of the provisions in Chapter 4 of Part 2 of the Act ("Grounds for Refusal of Access to Records") would not be unfair to any of the parties involved in the application. Justice Dunn further pointed out that this reasoning is consistent with the constitutional right to access to information, which is not absolute. Although not clear from the facts of this case, one is left wondering if the government actually considered whether any actual harm would arise from disclosure, particularly in respect of confidential business information. According to the Open Democracy Advice Centre, Monsanto failed to provide any compelling evidence to the High Court in support of its contention that the information Biowatch sought was commercially confidential and thus subject to exemption. Indeed, rather than identify those specific records that might contain confidential business information and thus fall within the ambit of a statutory exemption, Monsanto instead tried to convince the court that all of the information it had provided to the Government of South Africa in support of its applications for regulatory approval of its genetically engineered crops should be withheld from Biowatch. This failure is particularly important since, as the reader will recall, constitutional limitations on the section 32 right to access to any information held by the State must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom," as set out in section 36 of the Constitution. The onus for justifying such a limitation falls upon the party seeking to limit the constitutional right. PAIA similarly places the burden of justifying any refusal of an access request on the party claiming the refusal ("[Heads of argument filed on behalf of the *Amicus curiae* Open Democracy Advice Centre - Case No: 23005/2002,](#)" 2004).

All the respondents, albeit with varying degrees of emphasis, sought to advance the defence that Biowatch formulated its access requests in a wholly unsatisfactory manner. The three government respondents maintained that the scope of information requested was so broad that a proper response was rendered extremely difficult. Monsanto characterized the requests as a "fishing expedition" while counsel for Stoneville submitted that the requests were "clearly vexatious and oppressive." While Justice Dunn did make the point that "[t]here is certainly some substance in these submissions," he also pointed out that in its answering affidavit the Registrar never claimed to have any difficulty determining the precise information that Biowatch sought ("[Trustees, Biowatch Trust v Registrar: Genetic Resources, and Others 2005 \(4\) SA 111 \(T\)](#)", para. 42). According to Dunn, if the Registrar was unclear about the information being sought he had a duty to establish precisely what Biowatch was seeking and to assist the latter in its efforts

to obtain such information. Moreover, none of the government respondents ever sought to refuse Biowatch's requests for information on the grounds of being vexatious, oppressive, or unintelligible, a fact that Justice Dunn considered to be rather significant. In his analysis of the eleven specific categories of information elaborated above that were contained in Biowatch's fourth access request, Dunn found that while many were perhaps somewhat wide they, with the exception of requests 2, 9, and 11, were certainly not vague. Of course this criticism is somewhat endemic to many access to information requests since requestors, as was the case with Biowatch, often do not know the specifics of the documents in the possession of the body to whom an access request is submitted. In this regard the manuals and indexes of records within their custody that are to be compiled and made available by public and private bodies under sections 14 and 51 of PAIA, respectively, could remedy this problem in future. Although as elaborated above, compliance with this requirement of the Act remains low among public bodies, a situation presumably comparable among private bodies. In this particular case the government bodies failed to adequately respond and Monsanto expressly refused to provide a list of the documents that it had submitted to the South African regulatory authorities. Given that the necessary knowledge of the facts rested with the government and Monsanto, it seems somewhat unreasonable that the judge penalized Biowatch for its inability to particularize its request for information in these three categories.

Overall Dunn concluded that Biowatch had no alternative remedy to enforce its rights and that it had, despite what he characterized as the "inept manner" in which it formulated its requests, sufficiently established its right to some of the information to which it sought access ("[Trustees, Biowatch Trust v Registrar: Genetic Resources, and Others 2005 \(4\) SA 111 \(T\)](#)", para. 66). The Registrar's refusal to grant access to this information thus constituted an infringement of Biowatch's rights under section 32 of the Constitution. Dismissing the three requests he considered too vague, Justice Dunn ordered the government respondents to provide the information sought by Biowatch in its remaining eight requests. As Rose Williams points out, this represented a real victory for Biowatch since this was the first time in South Africa that this type of information was made publicly available. Where legitimate issues arose Justice Dunn allowed for the exercise of the exemption provisions established in Chapter 4 of PAIA so long as Biowatch was still provided with records or those portions of records not immune from disclosure. In the case of any refusals the government was further required to provide written reasons with reference to the relevant legislative provisions.²⁰

