

CHAPTER 5

CIVIL SOCIETY AND THE RIGHT TO ACCESS TO INFORMATION IN THE GHANAIAN OIL INDUSTRY

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Abstract

Following the discovery of large fields of oil in Ghana in 1997, hopes ran high in Ghana. With a potential annual income from oil production of \$1 billion a year for the next 20 years, the potential to improve the living conditions of all Ghanaians is immense. At the same time, can Ghana avoid the dreaded ‘oil curse’? The chapter argues that an improved management of the oil resources is only possible if civil society is fully involved and the right to access information is respected. The chapter thus assesses the extent to which civil society has access to information pertaining to the oil sector. While the constitution of Ghana protects the right to information, there is no enabling legislation. In turn, the laws regulating the oil sector in Ghana become all the most important, representing the legal gateway to information for civil society. An analysis of those laws reveals that the notions of transparency and accountability are known to the government of Ghana. They are clearly mentioned in the laws. However, the sections in the laws surrounding the petroleum industry do not clarify the manner in which civil society may request information. Currently civil society is limited to the information which government releases in reports. The right to information however requires the right not only to receive but also to seek information.

1 Introduction

Following the discovery of large fields of oil in Ghana in 1997, hopes ran high in Ghana.¹ With a potential annual income from oil production of USD1 billion a year for the next 20 years, many hoped for increased state expenditure on development and infrastructure projects which in turn would improve the living conditions of all Ghanaians.² George Aboagye, CEO of the Ghana Investment Promotion Centre talked of a new future with Ghana entering a different category of economy.³ Former President

1 N Annan & F Edu-Afful ‘Confronting the “oil curse”: State–civil society roles in managing Ghana’s oil find’ (2015) 5.

2 Annan & Edu-Afful (n 1 above) 6.

3 ‘Ghana’ *Oil & Gas Financial Journal* 10 January 2010 <http://www.ogfj.com/articles/2010/10/ghana.html> (accessed 24 November 2016).

John Agyekum Kufuor held that '[e]ven without oil, we are doing so well, already. (...) Now, with oil as a shot in the arm, we're going to fly'.⁴ At the same time, discussions were rife as to the ability of Ghana to avoid the dreaded resource curse. Many resource-rich countries have been unable to use the increased wealth derived from natural resources to the benefit of their people and to uplift the living standards. In fact, in research undertaken by Sachs and Warner in the late 1990s, evidence was presented that show 'an inverse association across countries between natural resource abundance and economic growth over the period 1970–1990'.⁵ This outcome has been named the resource curse.⁶ In this regard, African countries are often cited as examples of states rich in natural resources but where natural resource exploitation has become a curse. Poverty levels in Nigeria were higher in 2010 than in the 1970s prior to the discovery of oil.⁷ In Angola, diamonds played a determining role in sustaining the conflict.⁸ The ability of Ghana to avoid the resource curse and to use its newfound wealth to the benefit of its population is therefore on everyone's mind.

One way put forward to avoid the resource curse is to create the conditions necessary for accountability and transparency.⁹ The public interest must remain of paramount importance in any decision taken with regards to the oil in Ghana. However, this requires that the laws and institutions be built upon the premises of transparency and accountability.¹⁰ As far back as the pre-20th century, theories have abounded on the good society doctrine of frankness, openness and candour in state affairs.¹¹ The information asymmetry between the citizens-the rightful owners of the natural resources- and the government who is entrusted with the management in good faith of those resources affords government greater opportunities to divert revenue and to act for personal gain.¹² The publicity of information acts as a deterrent against corruption and poor governance by the executive by allowing for citizen oversight.¹³ The Ghanaian public must be able to review the accounts and actions of the oil companies, to hold their leaders accountable and to sanction them if need be. This power of oversight is however dependent on access to information: without accurate, reliable and time-relevant information, no scrutiny is possible.¹⁴

4 Annan & Edu-Afful (n 1 above) 7.

5 The research was referred to in P Stevens & E Dietsche 'Resource curse: An analysis of causes, experiences and possible ways forward' (2008) 36 *Energy Policy* 56.

6 Stevens & Dietsche (n 5 above) 57.

7 E Debrah & E Graham 'Preventing the oil curse situation in Ghana: The role of civil society organisations' (2015) 7 *African Studies* 22.

8 J Ofori & P Lujala 'Illusionary transparency? Oil revenues, information disclosure, and transparency' (2015) 28 *Society & Natural Resources* 1188.

