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Freedom of information legislation, state compliance and the discourse of knowledge: The South African experience

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Summary In this paper, we use the example of post-apartheid South Africa since 1994 as a case study, with US experience as a point of reference, to begin a modest deconstruction of some of the nomothetic assumptions implicit in general freedom of information (FoI) discourse. Using the Roberts–Snell model to analyze South African levels of administrative compliance with FoI legislation, we conclude that a lack of capacity and some deliberate evasion have combined to produce poor performance levels in the first years. Turning to low public demand, we examine language and discourse problems arising from the extreme diversity of South African society and the status domination of English, a minority language. In conclusion, we argue that although FoI may or may not be a genuine human rights issue in the strict sense, there is little doubt that unless FoI practices are articulated with other civil and human rights, societal change may be a long time coming.

Hacking through the bitter-almond hedge

In 1660, Jan van Riebeeck of the Dutch East India Company ordered the planting of a bitter-almond hedge across Cape Town. The hedge separated the crops and cattle of the Dutch settlers from the land occupied by the Khoikhoi, the original inhabitants. It was not only a physical barrier but also a significant symbol. It designated groups of people, separating those who were part of the 'civility' from those who were not. Those outside played confined roles in the emerging society, subject to constraints on their freedom of movement and access to knowledge and power. Today the hedge remains a powerful metaphor for the fractured society that was to become over the three centuries up to 1994 the apartheid state of South Africa. Breaking down 'the hedge', or hacking through it, is in a real sense the major political and social task confronting South Africa today.

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In this context, we argue here that freedom of information (FoI) is fundamentally a change process that needs to be managed in its social circumstances, rather than a simple constitutional or legislative act (Kearney & Stapleton, 1998, quoted by Snell, 2001). Management of the FoI process involves both the analysis of compliance behaviors by the state, and a nuanced examination of the demand for FoI access by the citizenry. However, in South Africa, where the FoI change process has been launched in the context of a larger political change process—from racist authoritarianism to constitutional democracy—there is little recognition of this need. As a result, levels of both demand and compliance remain disappointingly low.

There are two key components to organizational compliance, namely *capacity to comply*, and *willingness to comply*, although these are often hard to distinguish. A secretive civil servant can credibly claim a lack of resources, as a strategy for the effective denial of access. Demand, moreover, is a complex matter since it is determined by such imponderables as affordability, public awareness of civil and human rights issues, levels of information literacy, the coherence of national political discourse, and the perceived chance of success.

FoI legislation in many countries is increasingly circumvented by the state's effective withdrawal from the provision of services that were until recently seen as incontestably public sector responsibilities. Privatization of such services as telephones, the post office, or even prison services has been termed 'structural pluralism'. As a result 'many public functions are now undertaken by entities that do not conform to standards of transparency imposed on core government ministries' (Roberts, 2001, p. 2). In the case of South Africa, FoI legislation skirts this problem by laying an obligation on both public and private bodies, but it is clear that many of these 'do not have the capacity and the resources to carry out most of their obligations' while the better-resourced organizations 'have simply ignored their obligations' (South African Human Rights Commission (SAHRC), 2003, p. 63).

It is possible to write about FoI in the narrow sense of the citizen's ability to gain access to state records (facts, data or documents), without engaging much with social theory. Such an approach takes it as given that the concept is virtuous and applicable across societies or cultures without complication or difficulty—and much of what might be termed the activist literature pretty much adopts this line. However, we believe that FoI requires a more complex reading of social reality, because it aims in a deeply subversive way to reconfigure the relationship between state and citizen by specifying how and under what terms politicized knowledge is shared—in other words, by reconfiguring at least partially the nexus of knowledge and power. It is for this reason that it often calls forth such stubborn resistance from state bureaucracies the world over (American Civil Liberties Union, 1982). The irony lies in the fact that, at the same time, it apparently does this in terms of a modernizing discourse that assumes the purity, universality and neutrality of knowledge and information (Schech, 2002).

