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Freedom of Information in Relation to Private Companies

Comparative law research project prepared for the Hungarian Civil Liberties Union

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CONTRIBUTORS

Faculty:

Dr Jacob Rowbottom
CUF in Law, University College
OPBP Executive Committee Member

Research co-ordinator(s):

Tamas Szigeti
OPBP Event and Liaison Officer
MPhil Candidate

Researchers:

Celia Rooney
BCL Candidate

Ioannis Katsaroumpas
DPhil Candidate

Zachary Vermeer
DPhil Candidate

Readers:

Chris McConnachie
OPBP Chairperson
DPhil Candidate

Emma Webber
OPBP Internships Officer
MPhil Candidate

Ingrid Cloete
OPBP Deputy Chairperson
MPhil Candidate

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Intellectual property

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The research has been prepared for the Hungarian Civil Liberties Union (HCLU), a non-profit human rights organisation in Hungary, to support its strategic litigation programme on access to information. The HCLU regularly submits freedom of information (FOI) requests to the state and private bodies under the national freedom of information laws. They have observed that publicly owned or controlled private companies have increasingly refused these requests. As a result, the HCLU requested Oxford Pro Bono Publico to investigate the following questions:

a. What is the scope of freedom of information legislation in other jurisdictions?
b. Does this legislation cover private entities carrying out public functions or using public funds?
c. What balance is struck between public data and a state-owned company's interest in protecting its business secrets?

The second and the third questions have been answered together, in the second section of this report, because the research results showed that the two questions were significantly interlinked. This research covers five jurisdictions: the United States of America (US), the United Kingdom (UK), South Africa, Australia and Greece.

Three out of the five jurisdictions (the US, the UK and South Africa) extended the scope of their freedom of information laws to private entities. Furthermore, in all five jurisdictions there were debates on introducing disclosure rules to private entities. The question of extension generally surfaced due to the privatisation of public functions that resulted in some traditional government functions shifting to the private sector. The jurisdictions covered in this research adopted three different approaches to the application of freedom of information laws to private entities.

a. *Legislation-driven process.* The South African Constitution,[1] read with the Promotion of Access to Information Act 2 of 2000 (PAIA), affords two types of entitlements to access information held by private companies: 1) a general right to access information where the private company is classified as a 'public body'; or 2) where a company does not qualify as a 'public body', a more limited right to access information where the information is required for the exercise and protection of any right. A private

[1] Constitution of the Republic of South Africa, 1996, section 32.

company is classified as a 'public body' where it performs a public power or a public function in terms of legislation. The South African courts consider a number of factors in determining whether a private company is performing a public function, including: a) the degree of control the state exercises over the company;[2] b) the source of the company's funds; c) the degree of power or coercion exercised by the company; d) the extent to which the company's activities impact the public; e) the source of the company's powers; and f) whether there is a need for the company's activities to be exercised in the public interest, among others.[3]

b. *Government-driven process.* The United Kingdom's Freedom of Information Act 2000 (FOIA 2000) allows the Secretary of State to extend the law to cover private entities carrying out public functions on a case-by-case basis. Schedule 1 of the FOIA includes a list of public authorities, and the Secretary of State is granted a discretionary power to add certain private bodies to that list. Since its adoption, the Schedule has been left largely untouched. The Australian legislators considered adopting the UK model but decided against extending FOI legislation to private companies.

c. *Court-driven process.* In the United States, courts were active in interpreting the existing freedom of information laws to scrutinise whether private companies were already covered by existing laws. The main factors the courts took into account are the followings: (i) whether the company carries out public functions; (ii) the level of public funding; and (iii) the nature of the public records. These factors were fleshed out in several forms in the relatively rich case law. The case law highlights the underlying difficulty the courts face, *viz* whether exchange between the state and the company should regarded as a mere quid pro quo business relationship or the shifting of a public function to private sector. In some states the legislators amended the FOI laws to expand access to information held by private companies.

In the jurisdictions studied, the following factors were found to be relevant in determining whether a private company is subject to FOI legislation:

a. Whether the private company carries out public functions that were previously performed by the state.

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[2] *Mittalsteel South Africa Ltd v Hlatshwayo* [22].

[3] See further *Mittalsteel* ibid [21]; *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC) [186]; *M & G Media v 2010 FIFA World Cup Organising Committee* 2011 (5) SA 163 (GSJ).

b. The level of influence or control the state exercises over the private entity. Courts may focus on the decision-making process, where the profits of the company go, or even the regulation framework of the company.
c. Whether the entity was created by the state.
d. The extent to which the state funds the private entity.
e. Whether the information is required for the exercise or protection of a right.

Finally two caveats should be added to this research. First, the choice of jurisdictions was based on the expertise of our researchers and does not reflect a systematic choice of jurisdictions with regard to the research questions. Second, the issue of freedom of information in the context of environmental protection was excluded from the ambit of this research. However a brief discussion of this topic has been included in the overview of UK law.