9 Debrah & Graham (n 7 above) 28.

10 A Cavnar 'Averting the resource curse in Ghana: The need for accountability' (2008) 3.

11 Ofori & Lujala (n 8 above) 1188.

12 Ofori & Lujala (n 8 above) 1189.

13 Ofori & Lujala (n 8 above) 1188-1189.

14 Cavnar (n 10 above) 2.

This chapter focuses on access to information by civil society as a mean to improve transparency and accountability in the oil sector. The focus is placed on civil society and not on the general population. While public participation through individual citizen is a must, civil society has a representative character serving as ‘the organizational manifestation of diverse societal interests’.¹⁵ In addition, one must recognise the fact that meaningful participation in the oil sector is sometimes dependent on knowledge of the sector. Individual citizens may possess neither the knowledge nor the will to pour over pages and pages of financial and legal documentation and will often rely on civil society to shed light on those matters and any governmental transgression.¹⁶

This chapter assesses the extent to which civil society may have access to information pertaining to the oil sector. The focus is placed on the legal framework as opposed to anecdotal evidence: law imposes an obligation to comply by the government as opposed to voluntary endeavours which rely on goodwill and thereby place civil society at the mercy of government. This chapter analyses both the international and domestic framework surrounding access to information. Subsequently, the place afforded to the right to access information in the legal framework of the oil sector is focused on. The Petroleum Revenue Management Act, the Petroleum Exploration and Production Act and the Petroleum Commission Act are the three legislations focused on. The chapter concludes with recommendations.

2 Framework surrounding access to information

2.1 International framework

The right to access information is one of the manifestations of the right to freedom of thought and expression and entails the right by the public to seek and receive information.¹⁷ Correlatively, governments have the duty to implement the necessary legislative and procedural measures that will allow the public with effective and equal access to information.¹⁸ The main principles should be of maximum disclosure and of presumption of publicity.¹⁹ Without the right to access information, civil society is unable to carry out its monitoring and advocacy role. In the 1999 Principles on Freedom of Information Legislation endorsed by the then UN Special

15 Brinkerhoff *et al* quoted in Cavnar (n 10 above) 2.

16 Cavnar (n 10 above) 2.

17 Inter-American Commission on Human Rights ‘Second report on the situation of human rights defenders in the Americas’ (2011) paras 189-190.

18 OSCE/ODIHR ‘Guidelines on freedom of peaceful assembly’ (2010) para 46.

19 UN Special Rapporteur on the situation of human rights defenders ‘Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms’ (2011) 59.

Rapporteur on Freedom of Opinion and Expression, Mr Abid Hussain as well as Mr Santiago Canton, the then Special Rapporteur on Freedom of Expression for the Organization of American States, the need to tackle the culture of official secrecy through legislation was recognised.²⁰ Legislation on internal security such as treason and sedition laws should not be unduly used to deny access to public records.²¹ Access to information restrictions are only acceptable where the public authorities are able to prove that there is a risk of substantial harm and that the alleged harm exceeds the overall public interest in gaining access to that information.²² In this regard, one often mentioned exemption relates to national security. As per the Inter-American Commission, a restriction based on national security must be genuinely and demonstrably for the protection of the state or its territorial integrity against the use or threat of force, whether a military threat or a *coup d'état*. As such, the suppression of industrial unrest, the concealment of information from public bodies and the protection of government from embarrassment are not legitimate purposes under national security.²³

The African Commission places a strong emphasis on the right to access information, which is guaranteed at article 9(1) of the African Charter. Article 4(1) of the Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission in October 2002, further provides that

Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

In 2013, the African Commission following a two-year consultation process adopted a Model Law on Access to Information.²⁴ This focus on access to information might in part be explained by the level of corruption in Africa, which is helped by the high secrecy surrounding public affairs.²⁵ High levels of corruption aggravate the problem of poverty in Africa, worsening access to basic services and amenities.²⁶

20 The public's right to know: principles on freedom of information legislation (1999) principle 3.

21 International Service for Human Rights (ISHR) 'Defending human rights defender: a short guide' (n.d) 9.

22 Special Rapporteur on the situation of human rights defenders 'Situation of human rights defenders', A/67/292 (2012) para 53.

23 Inter-American Commission on Human Rights (n 17 above) para 200.

24 Africacheck 'Factsheet: Freedom of information in Africa' <https://africacheck.org/factsheets/factsheet-freedom-of-information-laws-on-the-african-continent/> (accessed 18 March 2016).

25 Art 9 of the 2003 African Union Convention on Preventing and Combating Corruption states: 'Each State Party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences'.

26 Africacheck (n 24 above).

In the context of natural resources, access to information has been recognised in various international instruments though mostly in the context of the protection of the environment. The 1992 Rio Declaration on Environment and Development at principle 10 states in the context of public participation that:

each individual shall have appropriate access to information concerning the environment that is held by public authorities, (...) States shall facilitate and encourage public awareness and participation by making information widely available.