It is then hardly surprising that in many countries FoI has been the object of political struggle, has often been realized only in the most enfeebled fashion, and has continued to come under attack even after implementation. Its specific history as the outcome of *particular* struggles, as in South Africa, the United States of America and elsewhere, means that it has both an unrecognized idiographic as well as a nomothetic character. While FoI may seem 'to be a global notion [...] on closer examination, this freedom [...] is influenced by local values [...]' (Wieland, 1999, p. 84).

Two contrasting histories illustrate the point nicely. In the United States, the first Freedom of Information Act of 1966 (FOIA) was developed in response to specific and practical problems of governance. Legislators were unable to carry out their duties if they were kept in the dark by the executive branch about the development of policy. The history of the work carried out by the Moss Sub-Committee on Government Information from 1955 to 1966 is a chronicle, in essence, of the assertion of congressional privilege over the obsessive administrative secrecy of the executive branch (Archibald, 1993, p. 726). However, the project was soon subsumed into a wider discourse of civil rights, and redefined itself within a framework of the (individual) citizen's relationship to the state.

In South Africa, the enactment of FoI legislation has taken place as part of a rapid *negotiated political transition*, and as part of a self-conscious attempt to begin building a national human rights culture (van Huyssteen, 2000, p. 246). The country has a long and shady history of information management by the state—both in the form of obsessive record keeping, and also in the shape of equally obsessive censorship and often disastrous attempts at disinformation, such as the Muldergate debacle of 1978–1979 (O'Meara, 1982). The South African Parliament itself noted some years ago that

> the system of government in South Africa before 27 April 1994 [...] resulted in a secretive and unresponsive culture in public and private bodies

> which often led to an abuse of power and human rights violations' (South Africa, 2000a, Section 9).

But in a decisive break with this past, South Africa inaugurated its first democratically elected government on 10 May 1994, and the Constitution became law on 10 December 1996. In many respects the provisions represent liberal Enlightenment values in a distilled form, and it remains to be seen to what extent these values are actually rooted in the political or social practices of the majority of South African citizens (van Huyssteen, 2000). Be that as it may, Section 32 states that

> 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 (South Africa, 1996, Section 32).

Enabling legislation was passed in February 2000 and came into effect in March 2001 (South Africa, 2000a).

Although in both cases—the United States and South Africa—there is an underlying positivist faith that objective truth can be constructed out of enough 'information', the dynamics of the processes that produced FOI laws in each country are significantly different. In the United States, where a famously self-referential political discourse allows only for the interrogation of the intentions of the Founding Fathers, FOIA emerged as an ad hoc solution to a particular problem, and despite its immense practical significance has never gained recognition as the expression of a Constitutional principle.

For many people in many countries, the idea of a democratic practice that holds the state accountable by actively keeping the citizenry well informed is intuitively attractive. Indeed, it is sometimes argued that the presence of functional FoI mechanisms is fundamental to freedom and democracy, and that FoI promotes and stimulates popular participation in the political process. This may be true to some degree in some places. However, it is important to recognize that in countries with relatively short democratic traditions, FoI is at least as important for the safeguards it provides in 'discouraging arbitrary state action and protecting the basic right to due process and equal protection of the law' (Roberts, 1999). It is also vitally important as one weapon in the armory of civil society in fighting corruption, promoting transparency, and resisting the politics of patronage.

Keeping the car running: administrative compliance in the South African context

South Africa's rapid movement from autocratic information management towards democratic transparency has made the national context quite distinctive, and more similar to post-communist Eastern Europe than to such stable long-term democracies as Australia or Canada. The introduction of FoI legislation has been derived more from a constitutional imperative than from popular pressure. The South African enabling legislation, the *Promotion of Access to Information Act* (PAIA), was passed in February 2000 and implemented in March 2001, 7 years after the advent of democracy. On the same day that PAIA was enacted, the *Promotion of Administrative Justice Act* was also passed, laying an obligation on the state to provide written reasons for Government action, if requested (South Africa, 2000b). The two laws are intended to work together to provide the citizen with tools for political participation: information records and reasons for action. The progenitor of these laws was the *Batho Pele* ('people first') White Paper. Its principles, adopted on 1 October 1997, concern accountability and quality control in the delivery of public services.

