



RIGHT ² KNOW

SECRET

State of the Nation Report 2014

trends, patterns and problems in secrecy

Mapping SA's (growing?) climate of secrecy

20 years into South Africa's democracy, the right to know faces apparent threats

The right to know – to access and share information, to organise, protest and speak out – is the foundation of a just society. Information rights were a driving principle in the struggle against apartheid, and at the centre of the democratic gains achieved in the 1990s.

Twenty years into South Africa's democracy, these gains appear to be facing greater limits.

Climate of secrecy

At the heart of this is an emerging trend towards security-statist approaches to governance.¹ An expansive 'national security' mentality encroaches on democratic principles by stifling debate, undermining accountability and protecting the powerful from scrutiny.

The best-known embodiment of this security-statist mentality is the Protection of State Information Bill (the Secrecy Bill), which sits on President Zuma's desk, awaiting signature. Few laws have so focused the public mind on the problem of secrecy in our society and what appears to be a resurgence of the 'securocrats'.

But the Bill may merely be a symptom of a broader climate of secrecy and securitisation:

- The use of secrecy to shield political actors, in particular President Zuma, from embarrassment and accountability;
- Increasing limitations on protest, with an extraordinary spike in police violence and growing signs of criminalisation of protest;
- Apparent increase in the use of state-security policies such as the National Key Points Act;
- Lack of democratic oversight of surveillance tools which are vulnerable to abuse.

Ordinary people, ordinary secrets

Secrecy is not only about the political machinations of major institutions.

At the heart of possibly every grassroots struggle for social, economic or environmental justice, there is a need for information. This is often basic

information about bread-and-butter issues, which people need in order to exercise control over their own lives. Here we see worrying signs of the obstacles to accessing information:

- Access to information mechanisms are failing;
- There is too little proactive release of information;
- The transparency obligations of the private sector, particularly in industries with a serious environmental impact, are largely overlooked.

All of these developments undermine democracy. It is a given that secrecy is sometimes necessary to protect human life or a person's legitimate claim to privacy. But secrecy is easily misused, and when this happens, it becomes a tool to protect the powerful.

This report's findings highlight the need for greater transparency so that the public can monitor the use of state secrecy, as well as the need for a greater commitment to transparency both from the state and the private sector. These conditions have made it very difficult to even research this short report.

But our findings also underscore the need for continued, unified action to resist a growing culture of secrecy and authoritarianism. The recent regeneration of information activism in South Africa must continue: South Africans must continue to challenge the increasing power and influence of the country's securocrats in our politics and in our daily lives.

– Right2Know Campaign, September 2014

This report aims to give a snapshot of key trends regarding secrecy in law and practice. By its nature, secrecy is difficult to measure and the data provided here is pulled together from many different official and unofficial sources. Greater transparency from the relevant bodies, and more detailed datasets, would improve efforts to measure the state of secrecy.

16% *PAIA requests by civil society orgs that led to full release in 2012/13*

22% *PAIA requests by civil society orgs that led to full release, 2010/11*

35% *PAIA requests by civil society orgs that led to full release, 2008/9*

Access to info mechanisms are failing

Civil society orgs are experiencing an all-time low when it comes to PAIA

South Africa's freedom-of-info law, the Promotion of Access to Information Act (PAIA), is a powerful tool on paper, allowing anyone to request records from a public body (or in some cases, a private body) and get a response within 30 days. But in practice, PAIA often proves to be a frustration that is symptomatic of resistance to openness from information holders.²

The PAIA Civil Society Network is a cluster of organisations that make frequent use of PAIA and are striving to ensure better PAIA compliance.

In the months following the last R2K Secret State of the Nation Report, the PAIA CSN published a survey of information requests submitted in 2012/13, which showed shockingly low compliance with PAIA. In over 250 requests submitted between August 2012 and July 2013:

- Only 16% of requests resulted in a full release of information. This figure is down from 22% in 2011, and 35% in 2009;³
- Many requests were met with silence: 54% of initial requests, and 62% of requests that were under 'internal appeal', did not get a response in the 30 days required by law.

In the case of the private sector, the use of PAIA to hold companies accountable is still in its early stages. The PAIA CSN only recorded 22 requests to private bodies in the last reporting period. Of those, six were refused, and only two resulted in information being released (the balance were still pending at the time of reporting). This suggests even lower compliance in the private sector.

Though this is only a small sample, drawing on the experiences of a few key organisations who form the PAIA CSN, it reflects a general frustration expressed among civic organisations that the tools of openness and transparency are good on

paper but fail in practice.

In 2013, Parliament amended PAIA to make provision for an Information Regulator, which will act as an ombud with legal powers to force compliance with information requests. Though the office of the Information Regulator has not yet been established, it is hoped that this will strengthen transparency.

Open Data: set the info free!

A key problem is that there is very little proactive release of information. Often civic organisations and community groups are looking for information that should already be available online and in every municipal office. Frequently cited examples include:⁴

- Housing allocation plans
- Local government Integrated Development Plans (IDPs)
- Service Level Agreements between local government and private companies contracted to deliver public services
- Licenses of mining operations and environmental impact reports