The 1998 Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters as its title indicates also strongly highlights access to information. Though a regional instrument adopted under the auspices of the United Nations Economic Commission for Europe, the Convention has the potential to become a global regime. The legally binding Convention is open in principle to all state members of the United Nations.²⁷ In the African context, the revised 2003 African Convention on the Conservation of Nature and Natural Resources at article 16 demands that states adopt legislative and regulatory measures to ensure access to environmental information by the public. The Convention was ratified by Ghana in 2007, but only recently came into force following the required number of ratification.²⁸

2.2 Ghana's domestic framework

The right to access information is guaranteed under the 1992 Constitution of Ghana at article 21(1)(f) which grants to all persons the right to 'information, subject to such qualifications and laws as are necessary in a democratic society'. According to the panel of constitutional drafting experts charged with the drafting of the 1992 constitution:

A political system in which the public surrenders these rights to a political party or government cannot hope to remain democratic. The public must, therefore, be guaranteed the right to know, the right to access information, as a basic human and constitutional right.²⁹

27 M Fitzmaurice 'Environmental justice through international complaints procedures? Comparing the Aarhus Convention and the North American Agreement on Environmental Cooperation' in J Ebbesson & P Okowa (eds) *Environmental law and justice in context* (2009) 213. There are 47 parties to the Convention, including some from Central Asia but no African country. 'Aarhus Convention: parties to the Aarhus Convention and their dates of ratification' (n.d) <http://www.unece.org/env/pp/aarhus/map.html> (accessed 4 June 2016).

28 African Union 'List of countries which have signed, ratified/acceded to the Revised African Convention on the Conservation of Nature and Natural Resources' (2017) https://www.au.int/web/sites/default/files/treaties/7782-sl-revised_african_convention_on_the_conservation_of_nature_and_natural_re.pdf (accessed 21 June 2017).

29 Client Earth 'The right to access information in the forest sector' (2013) 5.

While the right to access information has been granted constitutional recognition for more than two decades, an enabling legislation has yet to be passed. The first Right to Information (RTI) Bill was drafted in 1999, then subsequently reviewed in 2003, 2005 and 2007. In none of those occasions was the bill presented to parliament. The first real attempt to enact the bill into law through its presentation to parliament occurred on 5 February 2010.³⁰ In the same year, a series of public consultations took place where the public as well as the Ghana Right to Information Coalition, a coalition of non-governmental organisations (NGOs) from the ten regions of the country, were able to bring forward concerns and aspirations on the RTI Bill.³¹ Perhaps it is no surprise that this push to action for the enactment of the RTI Bill occurred the same year as the Constitutional Review Commission (CRC) was set up. The CRC was set up to effect public consultations on the operationalisation and reforms, if any, to the Constitution.³² The Commission recommended the passing of a RTI bill with minimal claw back clauses.³³ Referring to international commitments in that regard, the Commission also discussed the right of citizens to information about governmental activities and the use of public assets.³⁴ Not only should information be disclosed, but also resource decisions must be transparent.³⁵ Still, parliament did not vote the RTI bill into law.

In February 2015, a breakthrough occurred with the RTI bill being formally advanced by a committee for the first time. The Select Committee on Constitutional, Legal and Parliamentary Affairs advanced the bill for its consideration by full parliament.³⁶ In June 2015, the Attorney General moved the bill for a second reading.³⁷ By then, Ghanaian parliamentarians were faced with the examination of over 1000 amendments in a 50-page document as identified by the Select Committee.³⁸ Perhaps it is not surprising that in July 2016, George Loh, a member of the Select Committee on Constitutional, Legal and Parliamentary Affairs stated that

30 *Modern Ghana* 'Pass the right to information bill now' 16 November 2015 <https://www.modernghana.com/news/656396/1/pass-the-right-to-information-bill-now.html> (accessed 20 November 2016).

31 P Carlucci & W Owusu 'A right to information in Ghana?' *Al Jazeera* 6 September 2011 <http://www.aljazeera.com/indepth/features/2011/09/201194103443562521.html> (accessed 15 November 2016).

32 Client Earth (n 29 above) 6.

33 Constitution Review Commission 'Report of the Constitution Review Commission: from a political to a developmental constitution' (2011) para 194.

34 Constitution Review Commission (as above) para 141.

35 Constitution Review Commission (as above) para 142.

36 Freedominfo 'Ghana Committee approves right to information bill' (2015) <http://www.freedominfo.org/2015/02/ghana-committee-approves-right-information-bill/> (accessed 10 November 2016).