OVERVIEW OF RELEVANT FREEDOM OF INFORMATION LEGISLATION

I UNITED STATES

The United States (US) adopted the first modern, general freedom of information law in 1966, the Freedom of Information Act (FOIA).[4] The FOIA is only applicable to agencies of the executive branch of the federal government, and neither the judiciary nor Congress is covered. The FOIA was amended several times since its adoption, most recently in 2007 by the OPEN Government Act.[5] All states have adopted some form of freedom of information laws. These laws provide variable degrees of access to state information.

II UNITED KINGDOM

i) United Kingdom (excluding Scotland)

The Freedom of Information Act 2000 (FOIA UK) represents a comprehensive approach to disclosure of information held by the state. Proposals for the Freedom of Information Act were published in a white paper entitled *Your Right to Know* in 1997.[6] Legislation was enacted in 2000, and came into force in 2005. The Act grants two rights of disclosure: first, the right to either confirmation or denial that a public authority is holding certain information, and, second, the right to gain access to the information held by the public authority. It applies to information held by the public authority which originated from an external source, unless it is held by the public authority 'on behalf' of another, a feature which has significant implications for third parties and private companies. It also includes information held by other bodies on behalf of a public organisation.

ii) Scotland

In accordance with the devolved constitutional settlement in the UK, access to information regarding matters which are within the competence of the Scottish Parliament is governed by the Freedom of Information (Scotland) Act 2002, which came into force in 2005. The 2002 Act is largely equivalent to the FOIA UK in both substance and application. There are, however, some important differences. The Scottish Act, for example, does not split the right to information into

[4] 5 USC § 552.
[5] A bill to promote accessibility, accountability, and openness in Government by strengthening, 5 USC § 552.
[6] UK Government Ministry of Justice, *Your Right to Know* (White Paper, CM 3618, 1997).

the right to confirmation or denial and the right to have information disclosed, but has one unified right to obtain information. In addition, to be exempt from the disclosure requirements, the Scottish Act requires 'substantial prejudice' to the authority's interests, while the UK Act has a lower harm threshold, requiring only 'prejudice'. While the Scottish Act may offer slightly stronger rights of access to information, the FOIA UK and the Scottish Act roughly correspond.

III SOUTH AFRICA

South African law establishes a wide-ranging right to information which applies, not only to organs of state, but also to private companies and individuals. This right is enshrined in section 32 of the South African Constitution.[7] There are two categories of right to information under the Constitution: 1) a general right (subject to limitations) to any information held by organs of state; and 2) a more limited entitlement to access information held by private companies and persons where the information is required for the exercise or protection of any right.[8]

The Promotion of Access to Information Act 2 of 2000 (PAIA) gives effect to the constitutional right, and establishes a similar distinction between the two categories of right to information: a general right to information held by 'public bodies' (unless one of the exceptions in the Act applies),[9] and a more limited right to information held by the private sector where the information is required for the exercise or protection of any rights.[10]

Section 11 of PAIA establishes a right to information held by any 'public body'. A 'public body' is defined in s 4 of the Act as:

> (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 –

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[7] Constitution of the Republic of South Africa, 1996.
[8] Section 32 provides:

> (1) Everyone has the right of access to
>
> (a) any information held by the state; and
>
> (b) any information that is held by another person and that is required for the exercise or protection of any rights.
>
> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

[9] Section 11(1).
[10] Section 50(1).

i) Exercising a power or performing a duty in terms of the Constitution or a provincial constitution
ii) Exercising a public power or performing a public function in terms of legislation.

Under section 4(b)(ii) a non-state institution may be classified as a public body under the Act when it is 'performing a public function in terms of legislation.' Section 8 provides that some entities may have both public and private functions, in which case records created while in the course of performing public functions will be covered by the broader right of access to the information of public bodies, while those created in the course of performing private functions will be subject to the more limited right of access to private bodies' information.[11]

The more limited right to information held by a private body applies to all natural persons, partnerships, or juristic persons, excluding those which fall in the public body category.[12] This right can only be exercised where the information held by the private body is required for the exercise or protection of any rights.

IV AUSTRALIA

Australia is a federal state made up of nine different jurisdictions. Separate freedom of information laws exist in each of these jurisdictions, applying to the governmental institutions of that jurisdiction. While the details of these laws differ, they exhibit the same general features. The Freedom of Information Act 1982 applies at the federal level.

These laws confine the right of access to information to documents held by public bodies. Although the exact definitions vary, the effect is the same in all jurisdictions: there is a right to access documents held by government departments, public authorities, public universities and hospitals, regulatory bodies established by legislation, and (some) government-owned enterprises and their subsidiaries.

V GREECE

Freedom of information enjoys constitutional protection in Greece. Article 5A of the Greek Constitution provides that:

[11] Section 8(1).
[12] Section 1.

1. All persons are entitled to information, as specified by law. Restriction to this right may be imposed by law only insofar as they are absolutely necessary and justified for reasons of national security, of combating crime or of protecting rights and interests of third parties.
2. All parties are entitled to participate in the Information Society. Facilitation of access to electronically handled information, as well as of the production, exchange and diffusion thereof constitutes an obligation of the State, always in observance of the guarantees of Article 9, 9A and 19.

