

THE APRM-PROCESS AND THE ISSUE OF ACCESS TO INFORMATION
AND THE PROTECTED DISCLOSURES

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APPENDIX: The declaration of Principles on Freedom of Expression

KEYS

- Excerpts from the Questionnaire in Italics
- Additions in Bold

Acronyms Used:

AU	-	African Union
APRM	-	African Peer Review Mechanism
PAIA	-	Promotion of Access to Information Act
PDA	-	Protected Disclosures Act

SUMMARY

This Submission addresses the need for greater focus on the right of Access to Information within the process of the NEPAD African Peer Review Mechanism (APRM). Access to Information is a right guaranteed in numerous African documents, including the African Union (AU)'s *Declaration of Principles on Freedom of Expression in Africa*, which states that

“Public bodies hold information not for themselves but as custodians of the public good and everyone has the right to access this information... Everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right.”

Freedom of Information is fundamental principle espoused by the African Union, which is the parent body of NEPAD and the Peer Review Process. Freedom of Information laws have been passed in a growing number of African countries, including South Africa, Nigeria and Uganda. Furthermore, Freedom of Information is guaranteed in many African Constitutions, including Tanzania, Ghana, Zambia and Malawi. The United Nations General Assembly has resolved that “freedom of information is a fundamental human right and... the touchstone of all the freedoms to which the United Nations is consecrated.”¹ A South African commentator argues that “it is being increasingly accepted under international law that the right to information imposes on governments a positive duty to provide information.”² This points to the importance of Access to Information as a “leverage right” which helps protect and guarantee other human rights and promote equitable socio-economic development.

Freedom of Information therefore requires detailed consideration in the APRM Questionnaire, which forms the primary basis for gathering data about reviewed countries. The primary purpose of the APRM is to

“foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration.”³

¹ United Nations GA res 59 (I) of 14 December 1946 *Yearbook of the United Nations 1946-1947* New York 1948 176, cited in Saras Jagwanath, “The Right To Information as a Leverage Right” in *The Right to Know, The Right to Live*, ed. Richard Calland and Alison Tilley, 5.

² Jagwanath, *op. cit.*, 7.

³ Objectives, standards, criteria and indicators for the African Peer Review Mechanism, <http://www.nepad.org/2005/files/documents/110.pdf>

It is a voluntary mechanism allowing African States to review the political, economic and governmental practices of fellow African States. Through this information sharing process, mutual learning will take place in areas of high priority to NEPAD such as

- strengthening institutions of democracy and human rights,
- improving economic governance and
- increasing access to social services.

The APRM Process requires each country to develop programs of action linked to its specific national situation. It also requires that each country develops a Program of Action with time bound objectives.

Key objectives, standards, criteria and indicators in the Questionnaire should therefore be adapted to the specific situation in each country. As explained in the NEPAD document "Objectives, standards, criteria and indicators for the African Peer Review Mechanism" the Questionnaire will only provide indicative criteria and some examples of indicators. The development of these components is a technical task which should be undertaken by those with expertise in specific fields involved in the assessments at the country level.⁴

The Open Democracy Advice Center (ODAC) is a specialist organisation working in South Africa and the Southern African region in the areas of access to information and whistleblowing. We recommend that the Questionnaire be extended to address the right of Access to Information, not merely as a cross-cutting issue but in relation to specific indicators in the four sections of the questionnaire.

The Guidelines for the completion of the Questionnaire identify Access to and Dissemination of Information as "cross-cutting issues" that require systematic attention across all areas of the Questionnaire. It is explained that Questions and indicators on these important "cross-cutting issues" are systematically built into every Section: "Thus, the intention is that countries would mainstream these cross-cutting issues in all areas by taking these dimensions into account in their responses, providing specific indicators wherever available."⁵

⁴ See: Objectives, standards, criteria and indicators for the African Peer Review Mechanism, <http://www.nepad.org/2005/files/documents/110.pdf>.