37 Press release: 'Pass the right to information bill now' 16 November 2015 <https://www.modernghana.com/news/656396/1/pass-the-right-to-information-bill-now.html> (accessed 20 November 2016).

38 'RTI Bill: Parliament pushes for creation of Information Commissioner' *Myjoyonline.com* 30 June 2015 <http://www.myjoyonline.com/politics/2015/june-30th/rti-bill-parliament-pushes-for-creation-of-information-commissioner.php>.

only 20 per cent of the 116 clauses of the bill had been tackled. More worryingly, Mr Loh pointed out to the apprehensions of his fellow parliamentarians on passing the bill. Fearing being exposed to persecution and ridicule, parliamentarians were deliberately dragging their feet over passing this bill.³⁹

The passing of the RTI bill by Ghana is also an international commitment. Ghana is a signatory of the Open Government Partnership Initiative since 2011, an international platform where states and civil society work together to achieve a more transparent and accountable government. As a signatory, Ghana has committed itself to passing the Right to Information Bill by the end of 2013 under the first Action Plan 2013-2014. Under the second Action Plan, the aim is now to pass the Bill by December 2016.⁴⁰ This was however not the case and the Vice President of Ghana Dr Mahamudu Bawumia has now promised that the bill will be passed in 2017.⁴¹

Undeterred by the lack of an enabling legislation, the Human Rights Division of the High Court of Ghana pronounced itself in April 2016 on the right to access information in Ghana. The bus branding case was bought forward by seven applicants against the Minister of Transport and the Attorney-General to obtain full disclosure on the contracts regarding the branding of 116 buses, access to copies of the contract and all related documents.⁴² The branding of the buses had been the cause of significant controversy in Ghana due, among others, to the amount of money spent.⁴³ Ruling in favour of the applicants, the Court held that the '[e]very person in Ghana has the inalienable right to information, including official information.'⁴⁴ The right to information, being both a constitutional right and a human right, is independent of the enactment of a law.⁴⁵ In addition, the state may not benefit from its own failure to enact the RTI legislation and use the non-existence of the law as an excuse for non-disclosure.⁴⁶ Still, access through the courts cannot replace the enactment of an enabling legislation. Litigation is a long and arduous process which requires high

39 N Poku 'Ghana's right to information bill hangs in mid air' *News Ghana* 15 July 2016 <https://www.newsghana.com.gh/ghanas-right-to-information-bill-hangs-in-mid-air/> (accessed 11 November 2016).

40 The Open Government Partnership Initiative 'National Action Plan for the Republic of Ghana 2016-2017' (n.d) 12.

41 J Nyabor 'We'll pass RTI Bill this year-Bawumia' *citi 97.3fm* 2 February 2017 <http://citifmonline.com/2017/02/02/well-pass-rti-bill-this-year-bawumia/> (accessed 21 June 2017).

42 *L Sagoe-Moses & 6 others v The Honourable Minister & The Attorney-General*, 13 April 2016, SUIT No. HR/0027/2015 High Court of Justice (Human Rights Division 2) 2.

43 The amount reported is GHS 3.6 million (about US\$ 950,000) for the branding of 116 buses. M Nyarko 'Ghana's Human Rights Court gives life to the right to information' (2016) <https://africlaw.com/2016/04/15/ghanas-human-rights-court-gives-life-to-the-right-to-information/> (accessed 18 November 2016).

44 *L Sagoe-Moses* (n 42 above) 6.

45 As above, 6.

46 As above, 7.

financial investment and which may therefore not be readily available to civil society organisations and citizens. In this regard, it is to be hoped that the Right to Information Bill is soon voted into law.

3 Access to information in the oil sector

The right of the public to access information held by public bodies is increasingly recognised as an important right, necessary to allow for a more responsive, free and accountable government. Nowhere is it truer than in the domain of the management of non-renewable natural resources as evidenced by the experience of countries affected by the ‘resource curse’. As stated above, there is currently no enabling legislation on the right to information in Ghana. Since the court’s pronouncement in April 2016, it is now clear that civil society organisations can approach the court for release of information. In practice however, NGOs cannot rely on the court every time they require access to information held by public bodies. This section analyses the extent to which the laws in Ghana in the oil sector allow for civil society to access information. Civil society desirous to work on oil in Ghana operates within the following laws representing both the upstream and the downstream: the Petroleum Revenue Management Act 815 of 2011; the Petroleum Exploration and Production Act 919 of 2016 and the Petroleum Commission Act 821 of 2011.⁴⁷

If one desires to talk of civil society involvement in the oil sector in Ghana, one must refer to the Civil Society Platform on Oil and Gas (CSPOG). Created at a time where few Ghanaian NGOs had the necessary expertise to work on oil and gas, the CSPOG regroups approximately 120 organisations, individuals and professional bodies working on oil and gas issues in Ghana. Members of the CSPOG will take the lead on issues in line with their expertise such as the environment, human rights and revenue tracking. The Platform also works as one where the issue so requires such as on issues of national advocacy and the development of policy briefs.⁴⁸ By working together, members of the Platform hope to have a greater impact on government policies and actions.