However, no freedom of information law has been enacted to define the duty-holders and it is unclear whether private companies fall within the scope of this duty.

Article 10(3) provides a general right of access to government documents:

> The competent service or authority is obliged to reply to requests for information and for issuing documents, especially certificates, supporting documents and attestations within a set deadline not exceeding 60 days, as specified by law. In case this deadline elapses without action or in cases of unlawful refusal, in addition to any other sanctions and consequences of law, special compensation is also paid to the applicant, as specified by law.

The Greek Code of Administrative Procedure[13] regulates the terms and conditions for the exercise of the right of access to documents. Its scope is defined in Article 1 to cover 'the Public sector, Local Government and other legal entities governed by public law'.

[13] Greek Code of Administrative Procedure No. 2690/1999.

APPLICATION OF FREEDOM OF INFORMATION LEGISLATION TO PRIVATE ENTITIES

I UNITED STATES

The scope of the freedom of information law was mainly set by the definition of 'agency' in the FOIA. From 1974, the FOIA defined agency as: 'any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency'.[14] As government on both the federal and the state level started to contract out tasks previously carried out by the government, legislators and courts increased the coverage of existing freedom of information laws. The implications of these changes will be discussed first in the context of the federal government, then in the context of the state governments.[15]

On the federal level, the FOIA was not changed to encompass private companies. Section 9 of the OPEN Government Act of 2007 supplanted the FOIA with a technical modification to cover agency records maintained by private entities for the purpose of record keeping. In the absence of modifications to the Act, the courts became instrumental in deciding the extent to which disclosure rules applied to private entities via the interpretation of 'agency' and 'agency record'. In this respect, federal courts mainly dealt with cases where the government contracted out research or policy studies to private entities, such as universities, whose work subsequently served as basis for government policies. It is in that field that the question of application to private entities played out in its clearest form.[16] In *Forsham v Harris,*[17] the federal Supreme Court gave a narrow ruling on the meaning of 'agency record'. The case was about a research contract between a government agency (Department of Health and Human Service) and a university (University of Pittsburgh) to carry out a study. The agency had a contractual right to access to all records of the study but had

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[14] 5 U.S.C. 552(f)(1).

[15] In this part of the research we rely heavily on two sources: Harry Hammitt, *Privatisation: Its Impact on Public Records Access.* (FOI Report of the National Freedom of Information Coalition, Volume 2, Number 1.) <http://www.nfoic.org/sites/default/files/hammitt_privatization.pdf> accessed 1 May 2013. Craig D. Feiser, 'Protecting the Public's Right to Know: the Debate Over Privatization and Access to Government Information Under State Law' (2000) 27 Fla St U L Rev 825.

[16] Hammit (n 0) 1-2.

[17] 445 U.S. 169 (1980).

not exercised this right and was not in possession of these records. Those records were sought via FOIA requests. The Supreme Court held that a (supervising) agency is not required to retrieve information that it is legally entitled to have so as to reply to FOIA requests where research is carried out by a private entity from public funds under the supervision of the agency. This ruling was subsequently narrowed by two appellate court rulings: *Burka v Department of Health and Human Service*[18] and *Chicago Tribune v Department of Health and Human Service.*[19] In *Chicago Tribune*, the federal courts ruled that if the agency exercises significant control or considerable supervision over the contractor's findings (in that case: a research study, and the raw data used by the study) then the records could qualify as 'agency records'. Nonetheless, Harry Hammitt notes that the jurisprudence of the court is not completely settled and 'there have been no further developments extending coverage to contractors based on the extent of agency supervision'.[20]

At the state level, there is a multitude of responses to the phenomenon of contracting out government services with regard to the application of freedom of information laws. One academic survey[21] from 2000 found that a small number of states explicitly amended their laws to ensure that access to information is not negatively impacted by privatisation.[22] In 34 states, courts grappled with redefining 'agency' and 'agency records' to determine whether private entities were covered by these laws. Courts privilege a number of factors: (a) the public function; (b) nature of records; and (c) level of public funding.[23] Hammitt adds that these factors are often combined by court into a totality approach.

It is important to highlight that none of the approaches leads automatically to either more open or more restrictive results with regards to application of the freedom of information laws. This was demonstrated in the seminal case of *Connecticut Humane Society v. Freedom of Information Commission*,[24] where the FOI complaint was based on state laws. The court weighed a number of factors in deciding whether the private entity holding documents sought in a FOI request qualified as the 'functional equivalent of a public agency'.[25] The relevant factors identified by the court in

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[18] 87 F.3d 508 (D.C. Cir. 1996).
[19] U. S. Dist. 2308 (N.D. Ill.1997).
[20] Hammitt (n 15) 3.
[21] Feiser (n 15).
[22] By 'access law' we mean FOI legislation in all its forms, such as sunshine laws or freedom of information acts. One notable example is Connecticut, where the Public Act No. 01-169 ensured access to information after privatisation.
[23] Hammitt uses this classification which based on a more detailed one used by Feiser.
[24] 591 A.2d 395 (1991).
[25] ibid.