⁵ See Questionnaire p. 11

The purpose of this submission is to provide a clear framework where important parts of the South African Legislation such as the Promotion of Access to Information Act (PAIA) and the Protected Disclosure ACT (PDA), as well as regional and continental treaties and conventions are used as standards for objectives, questions and indicators on Freedom of Information and whistleblowing.

This paper argues that the right of Access to Information has been endorsed by the African Union, the APRM's parent body, and is a core principle of democracy and good governance. As a human right, it operates as a "leverage right" and is essential for the realization and protection of other rights. There is a strong correlation between freedom of information and economic growth and poverty reduction.⁶ Access to Information must therefore be specifically identified and considered in the Questionnaire in every section.

Furthermore this submission recommends that the issue of protected disclosures be added as an indicator of good economic governance and management.

⁶ See: Kaufmann, Daniel: Transparency matters: Towards an Integrated Empirical Perspective, <http://www.worldbank.org/wbi/governance/events/3infocancun%20%2705%20w.pdf>

SECTION 1 – DEMOCRACY AND GOOD POLITICAL GOVERNANCE

1. Amplify the definition of democracy and good political governance and add the issue of access to information in Section 1

“Good Governance means creating well–functioning and accountable institutions – political, judicial and administrative – which citizens regard as legitimate, in which they participate in decisions that effect their daily lives and by which they are empowered.”

Kofi Annan’s definition of good governance forms the basis of the definition given in the Questionnaire of good governance and democracy. The promotion of democracy and good political governance is considered the main objective of the APRM.

However, important points are missing from the Questionnaire’s definition of democracy and good political governance, e.g. access to information as a human right. As the promotion of human rights is considered a key principle in the declaration of the NEPAD⁷, the promotion of access to information must be added in this definition.

Furthermore it is insufficient to mention access to information as a cross-cutting-issue in the Questionnaire. It must be added as an indicator and an objective in this section because:

- Access to information is a core value of democracy and supports good governance.
- Access to information encourages an accountable and democratic government in which popular participation is guaranteed.
- Access to information empowers citizens and enables them to participate effectively in the democratic process.
- Without access to information it is impossible to have an informed political debate.

⁷ NEPAD: Declaration on Democracy, Political, Economic and Corporate Governance, http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/au/H3_nepad.pdf

The "Declaration of Principles on Freedom of Expression in Africa" and the "Promotion of Access to Information Act" (PAIA) must be added as standards in SECTION 1 of the Questionnaire.

2. Add access to information as an indicator to the following objectives

OBJECTIVE THREE

Promotion and protection of economic, social and cultural rights, civil and political rights as enshrined in African and international human rights instruments.

QUESTION ONE

What measures have been put in place to promote and protect economic, social, cultural, civil and political rights?

INDICATORS

(i) Identify legal provisions that recognize and guarantee each of these rights including but not limited to the right to:

- Equal access to employment,*
- Education,*
- Health,*
- Freedom of speech,*
- Freedom of religion,*
- Accessible and affordable housing for the ordinary citizen;*

Add as a reference point:

- Access to information**

(ii) Assess the effectiveness of legal provisions and mechanisms put in place to promote and protect these rights;

Concretize Indicator (ii):

- a) Assess the work of the South African Human Rights Commission with respect to PAIA**

- b) Asses the work of the Department of Justice with respect to the implementation of the PAIA**
- c) Assess the work of the Public Protector with respect to PAIA**

(iii) Provide evidence of major cases of violations of citizen rights and liberties entertained by the courts over the preceding five years

OBJECTIVE FIVE

Ensure accountable, efficient and effective public office holders and civil servants

QUESTION ONE

What measures have been taken in the country to strengthen institutions for an efficient and an effective public service?

INDICATORS

- (i) Provide details of legal provisions, institutions and resource allocation for an efficient and effective civil service;*
- (ii) Provide evidence of administrative reform to improve public service delivery and measures taken to sustain progress;*
- (iii) Describe the mechanisms of promoting the evaluation of civil service delivery including the opportunity for citizens to express their opinion on the quality of service delivery;*
- (iv) Provide details of possibilities for citizens to hold government accountable including opportunities for access to public records;**
- (v) Provide evidence to support your assessment including any official report on the efficiency and the effectiveness of public service delivery.*

3. Add the issue of access to information as objective seven in section 1:

OBJECTIVE SEVEN

Promotion of Access to Information

QUESTION ONE

What is the status of the right of access to information in South Africa?