²⁰ While it is true that sections 46 and 70 of PAIA establish a public-interest test for public and private bodies, respectively, against which the exemptions are supposed to be balanced, the public-interest override has a relatively narrow scope, limited to cases where the information normally exempt demonstrates a serious contravention of or failure to comply with the law, or an imminent and serious public safety or environmental risk, and where the public interest in the disclosure of the information clearly outweighs the harms contemplated in the particular exemption provisions. The one and only explicitly articulated exception in the Act not subject to the public-interest override is set out in subsection 35(1), which provides for mandatory protection of certain records held by the South African Revenue Service. According to at least one legal scholar, the narrowness of this provision is exacerbated by the failure of the Act to either define the term "public interest" or to offer any guidance for actually measuring whether it outweighs the harm articulated in a particular exemption provision (Allan, 2009a; Klaaren & Penfold, 2009). Indeed, we need to remain cognizant of the fact that the concept of "public interest" is a dynamic, diachronic one heavily influenced by the power relations that prevail at a particular point in time (Harris, 2009). Although not clear from the wording of section 70, Allan (2009a) goes on to assert that the onus for demonstrating that the disclosure would reveal evidence of a contravention of law or an imminent safety or environmental risk falls on the requestor. Assuming she is correct in assignment of the burden of proof, this renders the "public interest" override that much more difficult to enforce given that requestors typically do not know the full scope of the information contained within the records related to their access requests. Thus not only does the requestor not receive the information of interest but she also has no way of knowing whether the invoked exemption legitimately applies and whether or not there might be associated grounds for challenging the exemption provision.

Despite this substantial victory for Biowatch in its efforts to enforce its constitutional right to access information held by the government, Justice Dunn made a curious and substantially anomalous order in respect to costs. Although cognizant of the fact that in litigation orders for costs typically follow the result, Justice Dunn concluded that the “inept manner” in which Biowatch formulated its access requests meant that it should not be granted a costs order in its favor. Moreover, Justice Dunn reasoned that because of its approach Biowatch had “compelled Monsanto, Stoneville and D&PL to come to court to protect their interests” (“Trustees, *Biowatch Trust v Registrar: Genetic Resources, and Others* 2005 (4) SA 111 (T)”, para. 68). Of course, as Justice Dunn also pointed out, albeit not articulated in these specific terms, the failure of the government to respond to Biowatch's requests for information compelled the NGO to come to court to vindicate its constitutional right to access to information. The apparent contradiction between this finding and his ruling on costs appears lost on Justice Dunn. Justice Dunn also completely disregarded the fact that one seed company, Pannar, had co-operated with Biowatch by advising what documents it considered confidential. Of the three companies involved as respondents in this case only Monsanto had sought an order for costs against Biowatch, which Justice Dunn granted. In his subsequent judgment on the application for leave to appeal Justice Dunn attempted to bolster the costs order by emphasizing his finding that Monsanto had also achieved substantial success “because it all along contended that Biowatch did not have open sesame to such information and that its rights of access was [sic] subject to the provisions of PAIA and, at the very least, also subject to the limitations contained in the *Genetically Modified Organisms Act, 1997* (Act 15 of 1997)” (as cited in “Trustees, *Biowatch Trust v Registrar: Genetic Resources, and Others, case number A831/2005, North Gauteng High Court, Pretoria, 2007*,” para. 15). In point of fact, Monsanto attempted to argue before the High Court that Biowatch's application should be dismissed in its entirety. That in the end only applicable exemptions set out in Chapter 4 of PAIA were permitted by the High Court seems a very narrow basis for the subsequent claim of substantial success and the consequent costs award. The overall result meant that not only was Biowatch unable to recover its costs against the government but it also was ordered to pay Monsanto's costs. The costs order in favor of Monsanto was interpreted by some as being tantamount to a SLAPP (strategic litigation against public participation) suit designed to silence the critical voices of opposition to genetically engineered crops in the country. As might be expected, a chilling cry was raised within the NGO community in South Africa, particularly among those that advocate for and make use of access to information legislation.