the case were as follows: 1) whether the entity performs a government function; 2) the level of government funding; 3) the extent of government involvement and regulation; 4) whether the entity was created by the government.[26] In *Humane Society*, after weighing all the factors, the court found that the society was not a government agency, mainly because it did not receive public funds. Similarly, the Florida Supreme Court identified nine factors relevant to deciding if a private entity is regarded as government agency for the purposes of freedom of information laws in case *News and Sun-Sentinel Co. v Schwab, Twitty & Hanser Architectural Group, Inc.*[27] Feiser described the nine decisive factors as follows:

> '1) The level of public funding;
> 2) Commingling of funds;
> 3) Whether the activity was conducted on publicly owned property;
> 4) Whether services contracted for are an integral part of the public agency's chosen decision-making process;
> 5) Whether the private entity is performing a governmental function or a function which the public agency otherwise would perform;
> 6) The extent of the public agency's involvement with, regulation of, or control over the private entity;
> 7) Whether the private entity was created by the public agency;
> 8) Whether the public agency has a substantial financial interest in the private entity; and
> 9) For whose benefit the private entity is functioning.[28]

In deciding whether the private company fell under the freedom of information law's scope some courts focused on the extent to which the tasks the private entity carries out are public functions. The Supreme Court of Ohio found that a private consultancy that was hired by the local government to help hiring for the local government was carrying out a public function. Hence the private company was held to be a government agency for the purposes of access to information laws in the case.[29]

Other state courts privileged the nature of the record. Courts in Minnesota and in Colorado focus on whether the document is held physically by the agency provided that the document itself serves a public function:

> In Washington, the Court of Appeals held that a private contractor's records filed with city government pursuant to contract were public because they contained information 'relating to the **...** performance of a [government] function,' the rehabilitation of the city's sewer system, under the Washington Public Disclosure Act. 74. This was true

[26] Hammitt (n 15) 3.
[27] 596 So. 2d 1029 (1992).
[28] Feiser (n 15) 839.
[29] *State ex rel. Gannett Satellite Infromation Network v Shirey,* 678 N.E. 2D 557 (1997).

> regardless of the characteristics of the entity involved (in contrast to the public function approach described above), or the entity in actual possession.[30]

Finally, other states tie disclosure requirements to the level of public funding private entities receive. The Kentucky Open Records Act[31] extends freedom of information laws to companies that receive at least 25% of their funds from the government, whereas the ratio is set at 30% by legislators in Tennessee.

The academic literature highlights an important problem for courts in these cases. Courts have to decide whether the private company that is asked to disclose some information by FOIA requests is a private company providing a service per se to the government without carrying out a public function; or a company carrying out a genuine government function by providing the service. In Connecticut this conundrum led the court in *Envirotest Systems Inc v Freedom of Information Commission*[32] to say that a company was not similar to a public agency simply because it was contracted by the state in quid pro quo business, despite the totality of factors approach used by the court. The company was hired to run auto-emission tests. In response, the Connecticut legislature enacted a law[33] that government contracts in excess of $2.5 million between a private entity and government must contain a clause that grants access to information concerning the performance of the public function carried out by the private contractors. The law guaranteed that if the government purchased any service beyond a certain value, the court did not have regard to further considerations to extend freedom of information laws to data held by private companies.

II UNITED KINGDOM

i) Application of FOIA UK to private entities in the UK and Scotland

The FOIA UK grants disclosure rights against 'public authorities'. Despite contrary indications in the 1997 white paper, private companies are not subject to duties under the Act. The FOIA UK takes a substantially different approach in defining public authorities compared to the Human Rights Act 1998 (HRA). Unlike the HRA, which gives a general definition of a public authority but leaves the application of that definition to the judiciary, the FOIA UK employs a more

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[30] Feiser (n 15) 852.
[31] KRS § 61.870 – KRS § 61.884; Tenn. Code 8-44-102(b). Both examples are from Hammitt (n 15) 5.
[32] 757 A.2d 1202 (2000).
[33] Public Act No. 01-169.

concrete and exhaustive list. Section 3 of the FOIA UK defines a public authority as anybody listed in Schedule 1 of the Act, or one designated as such by order of the Secretary of State, or a publicly owned company. The FOIA UK does not contain an exact list of public companies but rather it provides a definition in its section 6.[34] While companies that are currently considered to be private are not therefore covered by the Act, the FOIA UK leaves the door open to future designations by the Secretary of State. Furthermore, a number of the 'public authorities' listed in Schedule 1 would not conventionally have been considered to be public authorities, such as the Museum of London or the Westminster Foundation for Democracy, while traditional public bodies, such as the Security and Intelligence Services, are explicitly not included in the definition.[35] Some of the authorities are completely covered by the Act, in that freedom of information applies to all of the information held by the authority.