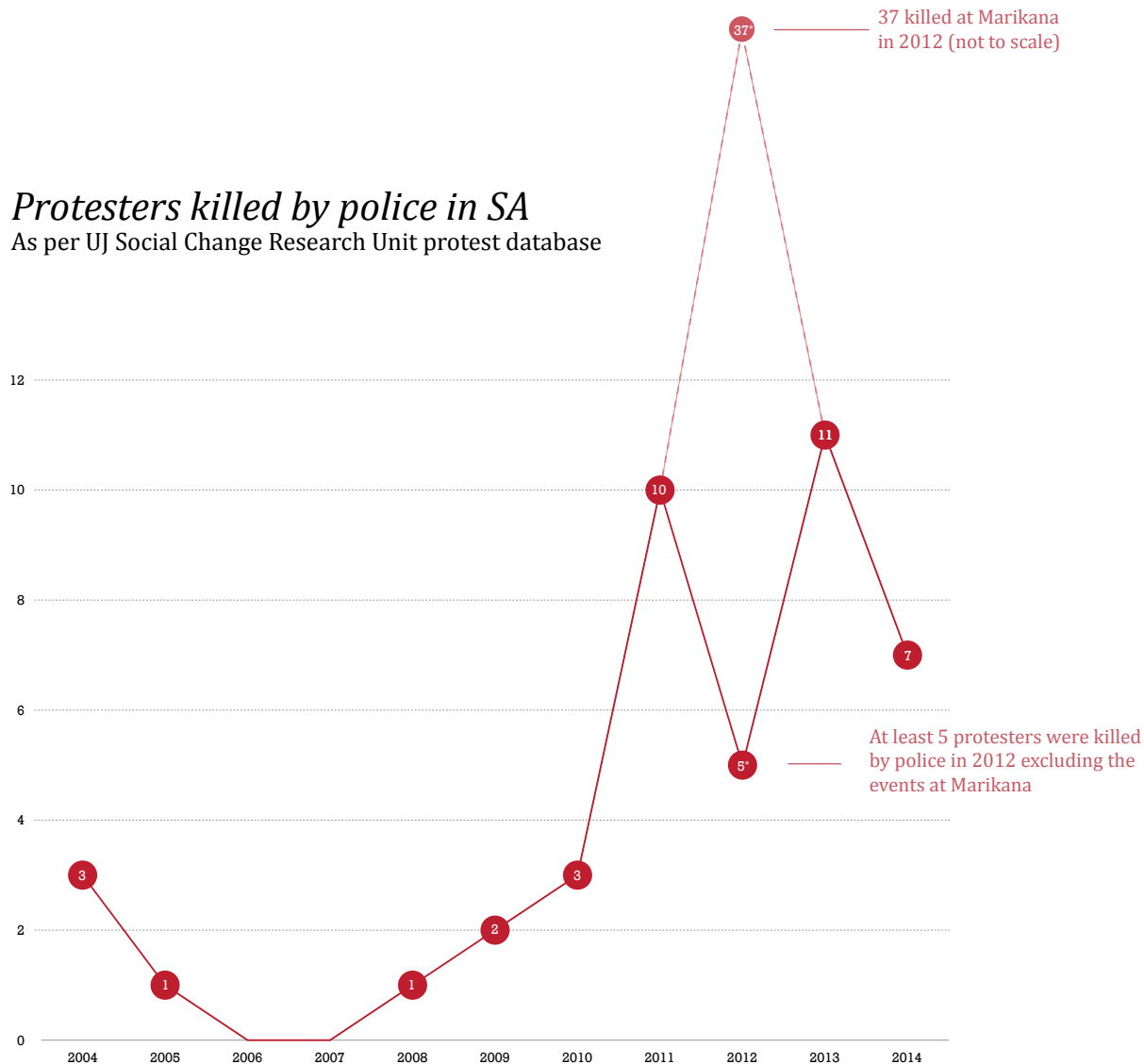
All too often, this information is difficult to get hold of, or presented in formats that are difficult to work with.

In the last year we've seen encouraging developments in civil society, and certain parts of government, advocating for an 'open data' approach: encouraging the proactive release of as much information as possible, in formats that are easy to access, use and adapt. In other words: to democratise information.

These developments are still in their early stages, limited to a few municipalities and public bodies such as the IEC and StatsSA. However, there is huge potential to be unlocked.

Protesters killed by police in SA

As per UJ Social Change Research Unit protest database



Source: University of Johannesburg Social Change Research Unit, Community Protests 2004-2013

The right to protest under attack?

Police militarisation and the criminalisation of protest is driving repression

Protest is a fundamental right used by communities across South Africa to exercise freedom of expression and highlight issues of social justice.

The state of protest can therefore be thought of as a litmus test for freedom of expression, and the signs are worrying.⁵ As the rate of community protests around the country appears to be rising, police brutality has increased sharply – suggesting that freedom of assembly is under threat.

Protest does appear to be on the rise in South Africa. However, for a range of reasons there are few statistics that quantify that increase reliably. SAPS appears to over-report protests⁶ (reporting all ‘crowd management incidents’ as protests, though this figure could include church fairs and fun runs).

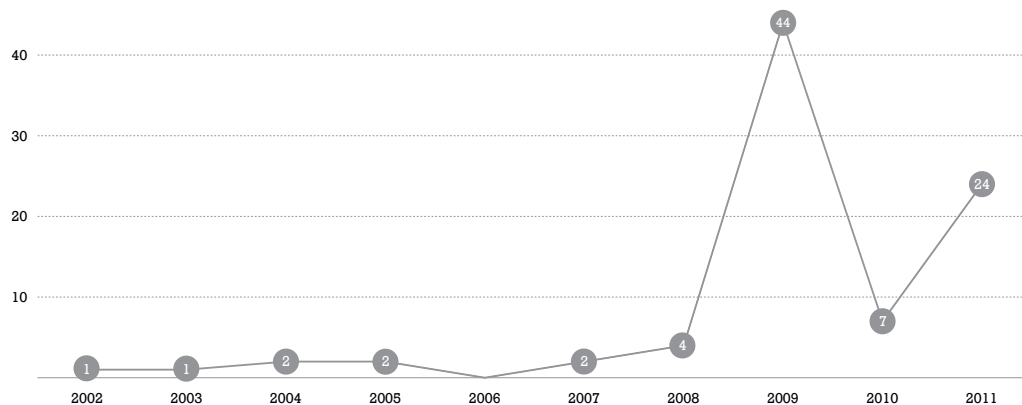
One important indicator, however, is the dra-

matic increase in incidents of violence against protestors.⁷ For example, in 2014 so far, seven people have been killed by police during protests. This is compared to three in the whole of 2004. It is difficult to reliably trace patterns from such small numbers, but there has been a general upward trend over the past ten years. There are likely many factors at play, but increased police militarisation has definitely led to more aggressive approaches to ‘public order’ policing – including the use of live ammunition.⁸