These two costs orders were particularly onerous for Biowatch, which, as a Trust, possesses very few assets and is reliant upon donor contributions to finance its activities. Recognizing that the second costs order to pay Monsanto's litigation expenses would have bankrupted Biowatch, its Trustees felt compelled to challenge the costs orders handed down by the High Court. Aside from the clear fiduciary duty to protect the ongoing viability of the Trust, the Trustees were also motivated by a strong sense of seeking justice within the context of the newly emerged democratic Republic of South Africa. According to the Chairperson of the Biowatch Trust, Dr. David Fig, “the importance of this litigation is to prevent the state and large gene-touting companies from riding roughshod over our legislators' commitments to environmental and social justice...We cannot remain passive when a company with Monsanto's history continues to undermine South African civil society organizations whose record of challenging injustice is known far and wide” (as cited in *n.a.*, 2009, p. 10). Biowatch thus sought and was granted leave to appeal the costs orders to the full bench of the North Gauteng High Court (Pretoria High Court as it then was), which heard the appeal on 23 April 2007 and delivered its judgment on 6 November 2007.²¹

²¹ In this appeal to the High Court and the subsequent appeals to the Supreme Court of Appeal and the Constitutional Court Biowatch was represented *pro bono* by lawyers from the Legal Resources Centre, an independent, non-profit public interest organization that engages with the law in pursuit of social justice issues.

Biowatch applied to have the costs order in favor of Monsanto set aside and a new order to cover its costs in the original suit and the appeal made against the Registrar, Genetic Resources and Minister of Agriculture. All three government respondents and Monsanto contended that the appeal should be dismissed since Justice Dunn had committed no material misdirection in his ruling and therefore no grounds existed for interfering with the discretion he exercised with regard to the costs orders. Space limitations preclude an extended analysis of the majority decision handed down by the full bench hearing this appeal; suffice it to say that the court affirmed Justice Dunn's reasoning and thus dismissed the appeal. In the result, not only were the original two costs orders maintained but Biowatch was also ordered to pay the costs incurred by the three statutory respondents and Monsanto in opposing the appeal (“Trustees, *Biowatch Trust v Registrar: Genetic Resources, and Others, case number A831/2005, North Gauteng High Court, Pretoria, 2007*,” paras. 37–38).

Following a refusal by the Supreme Court of Appeal to hear an appeal of this decision, Biowatch obtained leave to appeal to the Constitutional Court of South Africa, which deals exclusively with matters relating to the Constitution and its interpretation, enforcement, and protection. Here again the issue was the costs orders, with counsel for Biowatch contending that Justice Dunn failed to justify sufficiently his deviation from the “ordinary rule” in relation to costs, namely that the successful party should be awarded costs, and that the previous courts insufficiently assessed all the relevant considerations in respect of the costs awards, including their findings that Biowatch was litigating in the public interest. In summing up the importance of this case as one deserving of attention by the Constitutional Court, Biowatch lawyers contended that

the costs orders will deter organizations acting in the public interest from litigating important access to information cases which they might otherwise have taken up. A party seeking access to information who does not know exactly what records exist, would wish to frame its request as widely as possible. However a person who does so will now be discouraged from approaching the courts for relief for fear of being exposed to an adverse costs order (even if successful) on the basis that the request was too broadly framed (“Trustees for the *Biowatch Trust heads of argument*,” 2008, para. 29.4).

4.2. Seeking justice at the Constitutional Court

The Constitutional Court of South Africa heard the appeal on 17 February 2009 and delivered its unanimous judgment on 3 June of the same year. In determining whether to grant leave to appeal, the Constitutional Court considered the two related questions of whether the appeal raised a constitutional issue and whether it would be in the interests of justice for the matter to be heard. As perhaps a preliminary response to the latter query, three public interest NGOs applied for and were granted *amici* status, a development the court noted in its observation that “a shockwave appears to have swept through the public interest law community” upon the filing of Biowatch's application for leave to appeal (“Trustees, *Biowatch Trust v Registrar: Genetic Resources, and Others* 2009 (10) BCLR 1014 (CC),” para. 5). With respect to the first question, Justice Sachs, who wrote the majority opinion, determined that, because the substance of the original case involved the two constitutionally protected rights to information and environmental justice, the consequent award of costs in such matters itself raises a constitutional issue. With regard to the latter question, the respondents and particularly Monsanto attempted to argue that section 21A of the Supreme Court Act (59 of 1959) provides that appeals based solely upon costs should only be entertained in exceptional circumstances, which, in their interpretation, were lacking in the present appeal. Counsel for Biowatch contended that section 21A is not binding on the Constitutional Court, an interpretation accepted by Justice Sachs, albeit with the caveat that there is merit to the principle underlying this section given

that appeals on the limited, subsidiary issue of costs “are a side-show to the real issues that should occupy the court’s time (although as the facts of this case indicate, they can be an important side-show)” (“Trustees, Biowatch Trust v Registrar: Genetic Resources, and Others 2009 (10) BCLR 1014 (CC),” para. 11). Citing the submissions made by the *amici* in this case, who pointed out forcefully that the costs approach adopted by the High Court could jeopardize public interest litigation given the severe financial penalty that costs orders would impose on the organizations bringing such suits, Justice Sachs concluded that it would be in the interests of justice for leave to appeal to be granted.