INDICATORS

- (i) Provide an assessment of constitutional and legislative provisions dealing with access to information in South Africa**
- (ii) Give details about the implementation of access to public and private information**

QUESTION TWO

What measures have been taken to promote access to information in South Africa?

INDICATORS

- (i) Describe the legal and institutional measures that have been taken to promote access to information**
- (ii) Assess the effectiveness of these measures and outline challenges faced**

SECTION 2: ECONOMIC GOVERNANCE AND MANAGEMENT

1. Extend the definition of economic governance and management to include access to information and “protected disclosures”

The second part of the Questionnaire, on economic governance and management, points out a strong relationship between the political crisis in African countries and economic consequences: “The economic disorder of African countries has both internal and external dimensions. These include, among others: inefficient revenue mobilization and aid dependency, weak central banks and inefficient financial sectors, *non-transparent budgetary procedures and ineffective oversight by parliamentary and other bodies.*”⁸

Good economic governance, including transparency in financial management, is essential for promoting economic growth and reducing poverty. There is a strong correlation between transparency and GNP growth, as the Director Global Governance of the World Bank Institute Daniel Kaufmann has shown in a recent analysis of good governance matters in raising per capita incomes.⁹

Consolidation of democracy, good governance, transparency, access to information and economic growth are very closely linked to each other. Transparent budgetary procedures will not be obtained without promoting the right of access to publicly-held information.

⁸ See Questionnaire p.42. Emphasis added.

⁹ Kaufmann, Daniel: Transparency matters: Towards an Integrated Empirical Perspective, <http://www.worldbank.org/wbi/governance/events/3infocancun%20%2705%20w.pdf>

Access to information must be considered as an indicator in the sector of microeconomic policies because:

- Effective transparency is a key for competitiveness: the more information corporations are receiving from the government the higher their worldwide competitiveness is.
- Openness and access to public and private information support sustainable economic development.
- Open governance makes countries more attractive to foreign investors.
- The right of access to information increases transparency and reduces corruption and should therefore be considered as a practical tool, which can be used to oversee government decision-making and expenditure.

The issue of protected disclosures must be added as an indicator of good economic governance and management, too, because:

- Supporting whistle blowers using the Protected Disclosures Act is a crucial tool to fight corruption

Therefore the "Promotion of Access to Information Act" (PAIA) and the "Protected Disclosures Act" (PDA) must be added as standards in SECTION 2.

2. Add access to information as an indicator to the following objectives

OBJECTIVE ONE

Promote macroeconomic policies that support sustainable development

QUESTION THREE

What sectoral or microeconomic policies has your country developed and implemented to promote economic growth and sustainable development?

INDICATORS

- (i) *Provide an outline of the sectoral or microeconomic policies and programmes adopted and implemented in support of sustainable development;*
- (ii) *Describe measures taken to target gender equality, environmental sustainability and employment creation in sectoral and microeconomic policies and programmes;*
- (iii) **Describe measures taken to promote transparency in development objectives and implementation, including the right of access to information;**
- (iv) *Give evidence of progress made towards sustainable development with respect to the following indicators:*
 - *Growth in employment per sector for the past 5 years,*
 - *Out put of key economic sectors for the past 5 years,*
 - *Socio-economic development indicators including but not limited to health, education, HIV AIDS and housing.*

OBJECTIVE TWO

Implement sound, transparent and predictable government economic policies

QUESTION ONE

What has your country done to make the public administration, legislative system and fiscal authorities work effectively and in a transparent manner?