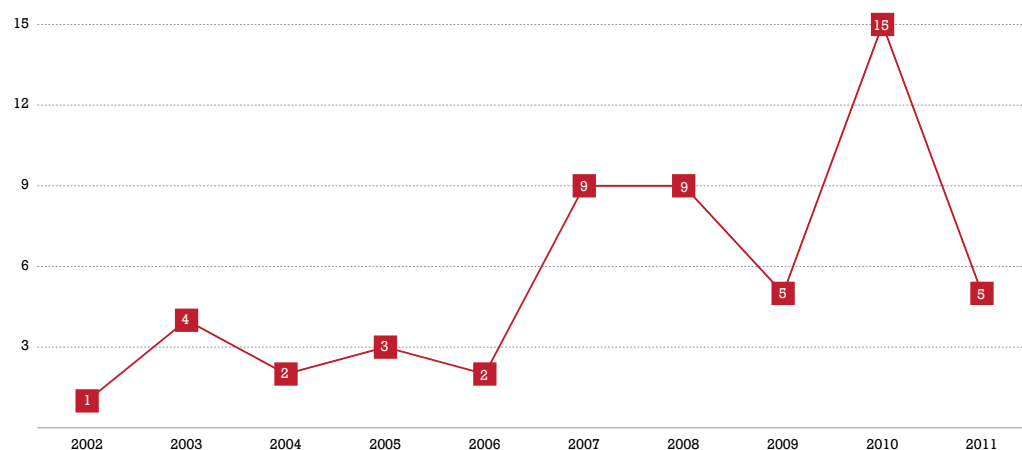
Statistics released in 2011 by the Independent Police Investigative Directorate show a similar trend, with a general increase in overall cases of brutality in ‘crowd-control’ situations (see graphs). Each case represents a complaint that needs to be investigated, though a case may rep-

Police violence in protest

IPID cases of assault by police (grievance bodily harm) in crowd control, 2002-2011



IPID cases of attempted murder by police in crowd control, 2002-2011



Source: IPID presentation to Parliament, 2012

resent more than one person (for example, IPID would count Marikana as 'one' case).

Of 204 complaints related to public-order policing between 2002-2011, only one resulted in a conviction. Seventy-five cases were closed as 'Unsubstantiated' because a perpetrator could not be identified.⁹

In July 2014, the new Minister of Police Nathi Nhleko announced an intention to demilitarise public-order policing. It remains to be seen what effect this will have on the right to protest, especially as the Ministry has proposed to use more intelligence-led approaches to policing protests, which suggests greater use of surveillance.¹⁰

WHAT WE DON'T KNOW

- There is no consistent annual reporting of instances of police violence against protesters.
- IPID's annual statistics do not provide a breakdown of protest-related incidents.

"But aren't protests becoming more violent?"

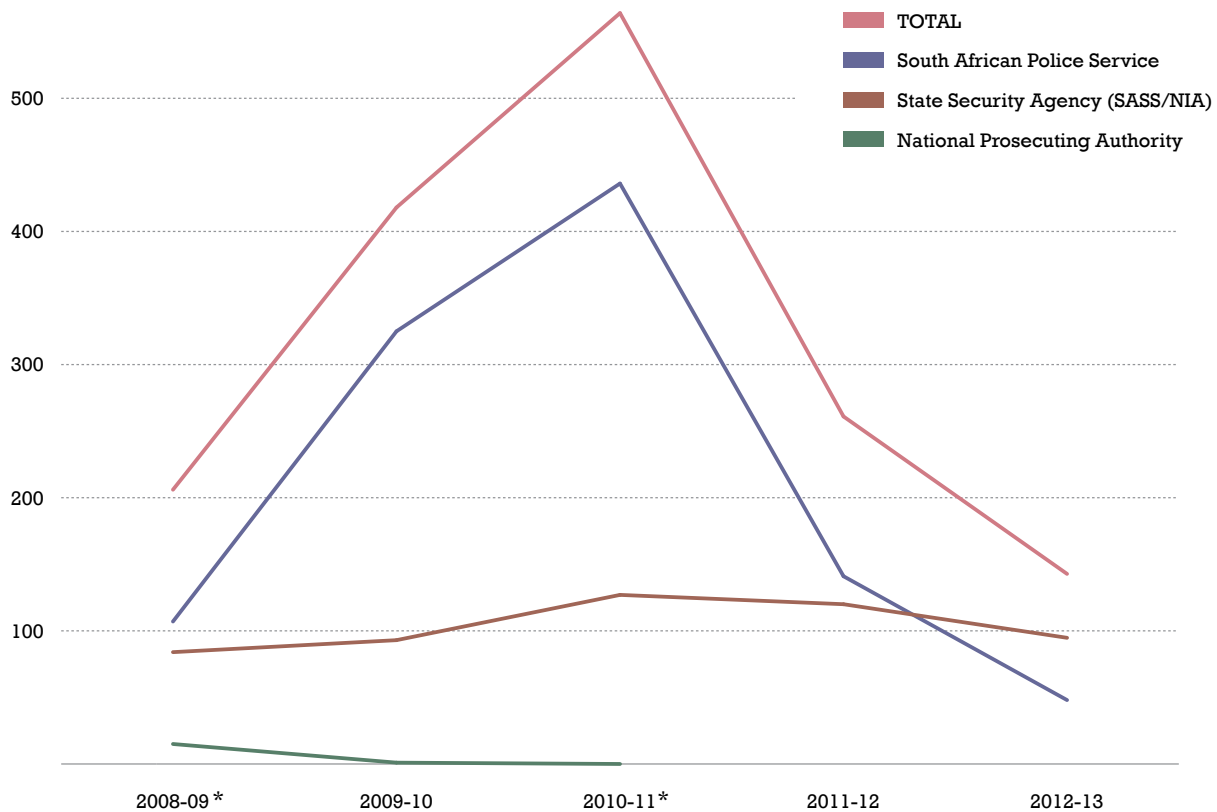
While media reports fixate on 'violent service delivery protests', recent research suggests that the majority of protests are non-violent – but that there is increasing hostility towards protestors from municipalities and police.