Having granted leave to appeal, Justice Sachs went on to elaborate the following four issues concerning costs awards in constitutional litigation raised by this case:

1. Whether costs awards in constitutional litigation should be determined by the status of the parties or by the issue;
2. What the general approach should be in relation to suits between private parties and the State;
3. What the general approach should be in constitutional litigation where the State is sued for a failure to fulfill its constitutional and statutory responsibilities for regulating competing claims between private parties; and
4. The role of appellate courts in appeals against costs awards.

Biowatch and particularly the *amici*, in emphasizing the deleterious effects of adverse costs awards on their capacity to perform their public interest advocacy work, sought to advance the argument that the High Court misdirected itself in failing to give sufficient regard to the fact that Biowatch was litigating not on its own behalf, but rather in the public interest. Monsanto, on the other hand, contended precisely the opposite in its argument that Biowatch had inserted itself into issues in which it had no direct interest and consequently should have to bear the repercussions of its purported inappropriate involvement. In any event, the Constitutional Court concluded that the starting point for any inquiry should be the nature of the issues rather than the characterization of the parties. Giving consideration to the status of the parties involved would, in fact, violate subsection 9 (1) of the Constitution, which provides that everyone is equal before the law and thus must enjoy the right to equal protection and benefit of the law. The determining criterion must thus be whether the parties involved are asserting rights protected by the Constitution.

With respect to the second issue dealing with the general approach in suits between private parties and the State, Justice Sachs pointed to precedent established in the *Affordable Medicines*²² decision, in which the Constitutional Court held that as a general rule in constitutional litigation an unsuccessful private litigant against the State should not be ordered to pay costs. Conversely, and again citing previous precedent²³ including the *Affordable Medicines* case, Justice Sachs pointed out that ordinarily if the government loses it should pay the costs of the opposing party. Justice Sachs provided a three-fold rationale for this general rule in respect of costs awards. First, it reduces the chilling effect that adverse costs orders could exercise on people trying to assert their constitutional rights, particularly given

the high costs of pursuing constitutional litigation. Second, constitutional litigation, irrespective of the outcome, typically bears not only on the interests of the particular litigants involved but more broadly on the rights of all those in comparable situations. Finally, the onus for ensuring that both the law and state conduct adhere to the principles of the Constitution falls upon the State. While Justice Sachs clearly indicates that this general approach is not unqualified (i.e., that frivolous, vexatious, or otherwise inappropriate applications should not be immune to adverse costs awards²⁴), his ruling strongly confirms previous precedent that in cases of genuine constitutional import courts must have very powerful reasons for decisions to impose costs on unsuccessful private litigants or conversely to deprive successful private parties of their costs against the State.

By their very nature constitutional issues do not typically arise in cases where the State is not a party. More often constitutional issues will arise in cases where the State is compelled to discharge one of its regulatory roles in the public interest between competing private parties, the third issue in the case at bar contemplated by Justice Sachs. In cases where one party seeks to challenge the constitutional validity of government action, or inaction as in the current case, different private parties might have opposing interests in the litigated result. The presence of multiple, opposing private parties notwithstanding, the essence of such matters remains one of whether the government failed to discharge adequately its constitutional and statutory responsibilities. Thus at their most basic such cases encompass litigation between a private entity and the State, with “radiating impact on other private parties. In general terms costs awards in these matters should be governed by the over-arching principle of not discouraging the pursuit of constitutional claims, irrespective of the number of private parties seeking to support or oppose the state’s posture in the litigation” (“Trustees, Biowatch Trust v Registrar: Genetic Resources, and Others 2009 (10) BCLR 1014 (CC),” para. 28). The essence of this case was based upon the responsibility of the State to make information supplied to it by Monsanto and other companies available to Biowatch. It thus follows that this litigation was a case between Biowatch and the State and not between the former and Monsanto. With respect to the particulars of the present appeal, Justice Sachs was quite critical of the obstinate failure of the government to provide information that, as subsequently became clear during the course of the litigation in the High Court, it had statutory and constitutional responsibilities to make available:

The applicant was pursuing information in terms of a right conferred by section 32 of the Constitution, and the information sought concerned environmental rights protected by section 24 of the Constitution. *The government’s duty was to act as impartial steward, and not to align itself either with those who had furnished the information or with parties seeking access to it.* It was important that the objectivity not only be present, but be seen to be present in circumstances where the information related to questions of general public interest and controversy, and *there was no lawful ground to withhold it.* This required objectivity and distance in

²² *Affordable Medicines Trust and Others v Minister of Health and Another* (2005) ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC). In reaching this decision Justice Ngcobo referred to previous precedent established in *Motsepe v Commissioner for Inland Revenue* (CCT35/96) [1997] ZACC 3; 1997 (6) BCLR 692; 1997 (2) SA 897 (27 March 1997), at para. 30.

²³ See for example *Du Toit v Minister of Transport* [2005] ZACC 9; 2005 (11) BCLR 1053 (CC); 2006 (1) SA 297 (CC) at para 55, in which the majority in this Court held that “although the respondent had asked for a costs order, the applicant has brought an important issue to this Court regarding the application and interpretation of the relevant provisions of the Act. I therefore make no order as to costs;” *Volks NO v Robinson and Others* [2005] ZACC 2; 2005 (5) BCLR 446 (CC); 2004 (6) SA 288 (CC); and *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* [1998] ZACC 18; 1999 (2) BCLR 139 (CC); 1999 (2) SA 1 (CC). Also see *Steenkamp NO v The Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) BCLR 300 (CC); 2007 (3) SA 121 (CC).

²⁴ Justice Sachs, note 28 at para. 24, cited the following cases in support of his qualification of the general approach to costs between the State and private parties: *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others* 2005 (6) SA 123 (ECD) at 144B–C, where Pickering J held that he was regrettably obliged to order an environmental NGO to pay costs in relation to an application that was unnecessary and unreasonable because its very real concerns had already been met, and the application was doomed to failure from its inception. See also *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 (1) SA 478 (CPD) at 493 C–E, where, after stating that NGOs should not have unnecessary obstacles placed in their way when they act in a manner designed to hold the State, and, indeed, the private community, accountable to the constitutional commitments of South Africa’s new society, including the protection of the environment, Justice Davis refused to make an order of costs against the unsuccessful environmental applicant, but nevertheless ordered the applicant to pay the wasted costs occasioned by the matter having been brought without justification on an urgent basis.

respect of any competing private interests that might be involved. The greater the public controversy, the more the need for transparency and for manifest fidelity to the principles of the Constitution, as ultimately given effect to by PAIA (“Trustees, Biowatch Trust v Registrar: Genetic Resources, and Others 2009 (10) BCLR 1014 (CC),” para. 45; emphasis added).

With respect to the fourth issue in this case, the role of appellate courts in appeals against costs awards, Justice Sachs was at pains to commend the High Court's carefully reasoned judgment based on the merits. On Justice Sachs' reading, Biowatch not only achieved substantial success against the government respondents²⁵ but also Monsanto, which, although successful in preventing disclosure of confidential information, not only unnecessarily prolonged the litigation by invoking nugatory procedural grounds designed to prevent Biowatch from pursuing court action altogether but also ultimately failed in its efforts to withhold *in toto* the information sought by Biowatch. Given this result Justice Sachs indicated his surprise at the costs orders made by the High Court and re-affirmed by the full bench of the High Court on appeal. Indeed, Sachs also made relatively short shrift of the rationale offered by Justice Dunn when delivering his costs orders since the latter's apparent annoyance at the “inept manner” in which Biowatch had formulated its requests for information exercised relatively little impact on the manner in which the case was ultimately and overall decided:

Whatever ineptitude there might have been in the manner in which the requests were framed fell far short of the kind of misconduct that would have justified the Court in refusing to follow the general rule, namely that, where an applicant succeeds substantially in a constitutional suit against the government, the government should pay the applicant's costs (“Trustees, Biowatch Trust v Registrar: Genetic Resources, and Others 2009 (10) BCLR 1014 (CC),” para. 46).