INDICATORS

- (i) *Outline key measures taken in terms of legislation, policies and programmes, institutional development and resource allocation to ensure the effective and transparent functioning of the abovementioned entities;*
- (ii) *Provide evidence of the effectiveness and transparency of these entities with respect to the following indicators:*

- *Timeliness, comprehensiveness and frequency in dissemination of information on the core activities of these entities,*
 - *Existence of procedures including legislation to conduct external and internal assessments of the activities of these entities;*
 - **Responsiveness to requests for publicly-held information**
- (iii) *Outline the main challenges relating to making these entities transparent and effective and list efforts to address capacity shortfalls and other constraints*

3. Add protected disclosures as an indicator to the following objectives

OBJECTIVE FOUR

Fight corruption and money laundering

QUESTION ONE

What is the prevalence of corruption in the public administration in your country and what measures have been taken in this regard?

INDICATORS

- (i) *Describe (briefly) the root causes and magnitude of corruption in the public administration;*
- (ii) *Give evidence of progress made to fight corruption with respect to the following indicators:*
- *Existence of legal provisions establishing clear and enforceable procurement rules in the public sector,*
 - *Existence of legal provisions establishing a national Code of Conduct of civil servants including regular disclosure of assets,*
 - *Cases of corruption in the public sector assessed by an Ombudsman, Parliamentary Accounts Committee, or other relevant authority in the past 5 years,*
 - *Follow-up action including prosecutions of cases of corruption for the past 5 years;*

- **Support for whistle blowers through the Protected Disclosures Act (PDA) and other means in the past five years**
- (iii) *Outline the key challenges encountered in fighting corruption in public administration and efforts to address these challenges.*

SECTION 3 CORPORATE GOVERNANCE

1. Extend the definition of Corporate Governance to include access to information and “protected disclosures”

Good Corporate Governance should provide a level of disclosure and transparency regarding the conduct of corporations, their boards and directors. It ensures that they comply with their legal obligations and are accountable to shareholders and responsible to stakeholders including employees, suppliers, creditors, customers and communities.

The key elements of good corporate governance mentioned in the Questionnaire, including discipline, transparency, accountability, fairness and social responsibility, are promoted by enforcing a right of Access to Information. Access to information is one of the most important prerequisites to guarantee transparent, accountable corporate governance, and it must be mentioned explicitly in this Section.

Access to information and protected disclosures are key principles of corporate governance must be added as yardsticks, because:

- Promoting accountability and fighting corruption requires the disclosure of irregular conduct in public and private bodies in a responsible way.
- The Protected Disclosure Act is a crucial corporate governance tool to promote safe, accountable and responsive work environment

Therefore not only PAIA but also the Protected Disclosures Act must be added as reference points in Section 3.

2. Add access to information as an indicator

OBJECTIVE THREE

Promote adoption of codes of good business ethics in achieving the objectives of the corporation

QUESTION ONE

What is the overall assessment of the corporate integrity in the country?

INDICATORS

(i) Outline the measures taken to promote good business ethics including but not limited to:

- Development of codes of best practice in the private and public sectors and their application and enforcement*
- Measures to combat white collar crime including but not limited to insider trading, corruption and money laundering (**including implementation of the Protected Disclosures Act**);*
- Role of the media and quality of investigative financial journalism in reporting on economic crimes and ethics violation;*
- Training programmes for professionals such as accountants, lawyers, directors to maintain or enhance standards of conduct.*

(ii) Outline the bodies in the public and private sectors that have been active in promoting adoption of codes of good business ethics in your country (for example, institutes of directors, centres or institutes of corporate governance, or associations of shareholders) and summarise the theme of recent efforts (if any) to promote business ethics in the country;

(iii) Assess the effectiveness of measures to promote adoption of good business ethics with reference to:

- Effectiveness of regulatory oversight including supervision by professional associations,*
- Success in prosecution of cases of corruption, money laundering, insider trading and other forms of ethics violation and seriousness of penalties*

imposed including blacklisting and suspension by professional associations,

- **Implementation of mechanisms for access to information held by corporations**

- *Existence of capacity and appropriate skills for regulatory oversight including number of professionals e.g. accountants, auditors, lawyers, financial and investigative journalists;*

(iv) Provide reports of any prior assessment of the integrity of the corporate sector in your country including assessment on the prevalence of corruption in the sector.