This is partly because non-disruptive protests are less likely to be reported in the media, and partly because official statistics on protest are unreliable. In a study of protest patterns in 12 municipalities, Professor Jane Duncan finds that media reports greatly exaggerate the incidence of protestor violence. However, there does appear to be an emerging pattern of protests being banned or declared 'illegal' arbitrarily, forcing communities to protest without legal protection.¹¹

When this happens, police may arrest or disperse protestors, forcefully which makes police violence more likely.

Surveillance rates

Number of warrants authorised by RICA judge each year



Source: Joint Standing Community on Intelligence Annual Reports 2009-2014

Surveillance secrecy undermines oversight of RICA and the right to privacy

RICA is fundamentally flawed, but there simply isn't enough information about its implementation to detect or quantify abuses

In the last year, NSA whistleblower Edward Snowden sparked a global debate about privacy and state abuses of surveillance. But locally, very little information is available on the surveillance system, although some abuses have become public – such as the attempted monitoring of journalists Mzilikazi wa Afrika and Stephan Hofstatter in 2010.¹²

RICA requires a judge's warrant to monitor communications, and Parliament's intelligence committee is meant to release public oversight reports, but until April 2014 it had not released any for three years. The information has now been released, and though it lacks detail, it appeared that the number of authorisations to intercept users' communications more than doubled between 2008 and 2011 (the increase is roughly 170%) before dropping off dramatically.

However, these statistics do not give us a clear

picture of the use of surveillance.¹³ They only measure how often the RICA judge issues a warrant to intercept someone's communications. So the drop is not necessarily a good thing: it may indicate less capacity to conduct surveillance as part of a legitimate law-enforcement investigation (for example, targeting organised crime); worse, it may mean that some interception is happening

Approx annual rate of RICA warrants issued

	2008/09*	2009/10	2010/11*	2011/12	2012/13
SSA	84*	93	127*	120	96
SAPS	107*	325	436*	141	48
NPA	15*	1	0*	0	0
SANDF	0*	0	1*	0	0
Total	206*	418	564*	261	144

* The JSCI RICA reports covered inconsistent time periods in 2008/09 and 2010/11. The figures presented for those periods represent a 12-month extrapolation based on average monthly figures

without the RICA judge's authorisation.

The facility that actually 'listens in' to people's communications reported to Parliament's JSCI in 2010 that it had made about three million interceptions over three years, during which time only 882 RICA warrants were authorised.¹⁴ So each warrant may represent thousands of interceptions, or else surveillance is happening without a warrant.

The Matthews Commission, a ministerial inquiry that looked into abuses in the intelligence sector in the 2000s, did find that security structures were engaging in a wide range of surveillance activity that bypassed the RICA process and the need for a judge's permission entirely. The Matthews Commission report was completed in 2008, but has been buried on a technicality, and if there has been any attempt to address the Commission's findings, it has not come to light.¹⁵

There is just not enough transparency in the system and too few safeguards to protect against abuses of surveillance. South Africa needs to kick-start a national dialogue about surveillance, RICA, and the right to privacy.

WHAT WE DON'T KNOW

- We simply don't have enough information about how often the authorities intercept civilians' communications directly, and why. The information we do get is out of date, and only relates to the number of warrants issued, not the number of interceptions that actually happen
- There is no information about how many RICA interceptions lead to arrests or convictions, which would at least show RICA's effectiveness in fighting crime.

Meta-data spying unchecked

These statistics also do not measure the collection of users' metadata. This could include capturing someone's location, who they are calling or texting, and when. The UN High Commissioner for Human Rights has argued that unchecked metadata collection seriously violates privacy.¹⁶

A warrant to collect metadata can be obtained from any magistrate or High Court judge, and it appears that there is no centralised oversight or official statistics.

"Challenges" with compliance

RICA judge Yvonne Mokgoro's latest report, from July 2013, notes several "challenges", including media reports of officials:

- Getting information in less than 36 hours, without the judge's knowledge;
- Getting cell phone billing and ownership records through Crime Intelligence, without the judge's knowledge;
- Getting user information "for personal reasons";
- Failing to give "fact-based justifications" for needing a warrant;
- Adopting a "cut and paste" approach in affidavits motivating for a RICA warrant;

The judge reported hosting workshops with law enforcement officials to "demystify the process of lawful interception", and said it had resulted in better applications.

