



Policy Brief

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IMPLEMENTING FINANCIAL DISCLOSURE IN LOCAL GOVERNMENT

Public access to information

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This policy brief is the second in a four-part series designed to assist municipal staff and elected councillors in South Africa manage and detect conflicts of interests in public life. The purpose of the series is to support effective implementation of financial disclosure regulations by reflecting on institutional good practice, lessons learnt, and providing practical advice and recommendations.

This policy brief addresses the issue of public access to financial disclosure information, and discusses why public access is critical to monitoring and oversight of potential conflicts of interests in South Africa. It also outlines the key legislative requirements for access to information, and advises on the major challenges that citizens face when trying to access the financial disclosure records of their councillors. Finally, the policy brief offers practical steps that municipalities can adopt to ensure that they uphold the principles of openness and transparency.

ACCESS TO INFORMATION

At the heart of disclosure is the principle of transparency. When there is public disclosure, the disclosed financial records act as public statements against which officials can be held to account. If the interests of elected officials remain hidden from public view after disclosure, the process serves little purpose.

It is especially in countries like South Africa, where parliaments have few internal investigatory mechanisms and powers, that monitoring and oversight rely largely on public accessibility. Therefore it is imperative that citizens are able to access these records easily so that they can scrutinise them and thus hold their councillors accountable.

South Africa's disclosure framework is strongly characterised by access to information and is more open than many other regimes that embrace disclosure. A citizen's right of access to information is enshrined in the South African Constitution and in two key pieces of legislation: the Promotion of Access to Information (Act 2 of 2000) and the Local Government Municipal Systems (Act 32 of 2000).

The latest 2010 financial disclosure records of councillors are available at *Who owns what?*, the ISS online database of politicians' interests and assets:

www.issafrica.org/corruption/whoownswhat

Legislative requirements for access to financial disclosure records:

The right of citizens to access information is enshrined in section 32 of the constitution:

Everyone has the right of access to-

- (a) any information held by the state; and
- (b) any information that is held by another person and that is required for the exercise or protection of any rights.

The Promotion of Access to Information Act (2000) (PAIA) gives effect to this right and overrides any legislation which limits this right:

This act applies to the exclusion of any provision of other legislation that

- (a) prohibits or restricts the disclosure of a record of a public body or private body and;
- (b) is materially inconsistent with an object,

or a specific provision of this Act.

According to section 7(4) of schedule 1 of the Municipal Systems Act (2000),

(4) [t]he municipal council must determine which of the financial interests referred in 45 sub item (sic) (1) must be made public, having regard to the need for confidentiality and the public interest for disclosure.

Section 70(2)(b) of the same act also states that the municipal manager must 'communicate sections of the Code of Conduct that affect the public to the local community'.

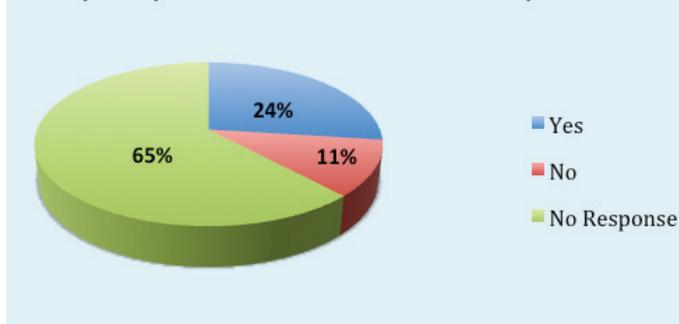
TESTING THE RIGHT TO ACCESS MUNICIPAL FINANCIAL DISCLOSURE RECORDS

Citizens face several challenges if they wish to access councillors' financial disclosure records:

Confusion at municipal level about public disclosure

In 2011 the Institute for Security Studies (ISS) approached a number of municipalities to test the right to access the information contained in financial disclosure records. To date, of the 75 municipalities contacted, only 18 have granted the ISS access to their records. In other words, of the 75 municipalities approached, 24 per cent responded positively to the ISS request, 11 per cent denied the ISS access, and 65 per cent who did not respond despite numerous requests. On average, these figures indicate that for every four municipalities the ISS contacted only one has been willing to make its councillors disclosure records available in a reasonable time. If these figures are extrapolated to the entire number of local municipalities (226) in South Africa, the project can realistically hope for the support of approximately only 57 municipalities in total.