Section 4 of the FOIA UK allows a process of rolling amendments of the Schedule 1 list if an organisation is either established under the prerogative, legislation, or a government department, or if a body is appointed by the Crown, a Minister or a government department. In addition, under section 5, the Secretary of State has the power to designate an organisation as covered by the FOIA UK duties. An organisation can be designated if it appears to the Secretary of State to exercise public functions or if it contracts with a public authority to provide services which are a function of that authority. Any Section 5 Order must specify the functions of the organisation which are covered by the designation, as the Order need not apply to all the information held by the company. In response to a public consultation in 2007, the Association of Chief Police Officers

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[34] Publicly-owned companies are defined as follows:

(1) A company is a "publicly-owned company" for the purposes of section 3(1)(b) if—
  (a) it is wholly owned by the Crown, or
  (b) it is wholly owned by any public authority listed in Schedule 1 other than—(i) a government department, or(ii) any authority which is listed only in relation to particular information.

(2) For the purposes of this section—
  (a) a company is wholly owned by the Crown if it has no members except—
    (i) Ministers of the Crown, government departments or companies wholly owned by the Crown, or
    (ii) persons acting on behalf of Ministers of the Crown, government departments or companies wholly owned by the Crown, and
  (b) a company is wholly owned by a public authority other than a government department if it has no members except—
    (i) that public authority or companies wholly owned by that public authority, or
    (ii) persons acting on behalf of that public authority or of companies wholly owned by that public authority.

(3) In this section—
"company" includes any body corporate;
"Minister of the Crown" includes a Northern Ireland Minister.

[35] FOIA UK sch 1, pt 6.

(ACPO), the Universities and Colleges Admission Service (UCAS), and the Financial Ombudsman Services (FOS) were designated as public authorities.[36] The ACPO is not a government entity, a 'company limited by guarantee' that is not for profit company. However, while the FOIA UK leaves the door open to the designation of private companies exercising public functions or providing services under a contract with a public authority, the Secretary of State is not obliged to do so. This is a significant retreat from the position of the 1997 white paper, which suggested the FOIA UK should automatically apply to private companies exercising public functions. Furthermore, the current coalition has signaled that it is unwilling to extend the coverage of the FOIA UK to private service contractors. The Scottish government has also retreated from plans to expand disclosure duties to companies under public service contracts.

Utility companies, many of which were publicly owned in the past, are sometimes considered to be exercising public functions. While the 1997 white paper contemplated automatic FOIA UK coverage of private utility companies, they are not included in the Schedule 1 list. In 2009, in response to public consultation, the government stated that it was 'attracted to bringing such utilities within the Act'.[37] However, utility companies remain undesignated for the purposes of the FOIA UK. The House of Commons Justice Committee examined the FOIA UK and the use of contractual terms to promote transparency. A number of government entities (e.g. local governments, public agencies) that are under the scope of FOIA UK make specific access to information stipulations in their contract with private business to ensure freedom of information. The Committee concluded the following on the access to information held be private companies:

> The evidence we have received suggests that the use of contractual terms to protect the right to access information is currently working relatively well. (…) We believe that contracts provide a more practical basis for applying FOI to outsourced services than partial designation of commercial companies under section 5 of the Act, although it may be necessary to use designation powers if contract provisions are not put in place and enforced.[38]

Under the HRA and for the purposes of judicial review, the status of utility companies as a 'public authority' is unclear and the case law takes various approaches. Often, for example, the regulator is seen as a public authority, while the company itself is characterised as a private organisation. There are, however, cases where the utility company itself is considered a public authority for the

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[36] FOIA UK sch 1.

[37] UK Government Ministry of Justice, *Freedom of Information Act 2000: Designation of Additional Public Authorities (*Consultation Paper 27/07, 27/01/2007).

[38] House of Commons Justice Committee, 'Post-legislative scrutiny of the Freedom of Information Act 2000' <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9611.htm#a52> accessed 1 June 2013.

purposes of judicial review or the HRA. In *R v Northumbria Water ex P Newcastle and Tyneside Health Authority*, for example, the fact that the company involved was subject to judicial review was undisputed, with Collins J. suggesting that the debate over whether or not denationalised utility companies were subject to judicial review had moved on. Furthermore, for the purposes of EU law, in *Foster v British Gas* the European Court of Justice held that a body would be an 'emanation of the state' if it provided public services under control of the state and had special powers for that purpose. The House of Lords then found that British Gas was indeed an emanation of the state. Finally, in *Griffin v South West Water*, it was held that even though South West Water had been privatised, it was an emanation of the state. While privatised utility companies are not currently covered by the FOI legislation, the approach of the courts in relation to a 'public authority' for the purposes of judicial review and the HRA suggests that there may be a case to be made for their designation. Under the FOIA UK, however, the Secretary of State would be under no obligation to do so.

ii) Environmental Disclosure

Environmental disclosure is exempted under the FOIA UK. However, this is not to exempt public authorities from disclosing such information, but rather to ensure than such disclosure is governed by the Environmental Information Regulations 2004 (EIR). The EIR implement the European Council Directive 2004/4/EC on Public Access to Environmental Information, with the EU have taken the lead on environmental disclosure. The 2004 Regulations also bring the UK into line with the Aarhus Convention.[39] The Regulations not only have a duty to make information available upon request, they also include an obligation to proactively disseminate environmental information.