3.1 Petroleum Revenue Management Act

The Petroleum Revenue Management Act (PRMA) is a great example of the successful involvement of Ghanaian civil society on the formulation of

47 Annan & Edu-Afful (n 1 above) 13.

48 R Zandvliet ‘Civil society and oil and gas governance in Ghana’ (2013) <http://capacity4dev.ec.europa.eu/article/civil-society-and-oil-and-gas-governance-ghana> (accessed 21 November 2016).

laws related to the oil sector. The CSPOG submitted 15 proposals to Parliament on the Bill, of which only one was rejected.⁴⁹

Enacted to regulate the collection and management of government revenue derived from upstream and midstream petroleum operations, the PRMA aims at providing a transparent and accountable framework for revenue management.⁵⁰ In the management of petroleum resources, the highest international standards of transparency and good governance must be abided to.⁵¹ Through this, the Act sets out transparency and accountability as statutory obligations in the management of resources as opposed to a voluntary choice.⁵² Among the relevant provisions ensuring civil society's access to information is the publication of the records of petroleum receipts within a specified time-frame by the Minister of Finance in two state-owned dailies and in the Gazette simultaneously.⁵³ The records shall also be made available online on the website of the Ministry of Finance.⁵⁴ The Minister of Finance must also report on the reconciled petroleum receipts and the annual budget funding Amount. The report is presented to Parliament and published both in the Gazette and in two-state owned daily newspapers by latest 30 April of each year.⁵⁵

Reporting forms part of the right to information. It is not only about the public seeking information, but states must proactively disclose information.⁵⁶ Reporting also puts the information in the public domain as opposed to merely the hands of the person requesting the information. Reporting requirements also extends to quarterly reports by the Bank of Ghana on the performance and activities of the Ghana Stabilisation Fund and the Ghana Heritage Fund⁵⁷ within a specified time-frame.⁵⁸ These are accompanied by two semi-annual reports on the Funds by the Bank of Ghana which shall be presented to Parliament and published in two state-owned newspapers and the website of the Bank. These reports must be published by latest 15 February and 15 August of each year.⁵⁹ The Minister of Finance shall also furnish an annual report on the Petroleum Funds. Importantly, the law sets out the necessity for the report to be 'prepared in a manner that makes it accessible to the public' and lists the minimum information which the report must contain.⁶⁰ This is in line with international best practices on disclosure by public bodies which point to

49 Debrah & Graham (n 7 above) 29.

50 Sec 1 of the PRMA.

51 Sec 49(1) of the PRMA.

52 Ofori (n 8 above) 1190.

53 Sec 8(1) of the PRMA.

54 Sec 8(2) of the PRMA.

55 Sec 15(3) of the PRMA.

56 Report A/68/362 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Promotion and protection of the right to freedom of opinion and expression' (2013) para 28.

57 Both Funds are financed by revenue collected from oil exploration.

58 Sec 28(1) of the PRMA.

59 Sec 28(2) of the PRMA.

60 Sec 48(1) of the PRMA.

mandatory minimum baselines whereby public bodies may exceed the strictures of the law, but must keep the dissemination bar at a certain minimum level.⁶¹ For example, the African Commission model law on access to information not only lists the information to be made available by the public body, but also the time-frame for doing so.⁶² Additionally, the obligation to prepare the report 'in a manner that makes it accessible to the public' touches on the important notion of effective transparency. Information must not only be available, it must be available in a format that the public may understand and respond to.⁶³ It is however unclear why a similar requirement as to a public-friendly report was not made with regard to the reports issued by the Bank of Ghana.

Created under the PRMA, the Public Interest and Accountability Committee (PIAC) has the potential to greatly improve access to information by civil society. The PIAC's objectives are to monitor, evaluate and assess the management and investment of oil revenue.⁶⁴ It follows calls both by civil society and the general public for an independent transparency and accountability mechanism to complement and overview the work of governmental institutions as well as to ensure the optimal use of petroleum resources.⁶⁵ The Committee is made up of 13 members, all of which hail from civil society organisations, think-tanks, professional and religious bodies.⁶⁶ These members are formally appointed by the Minister of Finance, though the influence of the latter is nominal and mostly confined to ensuring the eligibility requirements of the Act are met. Many of the members of the CSPOG are part of the PIAC, allowing for the inclusion of the CSPOG into the administrative structures of the petroleum industry.⁶⁷ Still, there is room for political intervention. Where a member from a think-tank was needed as appointee to the Committee, the Minister unilaterally contacted some more 'governmental friendly' think-tanks excluding the ones deemed more problematic.⁶⁸