The real issue for FoI, of course, is what effect the *Batho Pele* philosophy and subsequent legislation has had in practical terms on the average South African's ability to identify and then get at information that was previously inaccessible. One local commentator noted in a radio interview that

> Some laws you can pass and they can sit on the shelf, gather dust, and serve a useful purpose [...] A law such as this [the PAIA], like a car that's not used, will atrophy if it's not used (Calland, 2003).

To stretch the metaphor a little, it has become clear even in the extremely short period since the enabling legislation was passed that this particular car still has low mileage on the odometer, and some parts that may already need replacing. The reasons are not hard to find. Pickover and Harris (2001) identified three main concerns with regard to the successful management of the transition to an FoI culture in South Africa. These were, first, the problem of inadequate public information about what records are kept, since citizens can hardly claim access to files of which they know nothing. Second, organizations do not, by and large, operate efficient record keeping systems, either for paper or for digital records. At the provincial level, record keeping (including selection for destruction)

is either 'out of control or in complete chaos'. Digital documentation is equally disorganized, and 'a Wild West scenario prevails'. Third, there is little capacity for the provision of workable public access. Many departments and other bodies 'seem to assume that they can rely on existing staff already heavily overburdened by other responsibilities'—with predictable negative results (Pickover & Harris, 2001).

An ongoing analysis of state compliance with the requirements of FoI legislation is an essential component of managing the change process. In 1998, Roberts proposed an analytical framework for this type of investigation, which was subsequently refined in a series of papers by Snell. These developments represented an important step forward in a generally under-theorized field. Previously, in Snell's own words, the analysis of 'compliance issues [was] largely relegated to marginal notes or anecdotal accounts. The criticism [...] was blunt, unrefined and easily dismissed as an isolated lapse in an otherwise exemplary performance pattern.' (Snell, 1999).

In essence, the Roberts–Snell model consists of five categories of compliance, each characterized by specific types of action, as shown in Table 1. We have added a column indicating the probable placing of each category on a 'willingness/capacity continuum'.

This is scarcely an exhaustive list of conceivable bureaucratic tactics. Other possible 'snow jobs' might include burying relevant information in a deluge of paper, or what the South African monitoring group, the Open Democracy Advice Centre (ODAC), has called 'mute refusal', namely a refusal to deal with requests at all (2003, p. 1).

It is hard to produce an adequate analysis of South African trends or patterns of administrative compliance within this framework. The first difficulty—which is itself strongly indicative of non-compliance—is that the available statistics are both inadequate and problematic. The Human Rights Commission (SAHRC) is required by PAIA to submit annual statistics on compliance to Parliament (South Africa, 2000a, Section 84[b]). To fulfill its obligation, the Commission depends on annual reports submitted by each body (South Africa 2000a, Section 32), which it then aggregates. However, at the time of writing, nearly 4 years into South Africa's FoI regime, this has been done only once (SAHRC, 2003, pp. 57–73), with respect to the period March 2002–March 2003. There is no national data for the first year of PAIA (March 2001–March 2002) or for the third or fourth years.

Rolf Sorensen of the South African History Archive (SAHA) has criticized this first attempt on several grounds. First, the data are seriously incomplete: only 62 bodies in fact submitted

Table 1

High capacity High willingness	Proactive Compliance	• Information made available before requests • Exemptions waived • Review perceived as quality control
Capacity Willingness	Administrative Compliance	• Co-operative attitudes • Exemptions used minimally • Review seen as guide to future decisions
Low capacity Willingness doubtful	Administrative Non-compliance	• Inadequate resources • Poor record keeping • FoI accorded low priority
Low capacity? Low willingness	Adversarialism	• Us and them attitudes • Exemptions resorted to • Delaying tactics • No explanation
Capacity irrelevant Unwillingness	Malicious Non-compliance	• Shredding • Information not recorded or filed • Documents removed from files

Adapted from Snell (1999, 2001).