OBJECTIVE FIVE

Provide for accountability of corporations, directors and officers

QUESTION ONE

Does the corporate governance framework ensure that timely and accurate disclosure is made on all material matters regarding the corporation?

INDICATORS

- (i) Prepare a schedule of the requirements for disclosure of financial and non-financial information by corporations in the private and public sectors and mechanisms for evaluating, supervising and monitoring compliance;*
- (ii) Assess the effectiveness of supervisory authorities in monitoring the compliance of corporations with the prescribed reporting requirements;*
- (iii) Provide a description of the sanctions against corporations for non-compliance (e.g. warning, fines, suspension of trading, public reprimand, restatements, civil penalties, criminal penalties, etc.) and evidence of enforcement over the past 5 years;*
- (iv) Assess implementation of the right of access to information held by corporations**

- (v) *Describe the challenges encountered and efforts to address shortfalls and capacity constraints.*

3. Add a question concerning protected disclosures

OBJECTIVE FOUR:

Ensure that corporations treat all their stakeholders (shareholders, employees, communities, suppliers and customers) in a fair and just manner.

Add the following as a question :

QUESTION THREE

To what extent do corporations reinforce and protect the right to report concerns to key regulators and protect employees who raise concerns internally?

(i) Provide details of the measures taken by corporations to implement the Protected Disclosures Act

(ii) Provide examples of people having been victimized in breach of the Act, e.g. have been dismissed for making a protected disclosure

SECTION 4: SOCIO-ECONOMIC DEVELOPMENT

1. Extend the definition of socio-economic development and add access to information as an indicator

Socio-economic development is one of the core principles of the NEPAD declaration and is of great importance in the Questionnaire. Access to Information enables other socio-economic rights, and it is therefore not enough to consider it as a cross-cutting issue in Section 4. The right of access to information has a substantive content of its own and plays a crucial role in the realization of socio-economic rights.¹⁰

Access to Information must be identified as an indicator for measuring socio-economic development, because:

- Access to information allows citizens to exercise enforce their socio-economic rights.
- The right of Access to Information imposes a positive duty on the state to make information available that would allow people to exercise their rights

Hence PAIA and the Protected Disclosers Act must be added as a reference point in Section 4.

2. Add access to information as an indicator:

OBJECTIVE THREE

Strengthen policies, delivery mechanisms and outcomes in key social areas including education and combating of HIV / AIDS and other communicable diseases.

¹⁰ Jagwanth, Saras, “The Right to information as a leverage right” in *The Right to Know, The Right To Live*

QUESTION ONE

What measures has government taken to strengthen policy, delivery mechanisms and monitor outcomes in order to make progress towards the social development targets?

INDICATORS

- (i) Provide evidence of legal, policy and institutional steps to strengthen policy and delivery mechanisms*
- (ii) Provide details of the overall volume and criteria for resource allocation for this purpose*
- (iii) Present evidence of effective participation of all stakeholders in the design of policies, delivery mechanisms and monitoring of outcomes*
- (iv) To what extent do stakeholders have access to information concerning social development targets?**
- (v) Outline the challenges faced and efforts to address constraints.*

OBJECTIVE SIX

Encourage broad-based participation in development by all stakeholders at all levels.

QUESTION ONE

What mechanisms have been put in place to promote and encourage effective participation in development processes by key stakeholders?

INDICATORS

- (i) Provide evidence of legal, policy and institutional steps to ensure broad based participation in the development process by all stakeholders including civil society, private sector, media, rural communities, women groups, minorities and marginalised groups;*

- (ii) Provide details of the measures taken at all levels by public and private bodies for access to information concerning development processes.**
- (iii) Describe the governance system, particularly with regards to budgeting and disbursement processes;*
- (iv) Assess the effectiveness of the measures to ensure broad-based participation;*
- (v) Outline the challenges and describe the measures taken to sustain progress including (training, monitoring, evaluation, adjustment).*