Spotlight on SA's private surveillance industry

Nine months ago, Privacy International (PI) put a spotlight on South African surveillance corporation VASTech, whose mass surveillance technology was allegedly used by Libya's repressive military regime to spy on millions of citizens.¹⁷

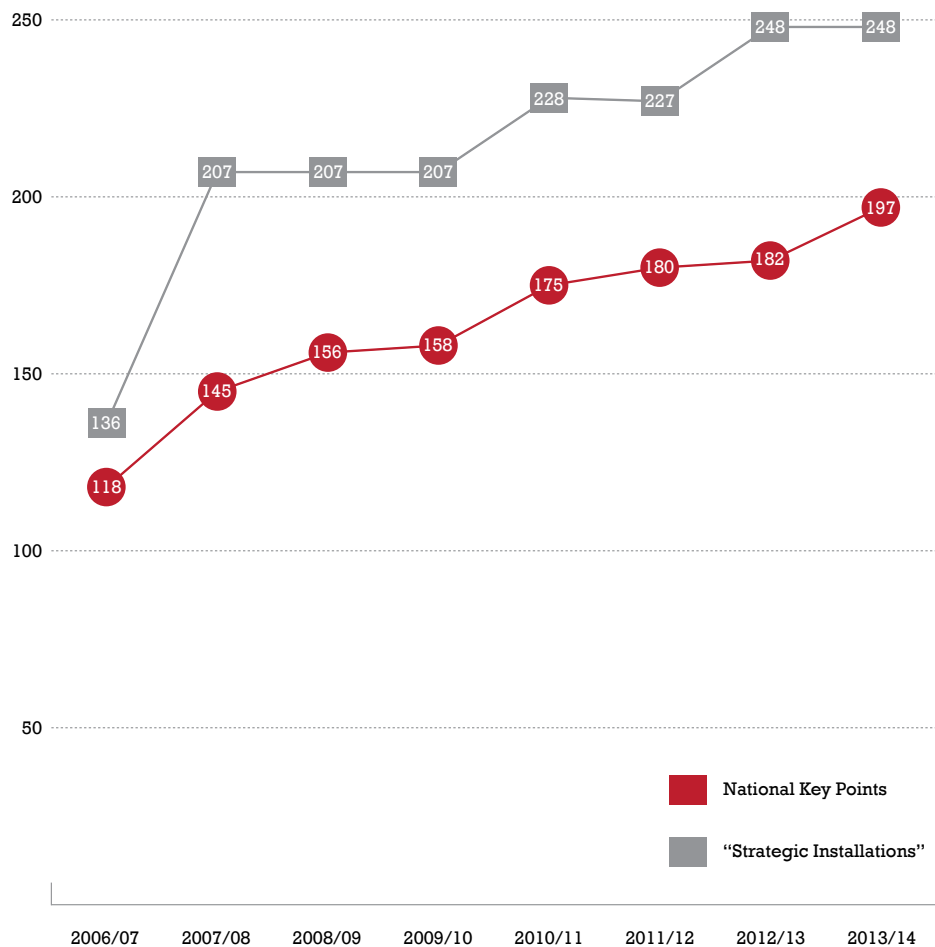
Though VASTech was already a thriving private company, PI uncovered documents that showed the Department of Trade and Industry

had provided nearly R4-million in funding to VASTech to develop its surveillance technology between 2005 and 2010.

Did the Department of Trade & Industry know it was using public money to help develop mass surveillance technology that was exported to a military regime with a history of human rights abuses? DTI responses to media reports suggest that it did.

Use of national-security policies

Number of National Key Points and Strategic Installations growing



Source: Police Budget Vote 2014; SAPS Annual Performance Plan, 2012/13

Increase in National Key Points shows irrational 'security' policies in action

Even under review, the law has been invoked and abused to block information and undermine protest

The apartheid-era National Key Points Act allows any place or building to be secretly declared a National Key Point for national security reasons. Once a place has been declared a National Key Point, it must meet minimum levels of security, and revealing information about these security measures is a crime.

The Minister of Police declares these sites in secret, and the government has refused to reveal a list of all the National Key Points in South Africa. We do know that it includes various government buildings, oil refineries, airports, SABC offices, and the president's personal home in Nkandla.

Why is the secrecy a problem?

The law has drawn a lot of criticism for being overbroad and unconstitutional, but government has tended to go beyond even the prescripts of the law. For instance, even though the secrecy provisions are meant to apply mainly to security features, the law has been invoked to withhold many other kinds of information.

The National Key Points Act has also been used to restrict protests. It is not provided for in the Act, but the police and many municipalities have effectively banned protests at most National Key

What's a Strategic Installation?

Little is known about 'Strategic Installations' except that they are sites that are given similar protections and functions to NKPs.

The same SAPS budgetary documents that disclose the number of NKPs (see graph) also disclose the number of Strategic Installations. When R2K wrote to SAPS for clarity, officials admitted that any provincial or national government site can be a Strategic Installation, but "they are not declared as such and there is no Act that prescribes this."

Given the abuses we have seen with NKPs, a separate set of sites with vague national-security protections is worrying - another secret policy not subject to public oversight.

When the Gupta family sparked an outcry by jetting into Waterkloof airbase in April 2013, former justice minister Jeff Radebe stated that Waterkloof is a Strategic Installation, not an NKP. Trespassing on a military base carries a penalty of up to 25 years jail in terms of the Defence Act, though none of the Guptas were charged.

Points - though a police advisory committee has ruled that this is unlawful.¹⁸

NKPs to be reviewed in secret

As public pressure mounted, the Ministry of Police last year promised a review of the National Key Points Act in Parliament, and set up an advisory panel to evaluate all National Key Points and Strategic Installations.

While the results of this review have yet to be tabled in Parliament, it remains to be seen if an amendment law will produce serious progressive changes, or simply reaffirm the general thrust of the existing Act. Importantly, SAPS has indicated that it intends for the list of National Key Points to remain secret, even while Parliament amends the Act, which makes it very difficult to evaluate the implementation of the existing Act.

The truth will out

Nearly two years ago, R2K and the South African History Archive (SAHA) used PAIA to ask SAPS to release a public list of all National Key Points. We viewed this as a first step in challenging the creep of unjustified 'national security' secrecy in our politics and public life. SAPS refused, and the matter is now headed for court in November 2014.