Section 32 reports, and then only after an advertising campaign in the newspapers, followed by a political intervention by the Minister for Justice and Constitutional Development (Sorensen, 2004, p. 2). Of the 62 reporting bodies, only 30 appear to have actually received FoI requests. It is also known that many non-reporting bodies had in fact received requests. Sorensen lists 14 bodies that SAHA had submitted requests to, but which did not submit Section 32 reports. They therefore do not appear in the statistics. Second, there are internal inconsistencies and possibly errors in the actual numbers reported, at least some of which probably arose as the result of differing interpretations of the Act's definitions (Sorensen, 2004, pp. 4 and 5).

Nevertheless, in Table 2 we present a summary of data extracted from the SAHRC report (2004, pp. 66–73), including only those bodies that reported actual requests received. The numbers in the left-hand side column are those assigned by SAHRC in the original tabulation.

These data can, of course, only be used indicatively. While the figures for the number of requests and for requests granted are probably reliable, the data on refusals are highly ambiguous and hard to interpret, as Sorensen has pointed out in detail (2004, p. 5). We have indicated all these difficulties with the word 'unclear' in the many cases where the data do not present a coherent picture. The SAHRC does not present any totals for requests, requests granted or refusals, and we have calculated totals, but again it is necessary to emphasize that these represent an aggregation of probably unreliable data, reported by a total of only 30 bodies in the whole country.

Despite these difficulties, it is interesting to see if the available data on submitted requests, here and elsewhere, can be analyzed in terms of the Roberts–Snell system, especially in the context of

Table 2

	Name of body	Requests	Granted	Refused	% Granted
1	Dept. of Agriculture	8	6	Unclear	75
3	Dept. of Education	245	Unclear	Unclear	
4	Dept. of Housing	1	Unclear	Unclear	
5	Dept. of Justice	66	44	Unclear	67
6	Dept. of Labour	374	374	0	100
8	Water Affairs and Forestry	22	20	2	91
10	National Intelligence Agency	10	7	3	70
11	National Treasury	9		8 (partially)	
13	SA Police Service	5024	4172	Unclear	83
15	Free State Dept. of Education	1	1	0	100
16	Free State Dept. of Health	16	11	Unclear	69
18	Free State Office of the Premier	3	Unclear	Unclear	
19	Free State Dept. of Public Works	1	1	0	100
23	Free State Dept. of Tourism	1		Appealed	
25	Free State Technikon	6	3	Unclear	50
26	Limpopo Dept. of Education	1	1	0	100
27	Limpopo Dept. of Health	19	19	0	100
29	Mpumalanga Dept. of Education	3	3	0	100
30	Mpumalanga Dept. of Finance	25	25	0	100
36	North West Dept. of Roads	Unclear	2	Unclear	
40	City of Cape Town	7	6	1	86
42	Theewaterkloof Municipality	5	5	0	100
43	Auditor General	4	1	Unclear	25
46	Independent Electoral Commission	1	Unclear	Unclear	
48	Central Energy Fund	1	1	0	100
50	Magistrates Commission	4	1	Unclear	25
55	National Ports Authroity	220	188	Unclear	85
58	Public Service Commission	3	3	0	100
59	SA Revenue Service	89	7	Unclear	8
61	Eskom	22	21	1	95
	Totals	6191	4922		80

the transfer of power from the apartheid state to pluralist democracy. The first point is that the failure of so many public bodies to submit the required reports to the SAHRC, and the SAHRC's own incomplete reporting, constitutes *in itself* a clear example of administrative non-compliance, probably a result of inadequate resources, poor record keeping and the low priority accorded to FoI activities by public bodies. Although there is some unwillingness to comply with FoI, SAHA has paid tribute to 'the professionalism demonstrated by a number of state agencies in implementing the Act' (Harris, 2003, p. 5).

That said, it is clear that both adversarialism and malicious non-compliance do exist in South Africa. One of the best publicized cases of the latter involved the work of the Truth and Reconciliation Commission (TRC), set up to investigate gross human rights abuses committed during the apartheid period, and through its testimony to begin the process of healing. The TRC relied on cooperation from state structures in accessing the records of the period, and not unnaturally there was some obstruction and covering of tracks by criminal elements. However,

> the degree to which obstruction might have affected the Commission's work only became apparent in 2001 when evidence of large-scale concealment of records from the Commission by the South African National Defence Force (SANDF) emerged. In 1997 and 1998 the Commission's investigation of records destruction by the Apartheid security establishment included a study of surviving Military Intelligence records. As was noted in the Commission's Report, the SANDF [...] disclosed only 3 series of Military Intelligence files. These were subsequently used selectively by various other Commission investigations. However, in 2001 SAHA submitted a request in terms of PAIA to the SANDF for lists of all surviving Apartheid era Military Intelligence files. This request revealed not 3 series, but 41 series embracing thousands of files. In other words, the existence of 38 series of files had been concealed from the Commission. It is not clear [...] whether this was an isolated incident or part of a broader pattern of obstruction (Harris, 2003, p. 4).