With regard to the costs order against Biowatch in favor of Monsanto, Justice Sachs again emphasized the fact that this case pitted Biowatch against the State over constitutional rights to access to information and environmental justice. Rather than discharge its duties and respond to Biowatch's requests for information in a manner appropriate to the protection of Monsanto's confidential business information, the State simply ignored the requests. This state obstinacy ultimately provoked the litigation, which Monsanto was then entitled to join in order to protect information it had provided that fell within the bounds of statutory exemptions. Contrary to Justice Dunn's interpretation in the High Court that Monsanto had been compelled to come to court to protect its interests against Biowatch, Justice Sachs situated the locus of blame at the proper door of the government respondents. That is, Monsanto entered into the litigation as a direct result of the failure of the three government agencies to execute properly their statutory and constitutional duties to delineate between information that could be disclosed and information subject to exemption provisions. Based upon this reasoning Justice Sachs ordered the government respondents to pay Biowatch's costs in both the High Court and the Constitutional Court.²⁶ He similarly reversed the second costs order against

Biowatch in favor of Monsanto. Commenting on this long sought after vindication Fig articulated the belief that “this was not just a victory for Biowatch and its legal team, but also for all public interest bodies which take seriously the work of securing constitutional rights using the legal system” (as cited in n.a., 2009, p. 6).

5. Conclusion

As contemplated in the South African Constitution, and provided for in the country's environmental and access to information legislation, citizens require the type of information sought by Biowatch to protect their environmental rights and political participation rights in making decisions about genetically engineered crops, which portend serious risks and uncertainties for the environment, community food systems, and potentially human health. The gravity of these rights and the clear necessity of an unimpeded flow of information to assess and sustain their protection in the face of unconfined release of genetically engineered crops underscores the vital importance of a rigorous access to information regime. Put another way, without access to information rights, themselves a fundamental right in South African law, other fundamental rights risk being harmed as a result of government and private sector opacity. Yet, as Rose Williams points out, Biowatch never anticipated that what began as a strategic use of access to information rights to secure information that could aid in broader environmental and sustainability struggles against genetically engineered crops would work its way up to the highest court in the land. The fact that Biowatch was aided in its efforts by a number of other civil society organizations that provided either direct legal support or acted as *amici curiae* perhaps bodes well for the ongoing development of South Africa's access to information regime. As researchers with the *Open Society Justice Initiative* (2006) determined in their cross-national study, in countries where civil society groups took an active role in promoting and ensuring a robust implementation of access to information laws, governments tended to be much more responsive to access requests than was the case in countries without significant NGO involvement.

So what lessons can we draw from this extended battle waged by Biowatch against both the government and Monsanto in terms of its implications for access to information in South Africa? Although overall an arduous and protracted process, this case demonstrates that dedicated civil society organizations can prevail against the cloak of secrecy still clearly entrenched within the South African bureaucracy, Executive, and corporate sector. That it took five years to obtain the requested information and an additional four years to settle the issue of costs is testament to both claims. From an organizational perspective this fight exacted a demanding toll on Biowatch that precluded it from carrying on its work as usual for a number of years. Indeed, it has only been since early 2010 that Biowatch has been able to get back on track and refocus its main attention to pursuing the goals and objectives that comprise its environmental, sustainability, and biodiversity mission. The long delay in obtaining the requested information was similarly problematic given the speed with which genetically engineered crops were, in the interim, gaining a foothold in South Africa. Although unclear whether deliberate in this particular case, refusals by government to release information and subsequent legal battles to compel disclosure actually afford corporations an expanded window of opportunity to sell as much of their genetically engineered products as possible in an attempt to integrate them so deeply into markets and the environment that a later potential regulated withdrawal would not only be environmentally impossible but also result in such a degree of economic upheaval that it is no longer considered a viable policy option (Levidow, 1995). Articulated from a policy perspective we thus note that information can be a volatile resource, meaning that there is an inverse relationship between its age and usefulness, particularly when exercised as a leverage right in pursuit of other constitutional and legislated rights. It

²⁵ In articulating their objections to the appeal the statutory respondents, while accepting that Biowatch had achieved substantial success at the High Court, also argued, rather illogically, that they too had achieved substantial success since Justice Dunn ruled that the exemptions contained in Chapter 4 of PAIA could be invoked to protect confidential business information.