NKP abuses in practice

January 2013: Department of Public Works cites the NKPA to justify secrecy around R215-million upgrades to the President's personal home.¹⁹

February 2013: Numsa is refused a permit to hold an overnight protest against electricity tariffs at the headquarters of Nersa, the electricity regulator - its headquarters are a NKP.²⁰

September 2013: Members of SAPS tell R2K organisers in Gauteng that Luthuli House has been declared a "temporary" National Key Point, though the police ministry issues a statement that this is false.²¹

November 2013: Former Minister of State Security Siyabonga Cwele states in a press conference that publishing photographs of the upgrades at Nkandla is illegal because it is a National Key Point. GCIS later says these comments were "misunderstood".²²

January 2014: SABC chairperson Zandile Tshabalala reportedly cited the NKPA in issuing a warning to staff, allegedly stating that as employees at a NKP they should not leak information about internal strife and could be subject to surveillance.²³

June 2014: Tshwane metro police cite the NKPA in attempting to dissuade R2K organisers from picketing the Seriti Commission on the Arms Deal, stating that the Commission venue is a NKP. The claim is never committed in writing.²⁴

WHAT WE DON'T KNOW

- The list of National Key Points, and the justifications for declaring each site a National Key Point, is officially secret.
- There is almost no public information about what Strategic Installations are, let alone which sites have been declared Strategic Installations. It is not clear that Strategic Installations are regulated by any law at all.

All the President's secrets...

How President Zuma and his allies have used secrecy and 'state security' as a political survival strategy

Though analysts have taken note of this emerging trend in the past,²⁵ the biggest political scandals of the past year have been marked by a tendency in the country's security structures to act as 'political bodyguards' for the President and his allies.

During the Public Protector's investigation of Nkandla, or the inquiry into the Guptas' landing at Waterkloof airbase, ministers of the security cluster began to take on an ever more public role in shielding the President from political pressure. Most recently, after chaos erupted in Parliament during President Zuma's parliamentary questions sessions, the security cluster assembled to announce that "certain measures" would be put in place to ensure "the authority of the state shall not be undermined, neither will the authority of Parliament be undermined".

The encroachment of the security cluster into democratic political life should be seen as deeply troubling. But more broadly, how have secrecy and security-statist tendencies manifested in public life?

Nkandla, the house that secrets built

The Problem: *The state abused secrecy laws and lied about national security to shield the President and government from embarrassment*

The Story: In 2009, when newspapers first reported upgrades to the Nkandla homestead, estimated then at R65-million, government denied any knowledge of the project and claimed no public money was being spent.

In 2012, when it emerged that over R200-million was spent, investigative journalists at amaBhungane used PAIA to ask for the procurement documents that would show where funds were coming from and how they were being spent. The Department of Public Works refused, citing apartheid-era secrecy laws: the National Key Points Act of 1980, the Protection of Information Act of 1982 and the extra-legal cabinet policy on Minimum Information Security Standards.

DPW Minister Thulas Nxesi argued that all documents about Nkandla spending were so full of security-sensitive information that none could be released. But over the court of AmaBhungane's

legal challenge to this decision, the DPW eventually backed down, releasing 12 000 documents that revealed massive abuse of public funds. Not one of them affected national security in any way. In other words, the DG and Minister had lied under oath about the need for secrecy.²⁶

The same thing happened when Nxesi classified the report of the Ministerial Task Team investigation into Nkandla as 'Top Secret'. When it was finally released, under separate legal challenges from the Democratic Alliance and amaBhungane, it did not include any security-sensitive information. Again, Nxesi had lied.²⁷

In November 2013, the security cluster ministers again deployed 'national security' as a cover-up tool, when they first rushed to court to block the release of the Public Protector's report on Nkandla. They claimed the report contained "several security breaches and top secret documents".²⁸ The state's case collapsed when the Public Protector pointed out that her office relied on the same documents given to amaBhungane, which were already publically available on their website.

Zuma's Spy Tapes

The Problem: *The President's lawyers have spent years fighting the release of documents that would reveal whether or not Zuma should currently face corruption charges*

The Story: The 'Spy Tapes' are probably the most explosive secret in SA's political soap opera. They led to the dropping of Jacob Zuma's corruption charges and paved his way to the presidency, but attempts to get the tapes released have created turmoil and factionalism in the National Prosecuting Authority (NPA) and led to a legal tussle that has lasted years.

The Spy Tapes are secret recordings of phone calls between senior members of the Scorpions and the NPA, who were then pursuing corruption charges against Zuma. The recordings are apparently a result of another element of the intelligence services bugging the phones of senior NPA officials.

Though these recordings were probably illegal in themselves, they were leaked to the Zuma legal

team in 2009, who used the tapes as leverage to get Zuma's charges dropped. Excerpts of the tapes suggest that the investigators were considering the *timing* of bringing charges, deciding whether to bring charges against Zuma before or after the Polokwane conference in 2007. This was used by the NPA head Mokotedi Mpshe to drop the charges altogether, saying that the timing issue was an abuse of process.²⁹

But the full contents of the Spy Tapes have never been revealed, and Zuma's legal team has fought for years in court to prevent their release. In August 2014, Zuma's five-year legal battle ran out of steam in the Supreme Court; the SCA ordered that both the recordings and all related documents be released.³⁰

Until the spy tapes are made public (along with all supporting documents that lay bare the NPA's reasons for dropping Zuma's corruption charge) South Africans will never fully grasp the extent to which intelligence services were subverted for political ends, and whether in fact the justification offered for dropping Zuma's charges was valid.

Secrets at the Seriti Commission

The Problem: *Commission is withholding or ignoring large amounts of information, undermining the public's right to the truth*

The Story: The Seriti Commission has been tasked with investigating allegations of corruption in the 1999 Arms Deal, which paint a picture of widespread corruption within the highest echelons of the South African state and the international arms industry.