Until more extensive, more reliable and better-organized data become available, we will remain unable to say with confidence whether cases like that of the TRC are the tip of an iceberg, or merely historical anomalies in a general culture of compliance.

The demand for FoI: the problem of discourse in South Africa

Although reliable statistics are unavailable, it is clear that popular demand for access to information in South Africa started at a low level and has remained there, for reasons about which we can only speculate. After the first year, Harris and Hatang reported on the basis of their concrete experience that utilization of PAIA provisions was

> anything but extensive. Levels of public awareness remain low, and key user groups [...]—journalists, academics, professional researchers and human rights activists—are not rushing to test the Act. [...] Levels of cynicism are high [...] (2002, p. 2).

After this slow start, even at the end of the second year, demand had not increased.

> Use of PAIA by the public in its first two years of operation has been extremely limited [...] it is clear that very few South Africans are using the legislation [...]. Freedom of information, as an idea and as a culture, has not yet taken root in the country. The media have given very little coverage to PAIA [...] the public does not have ready access to information about the resources available to it (Harris, 2003, p. 3).

Although the compliance problems outlined above may contribute to the public cynicism mentioned, these quotations also point to the idea that the FoI culture is only shallowly rooted in South African soil. At a recent conference attended mainly by information workers and academics, there was a surprisingly high level of support for the mistaken idea that mere suspicion on the part of an information officer that a request was motivated by ill intention constituted sufficient grounds for refusal (Nassimbeni, 2005).

The question naturally arises, *why* is the South African citizenry, so long oppressed by the racist ideology of apartheid, not making more extensive use of what is generally agreed to be in most respects a model piece of FoI legislation? It seems likely that at least part of the difficulty lies in South Africa's cultural and linguistic diversity, and in the fact that not only information but also the actual *discourse of power* remains inaccessible to many of the historically excluded sectors of society.

In this respect, the most obviously idiographic aspect of the FoI concept pertains to questions of language, and more broadly, of the 'language of legitimacy' (Bourdieu, 1977). An *implicit precondition* for an informed citizenry is a citizenry that is

information literate and able to understand the dominant discourse of power, both literally and metaphorically. It possesses, in other words, an awareness of how 'the system' works and what rights the citizen may claim within it. This precondition cannot always be met, especially in less-developed countries, in countries with dramatically unequal levels of education, and in multilingual and multi-cultural societies. South Africa meets all these conditions and exemplifies the proposition that the less homogenous a society and the lower the general level of education, the harder it is to develop sustainable and useful FoI practice.

The argument is supported by a concrete example. In 2003, ODAC in Cape Town conducted a monitoring study on PAIA implementation. This was part of an international study evaluating FoI practice in five countries, including Armenia and Macedonia, neither of which had FoI legislation at the time. Part of ODAC's research strategy was to attempt to discover to what extent a requester's social status and command of the skills necessary to fill in the request forms impacted on the outcome of the request. This process

> involved ODAC monitoring 100 information requests submitted by a diverse group of requestors to a range of government institutions. Though the information requested varied in nature, no information that was expected to be protected under PAIA was requested (ODAC, 2003, p. 1).

The 'diverse group' referred to included people belonging to what South Africans describe as the 'excluded', which is to say black people, women, the illiterate, people who do not speak English, and the disabled. These categories of citizen experienced huge difficulties even in *submitting requests* under PAIA, although the legislation

> requires that an individual who is unable to make a written request for access to a record of a public body may make that request orally. Under the Act, the information officer is required to translate the oral request into writing in the prescribed form and provide a copy to the requester (ODAC, 2003, p. 2).