The PIAC must publicise its work through a widely-disseminated semi-annual report and an annual report. The reports must be made available in at least two state-owned national dailies by the 15 of September and 15 of March of each year, on the website of the Committee and to the President and Parliament.⁶⁹ The PIAC must also hold two

61 Centre for Law and Democracy 'Kenya: Analysis of the draft Freedom of Information Bill, 2014' (2014) 7.

62 Sec 7(1) of the Model Law on Access to Information for Africa.

63 Ofori & Lujala (n 8 above) 1189.

64 Sect 52 of the PRMA.

65 N Oppong 'Ghana's Public Interest and Accountability Committee: an elusive quest for 'home-grown' transformation in the oil industry' (2016) 34 *Journal of Energy & Natural Resources Law* 315.

66 Sec 54(1) of the PRMA.

67 Oppong (n 65 above) 331-332.

68 Oppong (n 65 above) 331.

69 Sec 56(a) & (b) of the PRMA.

public meetings per year to report on its mandate.⁷⁰ Unfortunately, there is no statutory enforcement mechanism for these reports, making them dependent upon the good-will of Parliament.

The PIAC has been lauded as an example of a robust, home-grown practice which will enhance citizen voices in the oil industry.⁷¹ Its potential force to effect governmental oversight and to influence decision-making explains why the CSPOG pushed the government towards creating the Committee.⁷² Until now, the Committee has been bold and assertive in highlighting lacunas in the management of oil revenues, thereby reinforcing the public perception of a body unfettered by political interference.⁷³ The composition of the PIAC allows civil society a place of choice, enabling access to information which might otherwise have been difficult to obtain. However, while the PIAC is undeniably a great tool towards improved transparency, there are still some weaknesses in the operationalisation of the PIAC. Currently, the PIAC has more of a non-binding advisory position to the government and the executive as opposed to being a link among the government, petroleum fund managers and the public. The voice of the PIAC is further reduced by the fact that Parliament has not set up a Committee to consider the PIAC reports nor have all the reports been debated by Parliament.⁷⁴ This shows a low level of involvement and interest by local politicians in the work of the PIAC.⁷⁵ This could have been prevented if clear reporting lines had been set up in the Act. Another issue faced by the PRMA is funding, which is both discretionary and lacking. The PRMA only talks of allowances to be paid to members of the PIAC, but keeps quiet on the manner in which the PIAC is to be funded. This is in a context where the PIAC has the extensive mandate of overseeing executive activities while keeping the public informed. As early as 2011, the PIAC has highlighted its difficulties to operate in the context of an insufficient budget.⁷⁶ As an example, in November 2014, the PIAC was evicted from its leased premises following failure to renew the lease agreement due to budgetary constraints. This occurred despite the assertions by the Minister of Finance that funds had

70 Sec 56(c) of the PRMA.

71 Oppong (n 65 above) 313.

72 Debrah & Graham (n 7 above) 31.

73 Oppong (n 65 above) 335.

74 Review of The Petroleum Revenue Management Act 2011 (Act 815). Proposals presented to the Ministry Of Finance And Economic Planning by the Africa Centre for Energy Policy (ACEP), The Centre for Public Interest Law (CEPIL) and Friends Of The Nation (FoN) 12 <http://acepghana.com/wp-content/uploads/2013/12/ATT00051.pdf> (accessed 16 November 2016).

75 Oppong (n 65 above) 314.

76 A Brakopowers 'Gov't is not deliberately starving PIAC of funds – Ahadzi' *Myjoyonline* 14 November 2016 <http://www.myjoyonline.com/politics/2016/October-14th/govt-is-not-deliberately-starving-piac-of-funds-ahadzi.php> (accessed 17 November 2016).

been provided.⁷⁷ This chronic underfunding had led some political commentators to opine that it is a retaliatory measure by government against PIAC's criticism.⁷⁸ In fact, this is but a continuation from the position adopted by Parliament regarding the PIAC during debates leading to the adoption of the PRMA. Parliamentarians were highly suspicious of the PIAC, questioning its purpose with the Auditor-General and Parliament being already available as constitutionally appointed oversight bodies.⁷⁹ This finally culminated in the PIAC being subservient to Parliament and in funding to the PIAC being a matter of discretion by Parliament.⁸⁰