Municipal responses to access to information requests



Use of Promotion of Access to Information Act (PAIA) mechanism

Some municipalities insist that citizens follow the instructions given in the Promotion of Access to Information Act (PAIA) before they will grant public access to official records. PAIA is a legal application process that citizens can use to request access to information held by the state or another person that is required for the exercise or protection of one's rights. Generally, using this application is costly and a cumbersome administrative obstacle for most citizens, creating unnecessary impediments to access to information that should reside in the public domain in any case.

Identifying relevant municipal staff

When a person wants to contact a municipality with regard to accessing information, it is often difficult to identify the official responsible for granting public access to disclosure records. In these situations, public requests often go unheeded by staff, thus further frustrating attempts to access this information.

BALANCING TRANSPARENCY AND PRIVACY

The publication of financial disclosure records raises important but controversial issues with regard to the right to privacy. While it is important to secure the benefits associated with transparency, these must be balanced against the officials' right to privacy, for it is the personal integrity of officials and their families which are at stake: it is their financial and other interests that are exposed for all to see.

Striking a balance between transparency and privacy is difficult. However, the less South Africa relies on the integrity of internal regulation and oversight, the stronger the case for public disclosure as a mechanism for detecting and controlling conflicts of interest.

Many countries, including South Africa, choose to split the information contained in declarations into public and non-public parts (the latter being limited to information relating to spousal or immediate family interests, and addresses of private residences). This now constitutes best practice in South Africa.

However, unlike national and provincial legislation, the Municipal Systems Act does not identify which of the councillors' interests should be made public and which should remain confidential. Instead the Municipal Systems Act, 2000, Schedule 1 s. 7(4) places the responsibility for this decision on

municipal councils when it states:

The municipal council must determine which of the financial interests referred in sub item (1) must be made public having regard to the need for confidentiality and the public interest for disclosure.

This section of the Municipal Systems Act is ambiguous and has led to confusion and inconsistency in councils about how best to interpret the intentions of the legislation. As a result, there is significant variation among municipalities, with some choosing to make the entire contents of the record confidential without giving due consideration to the public interest for disclosure. This effectively nullifies the citizens' rights to access of information and is a serious misinterpretation of the intentions of the legislation.

RECOMMENDATIONS: PRACTICAL STEPS FOR STAFF AND COUNCILLORS

Making public disclosure mandatory by law is no guarantee that the public will be able to obtain the required information. Rather, it is recommended that municipalities and their councillors play a positive role in ensuring that this right is realised in practice in the following ways:

Municipalities must recognise that the principle of access to information is a democratic right in South Africa. In the case of financial disclosure, it is the key mechanism that enables the oversight and accountability of conflicts of interest and possible corruption among elected councillors.

Municipalities should avoid using the PAIA mechanism as a way of denying citizens access to financial disclosure declara-

tions. This information should be readily available and easily accessible to the public.

Municipalities can strengthen public access to information by publishing an annual electronic or hardcopy register containing all the latest financial disclosure records of councillors.

Municipalities can make the latest financial disclosure records of councillors available online each year at Who owns what?, the ISS database of politicians assets and interests (www.iss-africa.org.za/corruption/whoownswhat).

Municipalities must make it easier for citizens to identify staff dedicated to helping the public with requests for the disclosure records of councillors.

Municipalities should follow the best practice established in national and provincial legislatures in terms of deciding which information should remain public and which confidential.

Municipal staff can use ethics training workshops to raise awareness among councillors about legislative requirements and the rationale behind public access to financial disclosure records. The ISS is available to assist municipality staff with training and capacity-building workshops.

Public access is key to an effective financial disclosure regime. It increases opportunities for all South African citizens to identify and prevent potential conflict of interest situations among their elected politicians. By allowing public access to disclosure records municipalities can demonstrate their genuine commitment to transparent and accountable governance.