However, the results were seriously disappointing:

> The illiterate requestor was able to file only one out of ten orally submitted requests. She was not given assistance required under Section 3 nor under the duty to assist provision in Section 19. She was given the run-around, passed from office to office, and treated dismissively. The blind requestor was unable to submit five oral requests [...] (ODAC, 2003, p. 2).

In fact, in this monitoring exercise, only 23 percent of requests were granted, while another 17 percent went unsubmitted, in the sort of circumstances just described. A staggering 52 percent met with 'mute refusal', which is to say that they were simply ignored. This is a quite different and much gloomier picture than that presented in the figures of the SAHRC report cited in the previous section, and ODAC does not hesitate to draw the appropriate conclusion, with obligatory caveats:

> [...] the conclusion that PAIA is inaccessible for the illiterate is unavoidable. However, some bodies do handle oral requests, providing assistance to requestors [... and] some departments [...] demonstrated a commitment to pursuing oral requests (ODAC, 2003, p. 3).

As a consequence of this exercise, a formal complaint was laid on 21 October 2004 with South Africa's Public Protector, alleging that the extremely high number of mute refusals constituted maladministration. PAIA was a failure, the complaint claimed, for three principal reasons, namely

- a lack of political leadership and guidance in response to the Act;
- the lack of state resources to ensure effective implementation of the Act;
- the absence of an accessible independent oversight body and appeals mechanism other than the High Court (ODAC, 2004).

Another reading of the outcome of the monitoring exercise, however, might conclude that the real difficulties lie at a deeper level than this, and that a voluntaristic commitment to better administration and resource allocation would by no means solve them. For one thing, South Africa's 11 official languages are hugely out of equilibrium with each other. Ten of the 11 are endoglossic and one, English, which happens to be 'the language of legitimacy'(Bourdieu, 1977) is exoglossic. From a population of just under 45 million, 10.6 million speak Zulu as their home language, another 7.9 million the closely related Xhosa, and 5.9 million speak Afrikaans. English, with 3.6 million speakers, ranks sixth out of 11 in number of speakers (Statistics South Africa, 2001). The four main national languages of communication are in fact English, Afrikaans, Zulu, and the non-official and indeed uncodified urban lingua franca known as *Tsotsitaal* or *Isicamtho* (SADTU, 2000).

Yet English, although it is spoken and understood by a minority of citizens, occupies an unchallenged position as the language of government, education, social communication, and literature. Only a third of all South Africans can understand English, and this drops to a quarter of the African population considered on its own. These figures challenge 'the widely held belief that 'everybody' understands English' (SADTU, 2000). In fact, 45 percent of South Africans are unable to understand (or understand very little of) the information that political leaders try to convey when this is done in English only.

The problem of *how* official discourse can be understood by the general population is critically important to the functioning of FoI. Yet we are aware of almost nothing in the South African literature that explicitly raises this question. The concept and mechanisms of South African FoI need to be radically reconfigured if they are to have a significant impact on the daily lives of most people.

The situation of multilingual and multi-discursive South Africa is by no means unique. Similar struggles around language, legitimacy and discourse have taken place in Algeria, for example, where a

> fundamental dispute, generally repressed [...] involves what language should be used to discuss [political and social] issues—language in the sense of authoritative interpretation and representation of the world (Maghraoui, 1995, p. 23).

Another more or less random example might be the question of the discourse of power in Burkina Fasso in the mid-1980s:

> La presse écrite et les médias audio-visuels, dès lors qu'ils s'expriment en français, ne peuvent être compris que par une petite minorité lettrée [...] Telles quelles, les émissions 'idéologiques' diffusées à la radio et à la télévision sont inaudibles, tant par leur forme que par leur contenu, pour la majorité des auditeurs [The print and audio-visual media, given that they express themselves in French, cannot be understood except by a small literate minority ... So it comes about that 'ideological' broadcasts cannot be heard, either in form or content, by the majority of listeners] (Dubuch, 1985, p. 52).