The EIR cover a range of organisations, including some private companies. Unlike the FOIA UK, they automatically cover anyone carrying out functions of public administration, or 'under the control' of a public authority which has environmental responsibilities, as well as the Special Forces or those assisting GCHQ. The Department for the Environment, Food and Rural Affairs (DEFRA) has defined 'under the control of a public body' as a relationship constituted by statute, rights, licence, contract or other means which confer the possibility of directly or indirectly exercising decisive influence over an organisation. The DEFRA guidance specifically gives the

[39] Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters 1998

example of utility companies as bodies that may well be covered by the EIR because they are "involved in the supply of essential public services".

However, despite the DEFRA guidance, there has been some uncertainty as to whether utility companies are exempt or covered by the EIR. In 2007, in *Network Rail v Information Commissioner,*[40] the Information Tribunal found that Network Rail was not bound by the EIR obligations for, while it performed public functions, those functions were not of an administrative nature. However, in 2008, the Information Commissioner decided a request for information from Sutton and East Surrey Water Plc., concluding that the company was a public authority and so the Regulations were applicable to water companies. The decision in *Smartsource v Information Commissioner and 19 Water Companies,* however, added to the confusion – reverting to the position that, while utility companies do exercise public functions, they do not carry out public administrative functions, nor are they under the control of a public authority. As such, the EIR were held not to apply. The issue is currently pending before the ECJ, in the case of *Fish Legal v Information Commissioner.* Whether or not the EIR apply to utility companies, therefore, is as of yet unclear.

III SOUTH AFRICA

As outlined above, section 4(b)(ii) of PAIA provides that a non-state institution is a 'public body' when it is 'exercising a public power or performing a public function in terms of legislation'. Some entities may have both public and private functions, in which case records created while in the course of the public function will be covered by the broader right of access, while those records created in the course of the private functions will be covered by the more limited right of access where they are required for the exercise or protection of any right.[41]

i) Private entities exercising public functions in terms of legislation

There is no single decisive factor to be used to determine whether a non-State entity is exercising a public function. The South African Supreme Court addressed this question in *Mittalsteel South Africa Ltd v Hlatshwayo.*[42] This case involved records created by a corporation in the course of steel trading. The directors of the company were appointed by the South African State President and

[40] *Network Rail v Information Commissioner* EA/2006/0061.
[41] Section 8(1).
[42] [2007] 1 All SA 1 (SCA).

were not able to issue shares without the approval of the President. This was sufficient to establish that, although trading in steel was not by its nature an inherently public function, it was nonetheless public in this case because the company was acting under the state's control.

However, the court emphasised that the 'control test' was not always the most suitable test to apply, and that a company could be performing a public function even when not acting under the control of an organ of state if the function was a 'governmental function.' The Court explained the rationale for this approach as follows:

> In an era in which privatisation of public services and utilities has become commonplace, bodies may perform what is traditionally a public function without being subject to control by any of the spheres of government and may therefore, despite their independence from control, properly be classified as public bodies.[43]

In the context of this discussion of what characterises a function as having a 'public' quality, the Court cited with approval (at [21]) a passage from the British textbook writers de Smith, Woolf and Jowell, who listed the following considerations as relevant when determining whether a body should be subject to judicial review:

> d. Whether, but for the existence of a non-statutory body, the government would itself have almost invariably intervened to regulate the activity;
> e. Whether the government has encouraged the activity of a body by providing underpinning for its work or weaving it into the fabric of public regulation or has established it under the authority of government;
> f. Whether the body was exercising extensive or monopolistic powers.

In the later case of *M & G Media v 2010 FIFA World Cup Organising Committee*[44] the South Gauteng High Court had to decide whether the Local Organising Committee of the FIFA World Cup (held in South Africa in 2010) was exercising a public function when conducting a tender process. The court noted that there was a significant degree of government control of the body, with eight government ministers sitting on its board. However, it laid more stress on the fact that public funds were being dispersed by the body in the course of the tender process. The judge stated:

> I do not mean to suggest that it is only where state funding is received by a body that it will be performing a public function or exercising a public power, but the fact that state funding is involved must always be a useful feature of any such enquiry and…will incline a court to conclude that the function or power in question is public in nature.[45]

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[43] ibid [22].
[44] 2011 (5) SA 163 (GSJ).
[45] ibid [245].