President Zuma is among those who have been implicated in those allegations, as he faced a raft of charges relating to corruption after his financial advisor Schabir Shaik was convicted for soliciting a bribe on Zuma's behalf. The charges were controversially withdrawn shortly before he became president in 2009. It was also Zuma who initiated the Commission of inquiry in late 2011, preempting a constitutional court challenge.

But the Commission has come under sustained criticism for its approach, and key whistleblowers have withdrawn in protest from the Commission.

In August, three independent witnesses at the Commission (former ANC MP Andrew Feinstein, and researchers Paul Holden and Hennie van Vuuren), announced their decision to withdraw after struggling for over 18 months to get the Commission to release critical documents that are needed for the inquiry to function and for the public to participate meaningfully.³¹

The documents they have requested range from minutes of meetings where the Arms Deal was hashed out, to evidence collected as part of official investigations into alleged Arms Deal corruption and various government reports on the details of the contracts and tendering process.

In other instances, the Commission has ruled key evidence to be inadmissible, including a draft copy of the Auditor-General's report (used in previous State investigations) and a leaked report commissioned by one of the arms companies (Ferrostaal), the contents of which speak directly to their role in wrongdoing in the South African Arms Deal.

Most recently the Commission chair, Judge Willie Seriti, controversially ruled that witnesses should only speak to documents and evidence that they themselves have authored. Effectively this means that evidence of corruption would only come to the Commission's attention if it were submitted by people who were party to the corruption.

These combined conditions have created a situation that deeply undermines the public's right to know. The Seriti Commission appears to be playing into the hands of securocrats and those who have been implicated in the Deal by blocking access to information to the public, and apparently failing to engage with this evidence itself.

The missing Khampepe Report

The Problem: *The Presidency spent millions in legal fees to keep information out of the public domain, despite its importance to public interest*

The Story: This is a secrecy battle inherited from another President, but which continues to the present day. Twelve years ago, former President Mbeki sent two South African *continued on pg 12 >*

Who funds political parties?

20 years of broken promises on party-funding secrecy now coming to a head

In most democracies, it is recognised that the public has a right to know who is funding political parties. Yet in South Africa political parties are not required by law to disclose who their private donors are.

Six weeks before the 7 May elections, over 60 civil society organisations made an open call to the 14 biggest political parties calling for them to disclose their sources of private funding. Not one of them did.

The secret space between politicians and their financiers undermines democracy, allowing corporations, wealthy individuals and even foreign governments to buy influence and favours from the political elite.

The public has a right to know who is bankrolling the political parties that want their votes, and in most democracies, that information is public. In South Africa, keeping that information secret is one thing that seems to unite all major parties.

In July, civil society organisation My Vote Counts approached the Constitutional Court, effectively to force Parliament to make good on its years of promises to fix this problem. MVC is seeking an order that would compel Parliament to pass a law requiring political parties to declare their funding.

Parliament's broken promises

The history of party funding reform is littered with broken promises. In 2005, after civil society took the five biggest parties to court over their refusal to disclose their funders, the High Court ruled that Parliament must introduce a law to regulate private funding. But over the last ten years, with the exception of a few backbencher MPs, Parliament has resisted all efforts to bring in this legislation.

Just a year's worth of scandals:

- Reports that the Communist Party of China may fund the ANC's political school to the tune of R800-million.³²
- Gupta family escapes censure after landing a private plane at Waterkloof airbase.³⁴
- Reports that South African born billionaire Nathan Kirsh was the donor behind the failed DA/Agang merger. Kirsh controversially has a large stake in a security company with big contracts with the Israeli military.³⁵
- Uruguayan Gaston Savoi, accused of offering a donation to the ANC in exchange for a government tender, lost a court battle in May to get corruption charges against him dropped.³⁶

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All the President's secrets

judges (Justices Sisi Khampepe and Dikgang Moseneke) to observe the 2002 Zimbabwe elections. The report they produced – the so-called Khampepe report – is now confirmed to have questioned the fairness and legality of the election. However, it was never made public. In other words, the South African government would have endorsed the election of a neighbouring government that it knew to be invalid.

In 2008, after learning of the report's existence, the M&G newspaper used PAIA to request that it be released. The Presidency refused, and the matter went to court. It was only in February 2013, after a long legal battle, that Judge Joseph Taka-lani Raulinga finally ruled that the report should be made public after taking a 'judicial peek' at its

contents. The Presidency was ordered to release the report within 10 days.

But the report has not been released. Though the President has changed, the office of the Presidency continues to fight the document's release, appealing the decision at the Supreme Court of Appeal. For a period the report mysteriously went missing from Judge Raulinga's chambers (the Presidency's legal team claimed this was the only copy). The Judge, meanwhile, reportedly claimed that a state attorney had tried several times to get the report from his office while he was absent.

A copy of the report has since 'resurfaced' and the matter will be heard in the Supreme Court of Appeal later this year.³⁶

300 *days since Parliament sent the airbrushed Secrecy Bill back to the President, as of 8 Sept 2014*

Flawed Secrecy Bill awaits Zuma's signing

Despite cosmetic changes, the Bill remains a threat to the right to know - but has stalled as the President has neither signed nor referred it to the Con Court

The Protection of State Information Bill (the Secrecy Bill) now awaits the President's signature. Despite over a hundred minor and major tweaks spanning over thirty drafts, the Secrecy Act is still a threat to the right to know. Though the President referred the Bill back to Parliament briefly in September 2013, it was literally only to correct typographical errors, and Parliament re-approved the Bill soon after.