The failure to publish any information provided for under the Act is an offense punishable by a fine.⁸¹ Where however, the Act requires information to be publicised but the disclosure of it is seen as one 'which could in particular prejudice significantly the performance of the Ghana Petroleum Funds', the Minister may declare it as confidential subject to Parliament's approval.⁸² Such a declaration must be supported by a clear explanation, keeping in mind principles of transparency and the right of the public to information.⁸³ Parliament and the PIAC however retain access to the information.⁸⁴ Under international practices, states have the right to limit access to official information. However, the limitations must be set out clearly in the law, must be necessary in a democratic society and proportionate in their aims.⁸⁵ One important aspect here is the need for the harm to be actual, serious and real. One way in which to ensure confidentiality is in fact needed is to allow for an efficient and independent judicial review of the decision.⁸⁶ Here Parliament cannot be deemed to be replacing the court as an independent arbiter.

77 'Government reneges on promise to PIAC' *News Ghana* 30 November 2014 <https://www.newsghana.com.gh/government-reneges-promise-piac/> (accessed 17 November 2016).

78 Brakopowers (n 76 above).

79 Oppong (n 65 above) 324.

80 Oppong (n 65 above) 326. The general public in Ghana seems to have a different view, in the context of state-led consultations, it was reported that about 83% of survey respondents desired a 'separate oversight mechanism, independent of Parliament, with full access to all information regarding the use and management of oil revenues in Ghana'. Oppong (n 65 above) 319.

81 Sec 50 of the PRMA.

82 Sec 49(3) of the PRMA.

83 Sec 49(4) of the PRMA.

84 Sec 49(5) of the PRMA.

85 Report A/68/362 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (2013) para 52.

86 As above, para 54.

3.2 Petroleum Exploration and Production Act

Passed in August 2016 after lengthy consultations, the Petroleum Exploration and Production Act (PEPA) replaced the similarly named law of 1986.⁸⁷ While sharing similar concerns regarding the exploration and production of petroleum in a sustainable, safe, efficient and population-centric manner,⁸⁸ the 2016 Act elaborates more extensively on those matters.⁸⁹ Quite positively, the PEPA sets out the obligation for the government as of its section four to manage the petroleum resources of Ghana ‘in accordance with the principles of good governance, including transparency and accountability’.

Prior to and after declaring an area open to exploration, the Minister must publish an evaluation report in the Gazette and at least two-state owned dailies. The Minister may also publicise the report through any other medium of public communication.⁹⁰ The publication of the report will allow civil society to hold government accountable by granting information on the impact evaluation undertaken by the government and the mitigating measures envisaged. Prior to the decision of opening an area to exploration, an interested party may present its views to the Minister.⁹¹ As the Act has recently been voted, it will be interesting to see who might be deemed an interested party: will a broad and purposive approach be taken with civil society allowed to speak or will only the specific persons affected be deemed interested parties?

With regards to the bidding process under the PEMA, more can be done with regards to transparency and accountability. While the act speaks of ‘an open, transparent and competitive public tender process’,⁹² the act does not elaborate on a public access to the relevant bidding information such as the list of bidding companies, the criteria used to select the companies and the reasons behind choosing the winning bidder. Best practices encourage states to disclose information to the public to prevent corruption.⁹³ The Norway (Oil for Development) Checklist advises states to publicise the awarding criteria beforehand and to publicly justify the winning bidder in line with these criteria.⁹⁴ Without access to reliable and timely information, it becomes difficult for civil society to act as a watchdog. In a similar vein, the reasoning by the Minister behind entering

87 ‘Petroleum Exploration And Production Bill, 2016 passed into law’ *ModernGhana.com* 5 August 2016 <https://www.modernghana.com/news/709539/petroleum-exploration-and-production-bill-2016-passed-into.html> (accessed 23 November 2016).

88 Sect 2 of the PEPA.

89 n 87 above.

90 Sec 7(4) & (8) of PEPA.

91 Sec 7(6) of the PEPA.

92 Sec 10(3) of the PEPA.

93 Chatham House ‘Guidelines for Good Governance in Emerging Oil and Gas Producers’ (2013) 31.

94 Priority issue 30 of the Norway (Oil for Development) Checklist.

into direct negotiations for a petroleum agreement without a public tender should be made public so as to allow room for judicial challenge.⁹⁵ The act speaks of direct negotiation where it represents ‘the most efficient manner to achieve optimal exploration, development and production of petroleum resources in a defined area’ but fails to either define ‘efficiency’ or to provide the guidelines to support the efficiency argument. The potential for the government to use this loophole to its financial advantage is thus immense.⁹⁶

The PEMA allows the Minister responsible for Petroleum or the Petroleum Commission to request information from those conducting petroleum activities within a specified time.⁹⁷ The principles regulating access to information would require such information to be then available to the public. A public register of petroleum agreements, licences, permits and authorisations shall also be maintained by the Commission.⁹⁸ While rendering the register public is laudable, it does not ensure that the full content of the agreements are made public.⁹⁹ With several of Ghana’s petroleum agreements already public, the government should confidently take the next step of making full disclosure a statutory obligation. The publication of contracts and their subsequent online availability as stated under precept 2 of the Natural Resource Charter are an important tool to combat corruption and allow for greater transparency and accountability.