²⁶ Biowatch did not request, and thus did not receive, a costs order against the State in respect of its unsuccessful appeal to the Full Court because it was represented by the Legal Resources Centre. It also did not receive costs for its unsuccessful application with the Supreme Court of Appeal because it made no appeal in the Constitutional Court against the costs order granted by the former court.

is for this reason that Roberts (1999; 2000) argues access delayed is often tantamount to access denied.

Biowatch's ultimate success notwithstanding, its travails in exercising its constitutional right to access government-held information corroborate many of the challenges articulated by other researchers that continue to plague South Africa's access to information regime almost a decade after its enactment. As outlined in previous sections of the paper, South Africa has yet to develop any consistent and rigorous organizational capacity that would facilitate compliance with the spirit and the letter of PAIA as well as the broader constitutional right to access to information. While the empirical evidence presented above with regard to the Biowatch case is unable to speak to organizational capacity, it does add further evidence to the complementary theme found within access to information research about the continued lack of willingness to comply with PAIA that is widespread within the Executive and bureaucracy in South Africa. In fact, the Open Democracy Advice Centre maintains that systemic intransigence against transparency is so engrained within the bureaucracy and government that surmounting it requires not only education and awareness-raising but also strategic impact litigation in relation to PAIA. Rather than respond in a way that would have satisfied Biowatch's constitutional right to access to information, the NDA stonewalled and deferred to the Executive Council for Genetically Modified Organisms. Though certainly not clear from the evidence available, the fact that the Government of South Africa has long made biotechnology a prominent prong in its economic development strategies (culminating in a national Biotechnology Policy in 2004) raises serious questions about the political economic motivations behind the government's uncompromising position in this case.

The fact that Biowatch was compelled to seek redress through the courts because of the refusal of the relevant government bodies to provide the requested information points to a substantial weakness in South Africa's access to information regime at an even more fundamental level; namely that it is predominantly the courts that have been tasked with oversight. While it is true that the Public Protector, at his or her discretion, is charged with mediating disputes over access requests filed with public bodies (including a duty to advise complainants regarding appropriate remedies), this institution has thus far failed to discharge this role in any substantial depth (Allan, 2009a).²⁷ Similarly, SAHRC, although tasked by the Act with duties to monitor and provide education about the legislation, to assist requestors to exercise their access rights, to receive manuals and annual statistics from public and private bodies, and to submit annual reports to Parliament that outline usage of all aspects of the Act,²⁸ is, in fact, a lame duck institution that lacks any real order and enforcement powers in respect of access to information issues. Any recommendation it might make regarding a dispute over a right that falls within its purview is not binding on public or private bodies. Indeed, a continual theme expressed in SAHRC annual reports to Parliament laments the weak articulation of enforcement powers provided by PAIA and a corresponding lack of sufficient resources. Allan (2009a, p. 170), who is rather more critical in her assessment, maintains that the commission thus far has taken "a very soft approach to promotion and enforcement, with the result that it fails to be a catalyst for the resolution of disputes and access to records." So although intended to offer a cost-effective means of redress, the inability of SAHRC to enforce its recommendations ultimately compels complainants to avail themselves of the courts against recalcitrant bodies that refuse to honor their access duties under PAIA.

But seeking remedy through the courts is a daunting and typically expensive undertaking fraught with significant uncertainty. In a

country such as South Africa that remains plagued by educational, cultural, and socio-economic divisions, the appropriateness of the courts as an effective mechanism to adjudicate disputes over demands for government and private sector transparency is even more questionable. Although the original costs orders were ultimately overturned, the Biowatch case demonstrates that even a successful outcome can bring with it substantial consequent negative costs awards, which exercise deterrent effects on the development of a robust access to information regime. These challenges are further intensified by the relative youth of PAIA, such that there exists relatively little precedent that might serve as a guide to contemplating with any certainty the way that the courts will decide disputes over access. According to Allan (2009a), the overwhelming majority of litigated complaints against failures to disclose requested information have been settled prior to the commencement of a hearing, thus limiting the corpus of judicial precedent in respect of the interpretation of PAIA. That having been said, the Biowatch case establishes an important precedent that could aid other people and groups attempting to enforce their constitutionally enshrined access to information rights.