There have been a range of progressive changes to the Bill since it was tabled in 2010 (see box below). But many of the underlying problems are still there:

- An open-ended definition of national security which encourages over-classification (for example, including classification of undefined "economic" secrets).
- The Bill makes it a crime not only to leak classified information, but merely to possess it. This means that even if the information is already in the public domain, it would be a crime to have access to it.
- Although when the Bill is signed into law, only the security cluster and cabinet will get 'secrecy' powers, the Minister of State Security can extend this function to any other organ of state except municipalities.
- Classification decisions do not need to be public, creating a high risk of over-classification.
- The Bill retroactively protects all documents classified under the previous legislation, including apartheid-era records, with no deadline for declassification.
- There is no public interest defence in the law, providing only limited protection for whistleblowers. (For example, the law exempts a whistleblower from prosecution if they disclosed outright criminal conduct, but provides no protection for exposing shady tendering practices, improper appointments or flawed policy decisions).

- The Bill's espionage offences, which criminalise "receiving state information unlawfully", are so widely drafted that they could punish researchers, activists, whistleblowers and journalists who disclose classified information in the public interest. The penalty includes jail sentences of up to 25 years.

In sum, the Bill in its current form must be scrapped and redrafted to reflect the values of openness and transparency that underpin our Constitution.

But we know that even without the Secrecy Bill in place, there is already overclassification across many government departments (see 2013 Secret State of the Nation report). However, this only came to light because of a one-time disclosure by government departments to Parliament in 2011. It should be a regular reporting requirement.

WHAT WE DON'T KNOW

- The number of documents that get classified each year, by which departments.
- The number of documents that get declassified each year, by which departments.

Secrecy Bill: What's been fixed?

- Scope has been limited mainly to the security cluster. Municipalities are excluded, though any other state body can 'opt in';
- Now has limited whistleblower protection;
- Narrower, although still open ended, basis for classifying information;
- Most commercial information is excluded
- No longer overrides PAIA;
- Replaces the apartheid secrecy law which is even broader and more vague.

Industry, secrecy, and the community's right to know

Debates about transparency tend to focus on government, but what about the private sector? Within polluting industries, secrecy may literally cost lives

There are perhaps as many right-to-know issues relating to the private sector as to government. Yet the principle of 'commercial confidentiality' is often employed to shut the public out of issues about which it has a right to know. There are few sectors where this tendency is more strongly felt than in the extractives industry.

Though South Africa's environmental laws require companies to disclose certain information to government about their environmental impact, getting that information released to the public is often a struggle³⁷. Environmental rights groups have stressed that companies must be able to show the public what environmental commitments they have made, and whether they are fulfilling those commitments – this means public access to both their environmental licenses and compliance data³⁸.

Long struggles, small victories

The past year has seen court judgements in two important cases that tackled secrecy in the extractives industry. Both involve the Vaal Environmental Justice Alliance (VEJA), a coalition of civic bodies in communities affected by heavy industry.

- In 2013, fertiliser manufacturer Omnia was ordered to hand over water monitoring data to VEJA. VEJA had requested this information in early 2012, and Omnia refused, claiming it was commercially confidential (though the information requested had already been given to the Department of Water Resources as a matter of course). Omnia had argued in court that "it will create an unbearable situation if members from civil society arrogate for themselves the function to become co-regulators and co-enforcers" of industry's environmental responsibilities.³⁹
- In September 2013, the High Court ordered ArcelorMittal, Africa's biggest steel producer, to hand over a range of information about environmental rehabilitation. VEJA argued that communities near ArcelorMittal sites needed this information to better understand the extent of the company's impact on the environment and make it more accountable to the

communities they affect. ArcelorMittal is appealing the matter at the Supreme Court of Appeal.⁴⁰

However, even these small victories are the result of years of legal action. Too often, communities or civic organisations get drawn into long and exhausting battles for basic information which would help to identify wrongdoing and allow citizens to begin to enforce their rights; it can be years before the information is finally released, and only then can the community begin the task of holding the company to account. Even where attempts to access information are successful, by the time the information arrives in the hands of the community it may be years out of date.

When it comes to environmental safety and pollution risks, the delayed accountability created by such secrecy may literally cost lives.

Civil society advocates list a range of information sets that should be more proactively available to help civil society and communities hold the private sector to account. These include environmental licenses governing atmospheric emissions or water use, the internal reports produced to track compliance with those licenses, and the actual mining rights issued by the Department of Mineral Resources.⁴¹

No information, no consultation

Mining Affected Communities United in Action (a coalition of 50 civic organisations in communities affected by mining) has also highlighted the obstacles to accessing mining companies' Social & Labour Plans – a legally required document outlining companies' commitments to invest in the community, but which the community often struggles to access.⁴²

Even using PAIA for this document has its obstacles. For example, in 2013 Platreef initially refused a request by civic leaders in Mokopane community to get access to the Social & Labour Plan for their area, essentially arguing that it was a private arrangement between the company and the state. Platreef subsequently backed down and handed over the SLP.⁴³

Inkomati: How one government agency sided with the community's right to know

Environmental rights groups have often complained of instances where public bodies appear to be acting in the interests of corporate polluters instead of affected communities.

However, this year we see an information-access battle looming between a private company and a public body which has clearly sided with the community's right to know.

The private company is Northern Coal, and the public body is the Inkomati Catchment Management Agency, which oversees water catchment affairs in Mpumalanga. The community is Silobela, a small township on the outskirts of Carolina, Mpumalanga.

After acid mine drainage left their community without drinking water for about eight months, last year Silobela residents and attorneys at Lawyers for Human Rights went to Inkomati CMA for information about the contaminated

water seepage in their area. Some of the information they needed had been handed to Inkomati by private companies, including Northern Coal, which operates in the area.

Inkomati acknowledged that it was information that should be released to the public, and in July 2013 Inkomati notified Northern Coal that it intended to hand the information over to LHR and Silobela civic leaders.

But Northern Coal has gone to court to interdict the release – arguing in their papers that release of the information could damage their reputation and hurt their commercial interests. Northern Coal want to prevent Inkomati from making the information public.⁴⁴

Inkomati, LHR and Silobela residents are now opposing the interdict application. A hearing has not yet been scheduled.

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