3.3 Petroleum Commission Act

The Petroleum Commission Act (PCA) sets up the Petroleum Commission, whose role is to manage and regulate petroleum exploitation and the corresponding revenues in Ghana.¹⁰⁰ The Petroleum Commission has an important role to play in the petroleum sector: not only is it a regulator, the Commission also provides advice to the Minister, coordinates policies and acts as a link between the industry and the government.¹⁰¹ Previously, the role of regulator was undertaken by the Ghana National Petroleum Corporation, together with the role of economic participant. The PCA abolished this state of affairs with the Ghana National Petroleum Corporation nowadays solely focused on economic and commercial interests.¹⁰²

95 Sec 10(9) of the PEPA.

96 The Africa Centre for Energy Policy (ACEP) ‘Analyses and recommendations for good governance in the Petroleum (Exploration and Production) Bill 2014’ <http://www.acepghana.com/news/57/> (accessed 21 November 2016).

97 Sec (1) & (2) of the PEPA.

98 Sec 56(1) & (2) of the PEPA.

99 The Africa Centre for Energy Policy (ACEP) (n 96 above).

100 Sec 3 of the PCA.

101 Sec 3 of the PCA.

102 Sec 24(2) of the PCA.

The Commission publishes a public annual report on petroleum resources and activities.¹⁰³ The Schedule to the Act lists out clearly the minimum base for information to be included in the report. These include information on active or relinquished production permits as well as on health and safety.¹⁰⁴

4 Conclusion

This chapter has analysed access to information by civil society as a means to improve transparency and accountability in the oil sector in Ghana. Access to information has been lauded as a means to improve accountability, transparency and good governance in general. The financial rewards involved in oil exploitation are such that the threats of corruption and funds mismanagement cannot be dismissed. Resource curse has affected numerous countries and has left populations disappointed and bitter, and at times worse off.

While the constitution of Ghana protects the right to information, there is no enabling legislation. A recent court case has however shown that the courts may be used in that regard by civil society. However, as highlighted before, this cannot be deemed a sustainable solution. Courts cannot be used as the first port of call for accessing public information, rather the role of courts is to review any decision taken by the executive. One cannot expect an individual or an entity to go to court to retrieve every single piece of information in the hands of the government. It is in this context that the laws regulating the oil sector in Ghana become all the most important, representing the legal gateway to information for civil society.

An analysis of those laws has shown that the notions of transparency and accountability are known to the government of Ghana. They are clearly mentioned in the laws such as in the PEPA, becoming the overriding principles behind the law. The requirement for reports by the public bodies are also clearly set out, although minimum requirements could have been laid out such as for the reports issued by the Bank of Ghana under the PRMA. However, the question remains as to whether those concepts have been clearly understood. Among the most problematic areas are the bidding and the disclosure of the agreements and licences. The awarding of contracts whether through bidding or direct negotiations is a particularly sensitive time for corruption and public disclosure is here most important. To surround that area with secrecy is to purposely forget when and where transparency is most needed. There should be a statutory obligation to disclose information related to the bidding process and to fully disclose the agreements. Other areas of concern are the underfunding of the PIAC, the lack of clear reporting lines

103 Sec 3(k) of the PCA.

104 Schedule to the PCA.

and the delay in considering its reports by the Parliament. All point to an unwillingness to allow civil society and thereby the public full access to the transactions in the petroleum industry.

The biggest issue with regards to the right to information however remains that currently civil society is limited to the information which government releases in those reports. The right to information requires the right not only to receive but also to seek information. Currently, neither an enabling law nor sections in the laws surrounding the petroleum industry clarify the manner in which civil society may request information. While reports are undoubtedly useful, there are situations that require information immediately and where a delay would defeat the purpose. The lack of a clear mechanism has also led most NGOs to obtain information 'through the back corridor rather than the official door'.¹⁰⁵ Access to information is a constitutional right that cannot depend on the goodwill of the government and the persuasiveness of the person or entity effecting the request. It is therefore pertinent that Ghana passes the RTI Bill to allow civil society to effectively monitor the government and oil companies.

105 Debrah & Graham (n 7 above) 35.