And again:

> To look at the nature of the function or power is not a reliable guide on its own, the source of the funding required to perform the function must also direct the Court to the correct conclusion.[46]

Thus, although a tender process is not an inherently 'public' function, it will be so where it uses public money. The judge also held that in cases where a body receives both public and private funds, the whole of its spending falls within the category of a public function, because:

> to draw too fine a distinction between the public funded activities and the privately funded activities is to place too much trust in the body's account keeping practices; there is no reason why the public should have to limit rights under PAIA to anything less than a full disclosure of the records, and if that should involve some invasion of private it is a cost that must be paid.[47]

In reaching this finding, the Court drew on Chief Justice's Langa's helpful formulation of the 'public function' test in the Constitutional Court's decision in *Chirwa v Transnet Limited and Others*:[48]

> Determining whether a power or function is "public" is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context.[49]

As well as the question of whether the function is a public one, an additional requirement is that it is 'exercised in terms of national legislation.' This was interpreted broadly in the *M & G Media* case. The judge accepted the submission that these words did not require that the exercise of the function be specifically authorised by legislation. It was enough if the function was to be exercised 'in accordance with legislation'.[50] Since the Organising Committee, in the course of the tendering process, was obliged to act in conformity with general legislation governing procurement, this condition was met.

ii) Private bodies not exercising public functions

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[46] ibid [177].
[47] ibid [259]:
[48] 2008 (4) SA 367 (CC)
[49] ibid [186].
[50] *M & G Media* (n 44) [326].

A more limited right of access applies to records created by private companies unrelated to any public function. Section 50(1) of the PAIA provides that: 'A requester must be given access to any record of a private body if (a) that record is required for the exercise or protection of any rights'. Thus, the key question will be whether the record is 'required for the exercise or protection of any rights.'

First, 'rights' include not only fundamental constitutional rights, but all rights, including those created by statute and common law (*Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*[51] endorsing the position taken by Cameron J in *Van Niekerk v City Council of Pretoria*).[52] Second, the information must be 'required' for the exercise or protection of these rights. In *Cape Metropolitan Council*, Streicher JA stated:

> Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of that right. It follows that, in order to make a case out for access to information in terms of s 32 [of the Constitution], an applicant has to state what right it is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.[53]

Even if the record would be of assistance to the exercise of a right, it needs to be more than simply useful or desirable to be 'required' for the exercise of that right. But, as stated in the case of *Cluthco (Pty) Ltd v David*:[54]

> '[R]equired' does not mean necessity, let alone dire necessity. I think 'reasonably required' in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need.'[55]

To give some examples of the application of the test, in *Cape Metropolitan Council* the applicant had purported to cancel a contract on the grounds that the first respondent had breached the contract by committing fraud. The respondent sought access to information about the particulars of the allegations of fraud. The court found that the respondent was entitled to this information. Striecher JA stated in paragraph:

> The right which the first respondent wishes to protect is its right to a good name and reputation. It denies it submitted fraudulent claims. In order to protect its good name and

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[51] 2001 (3) SA 1013 (SCA).
[52] 1997 (3) SA 839 (T).
[53] *Cape Metropolitan Council* (n 51) [28].
[54] 2005 (3) SA 486 (SCA).
[55] ibid [13].

> reputation it obviously has to have particulars of the specific allegations made against it. It follows that the Court…correctly ordered that the first respondent be given access to this information.[56]

In contrast, in *Unitas Hospital v Van Wyk*,[57] Mrs Wyk sought information about hospital management in order to pursue civil action against the hospital in relation to her husband's death. The Supreme Court of Appeal, by a 2-1 majority, found that she was not entitled to these documents under PAIA. She did not require them to formulate her claim for the purposes of initiating an action, and once she began her claim she could rely on the ordinary civil procedure process of discovery. Therefore, she did not 'require' access to documents under the PAIA to exercise her rights.

In favour of a broad interpretation of the access requirement is the statement of the South Gauteng High Court in *M & G Media*:

> The drafters of both the Constitution and PAIA deemed it appropriate to include the word 'any' before the word 'right' when articulating the right of access to information held by private bodies. This language choice is significant. It points to the drafters' intention to ensure that the broadest possible interpretation be given to what qualifies as a right for the purposes of these sections.[58]

A narrow reading of the provision would limit the rights in question to those which are exercised through litigation. However, the case law suggests that rights can also be exercised in other ways such as before an administrative tribunal, in a political forum, or in the media, and that information required to exercise rights in this way can be accessed under the PAIA.[59]

iii) Exemptions from disclosure

Access to records held by public bodies (including private companies exercising public functions) *must* be refused or *may* be refused in cases classified in the legislation.[60] Interestingly section 42 of PAIA stipulates that access to records *may* be refused '[i]f release would be likely to materially jeopardize the economy or the commercial activities of public bodies'.

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[56] *Cape Metropolitan Council* (n 51) [29].
[57] 2006 (4) SA 436 (SCA).
[58] *M & G Media* (n 44) [366].
[59] See *Van Huyssteen v Minister of Environmental Affairs and Tourism,* 1996 (1) SA 283 (C). In relation to a similar provision in the interim Constitution, the High Court stated that there was no 'limitation or restriction in respect of the manner and form in which such exercise or protection will take place.'
[60] PAIA, ss 34- 44.