In practice, reliance on the courts for enforcement has meant that the full exercise of the constitutional and legislatively mandated access to information rights remains predominantly limited to a small number of NGOs able to litigate compliance failures on the part of the government, albeit not in all cases given their own resource constraints (Calland, 2009). The result is, as the Biowatch case so aptly demonstrates, that both public and private bodies tend to adopt a strategy of silence whereby they completely fail to acknowledge, process, and/or respond to requests for information. Indeed, an *ad hoc* Parliamentary Committee pointed out in its 2007 report to Parliament that

[t]he complex and potentially expensive appeals mechanism provided for in the legislation places further obstacles in the way of ordinary individuals wishing to access information...an aggrieved individual can only challenge decisions denying access to information in an ordinary court of law. The cost and complexity of such processes often make it difficult if not impossible for individuals or groups without adequate resources to exercise their right to information through the Act. It is significant that only a handful of cases reach the courts. (n.a., 2007, pp. 173–174).

This committee went on to recommend the creation of an independent oversight office that would be allocated a dedicated budget but located within the SAHRC in order to capitalize on existing infrastructure and avoid what the committee considers an unnecessary proliferation of human rights bodies. It remains to be seen whether Parliament acts on this recommendation. If we recall our previous discussion about lack of top-level support for access legislation in South Africa the signs are not particularly promising. Returning to the policy question articulated at the outset of this paper, the details of this case lend a further strong voice to the multiple calls within South Africa for the creation of an independent body to oversee the implementation and promotion of the country's access to information regime. Indeed, South Africa could look to a number of its Commonwealth brethren, including Canada, Australia, and New Zealand, for best practices in developing an independent and sufficiently resourced ombudsperson or commissioner dedicated to oversight, adjudication, enforcement, and education in respect of PAIA.²⁹

²⁷ Section 91 of PAIA vests this dispute resolution role in the Public Protector through a consequent amendment to section 6 of the *Public Protector Act*, 1994 (Act No. 23 of 1994).

²⁸ Part 5 of PAIA.

²⁹ Learning from best practices is key here since these three countries, despite relatively long and deep experience with access to information regimes, all suffer from their own peculiar challenges. For a very good outline and discussion of these issues see Roberts' (2006) latest book on government secrecy.

Aside from offering additional support for this policy recommendation, the evidence and analysis presented above suggests several avenues for future research. For example, what impact, if any, will the Biowatch decision exercise on the willingness and success of other NGOs to avail themselves of the provisions set out in PAIA when executing their missions? Might this precedent help to convince South African political leaders and top-level bureaucrats of the need to affect a sea change in attitudes toward openness and transparency? The High Court relied on the exemption provisions contained in PAIA to protect confidential business information. Moving forward, it would be very interesting to determine the extent and legitimacy of attempts by public and private bodies to invoke such exemptions as a means of shielding information provided by businesses from disclosure. This research similarly points to related questions about the records management capacity of all levels of South African government, particularly in light of the requirements established in PAIA for public bodies to compile manuals and indexes of the information held within their control. Finally, in the Biowatch case examined in this paper the public-interest override was not invoked since counsel for the applicants argued that PAIA did not apply. For obvious reasons none of the respondents raised this issue either. Nonetheless, the public-interest override³⁰ raises an interesting question that begs future study, namely whether, and if so with what success, requestors will be able to invoke the provisions in the Act that require mandatory disclosure of even exempt information if the disclosure would serve the public interest. If the present attempts by the Government of South Africa to implement a Media Appeals Tribunal³¹ and pass the current version of the Protection of Information Bill³² are any indication of things to come, a public interest informed by an effective right to information is anything but secure.

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³⁰ *Supra* note 20.

³¹ In response to an alleged dearth of media ethics in South Africa, the ruling African National Congress (ANC) and its ally, the South African Communist Party, are attempting to push through Parliament the creation of a Media Appeals Tribunal that would regulate what can be reported on and what constitutes a state secret. The rationale offered by the ANC in support of such a Tribunal is to limit the alleged damage caused by newspapers that purportedly do not represent the public interest but rather a narrow, mainly white interest. It is further claimed that the current office of the Press Ombudsman is ineffective because it is comprised of journalists and therefore cannot be objective when determining whether press coverage of certain stories violates individual rights to privacy and dignity.

³² Developed as a purported response to national security concerns, South Africa's proposed Protection of Information Bill has been criticized by a number of civil society groups for being so broad and vague that in practice it would curtail the right to access to information and thus damage public participation and good governance. These concerns are compounded by the bill's proposed creation of a series of broad offences that would impose substantial criminal penalties without establishing a public interest defence clause.