However, there is a proviso for most of these exceptions: even if the exception would otherwise apply, under ss 55 and 70 both a public body and a private body private company must release the document if:

> (a) the disclosure of the record would reveal evidence of—
> (i) a substantial contravention of, or failure to comply with, the law; or
> (ii) imminent and serious public safety or environmental risk; and
> (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

IV AUSTRALIA

i) Overview

Generally, there is no right to claim documents from private companies under Australian freedom of information legislation. This is the case even if they receive public funding. The establishment of such a right has occasionally been proposed but has been rejected, on the federal level, by a 1996 report of the Australian Law Commission and, in the state of Queensland, by the 2008 Solomon report. There is no exception for formerly nationalised industries such as Telstra, the main telephone provider. Since these privatised industries now operate in a competitive marketplace, it has been considered inappropriate for freedom of information legislation to continue to apply to them.

There are some differences in the way the legislation defines the duty-bearers. The Queensland *Right to Information Act* applies to documents held by an 'agency', and an 'agency' is defined in section 14(1) as:

> (a) a department; or
> (b) a local government; or
> (c) a public authority; or
> (d) a government owned corporation; or
> (e) a subsidiary of a government owned corporation.

The federal act takes a somewhat different approach. Unincorporated bodies are covered by the legislation if 'they are established for a public purpose by, or in accordance with the provisions of, an enactment or Order-in-Council' (see the definition of prescribed authority in section 4). Incorporated companies, on the other hand, are only covered by the legislation if they are specifically designated in the Regulations, and this can only be validly done if the company has

been established by the Governor-General or a Minister, or if the Executive is in a position to exercise control over it (see part (b) of the definition of prescribed authority in s 4). Under the *Freedom of Information (Miscellaneous Provisions) Regulation 1982*, Aboriginal Hostels Ltd, a company funded by the government to provide accommodation to indigenous people, is the only company prescribed under this provision. The National Broadband Network Company, a government-owned company which is in charge of providing broadband internet, is also specifically designated as being covered by the legislation in s 4.

ii) Out-contracted services

However, there is a special provision in several jurisdictions which applies to private contractors hired by government bodies to provide services to the public. Freedom of information legislation has been amended to ensure that documents held by contractors in relation to these services are subject to freedom of information legislation. In the federal legislation, this requirement is found in s 6C of the Freedom of Information Act. The contracts which are covered by this requirement are defined by s 4(1) of the FOI Act (the definition used in other states is similar):

1. to which the government or a government agency is or was a party
2. where services are or were to be provided under the contract on behalf of an agency to a person who is not the government or an agency, and
3. the services are in connection with the performance of the agency's functions or the exercise of its powers.

However, the FOI claimant cannot directly require the private contractor to provide access to documents in its possession. Rather, since s 6C was introduced in November 2010, government agencies are required by the FOI legislation to include a clause in these contracts allowing it to obtain documents from the contractor in the case of an FOI request.[61] So the FOI claimant must direct their FOI request to a government agency, not the private contractor; the agency must then invoke the contractual clause included in conformity with the FOI legislation to access the documents held by the contractor. The agency will then decide whether the FOI legislation requires that they be provided to the FOI claimant, or whether they fall within one of the exceptions to the legislation.

[61] This solution to ensure continued access is similar to the one that legislators in Connecticut opted for in adopting the Public Act No. 01-169.

iii) Solomon Report

As stated above there is no FOI right for individuals to claim documents from a private company on the basis that it receives public funding. The 2008 Solomon review[62] proposed reform of the Queensland FOI legislation to extend its scope to private companies in receipt of public money, in relation to those functions subsidized by the public money. In its response, the Queensland Government stated as follows:

> The government agrees with the principle that it is in the public interest for information to be made available to the public for organisations that are funded by government or contracted to provide services on behalf of government. However, non-government organisations that receive funding or support from the Queensland Government already provide large volumes of information to government, which may then be accessed through FOI.
>
> The government considers that the 'public interest' information sought from these bodies is already available from relevant agencies through existing accountability and reporting obligations or, if the information is not readily accessible, could be made available through improved reporting and information publication arrangements.[63]

V GREECE

Given that public enterprises and public corporations, which are those exercising public functions and/or have the state as their main shareholders, are considered legal entities governed by private law, they are excluded from the scope of the Greek Code of Administrative Procedure law[64] and the same *a fortiori* applies for other private companies. Nevertheless, the Legal Council of State (Νομικό Συμβούλιο του Κράτους) in an opinion issued in 2001 has held that the law applies as well to Legal Entities governed by Private Law when providing 'goods of vital importance' but only when the requested documents relate to their public functions. [65]

However, the law has limited application to private companies. Article 5 grants the right to everyone having a 'special legal interest' to request private documents (e.g. company documents) but on the condition that they are relevant to a case pending in relation to a public authority. Therefore, public interest requests for access to private documents held by public authorities are not allowed.

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[62] David Salomon, Simone Webbe, and Dominic McGann, *The Right to Information –Reviewing Queensland's Freedom of Information Act* (The State of Queensland, Department of Justice and Attorney-General, 2008).
[63] ibid 7.
[64] Greek Code of Administrative Procedure No. 2690/1999.
[65] Legal Council (Νομικό Συμβούλιο του Κράτους) of State Opinion 121/2002