Unless this exclusion of a majority of citizens from the very discourse of power is taken into account in the definition of appropriate compliance behavior at the microlevel, it is hard to see how FoI legislation, however carefully constructed it may be as law, will have a significant social impact in South Africa or other similar countries for years to come.

The category of problem: is FoI a human rights issue by default?

FoI activists in South Africa agree that it is necessary to 'focus overwhelmingly on problems with implementing PAIA, rather than on amendments to the Act [...]. The actual provisions of the Act are amongst the most comprehensive of their kind in the world' (Sorensen, 2003, p. 51). It is hard to disagree with this, but as we have argued, the achievement of an effective implementation of PAIA will require careful analysis of the nature of the difficulties, both in terms of poor state compliance, and of the low levels of popular demand.

In our view, this process must also involve a debate about competing but largely unexamined narrow and broad versions of FoI discourse. The narrower approach, adopted in this article, tends to see FoI issues as fundamentally limited to theoretical and technical questions of *how* citizens can access state records, without having to overcome such obstacles as demonstrating legitimate interest or paying excessive costs. A broader viewpoint, which can be characterized as the 'right to know' approach, places this narrow FoI view of the citizen's relationship to the state into the context of a range of information-related human rights issues, including media freedom and freedom of expression.

Underlying this conceptualization of FoI is the assumption not only that it is in some sense a specific human right, but that it is closely related to other human rights. According to this view, FoI together with the right to freedom of expression helps to 'establish a marketplace of ideas, which is fundamental not only for the development of a free personality, but also for a democratic government. Without FoI, freedom of expression is useless' (Wieland, 1999, p. 84). Venerable texts such as the United Nations Universal Declaration of Human Rights (1948), and the International Covenant on Civil and Political Rights (1966) lend some support to this line, since both recognize a right to 'seek, receive and impart information and ideas through any media and regardless of frontiers'.

Various advocacy groups, such as Privacy International and Article 19, now use the 'right to know' terminology quite extensively, and often in a context that appears to present it as simply an alternative to FoI. However, despite these widespread attempts to locate FoI within a generalized human rights discourse, there are dangers. One is that national treatment differs: 'judges and constitutional scholars [in the United States] have never actually identified a right to know' (Doyle,

2001). Indeed, the Supreme Court of the United States has even 'eschewed finding a general [...] right of access to government-held information under either the free speech or free press clauses of the First Amendment. [...] in 1978, former Chief Justice Warren Burger said public access to government information must be determined instead by 'carefully drawn legislation,' and the 'political forces in American society' (Hoefges, Halstuk, & Chamberlin, 2003, p. 2).

Why this judicial caution? A human right has been defined as an 'inalienable moral entitlement' that attaches 'to all persons equally, by virtue of their humanity, irrespective of race, nationality, or membership of any particular social group' (McLean & McMillan, 2003). It is hard to see how something as definite as access to government information can be included in such a definition, because of the historical specificity of modern state structures, which do not themselves arise from a universal *condition humaine*. FoI is a specific response to the modern historical phenomenon of the nation state, itself a social group with a defined membership. Although FoI is a 'right', it is a weaker kind of right than the right to life, the right to freedom of expression and so on. It may be that a theoretically underdeveloped concept such as 'civil rights', precisely because it can be defined as those rights 'that are conferred legally upon the individual by the state' (World Encyclopedia, 2004) is more useful in considering FoI.

It seems to us to be undesirable that FoI should become a generalized human rights issue by default without further debate. Nonetheless, we do agree strongly that access to information in and of itself is defective unless linked to other freedoms and their respective mechanisms for the correcting of injustice. The *Batho Pele* philosophy is a clear expression of the South African government's commitment to the idea of a fully articulated basket of transparency practices. Nor do we wish to argue against the nomothetic *core values* of FoI, which are that informed populations are better able to protect their interests, to hold the political class accountable, and to achieve social and economic development. But more reflection and more research into the concrete conditions in which it will be used is required, if FoI is to become a mass instrument of political engagement in less-developed countries.

Significant fractions within any state structure, regardless of the country, are likely to be disinclined—to put it mildly—to allow any substantial implementation of access. The elephant in any FoI room is the ferocity and persistence of bureaucratic resistance to FoI measures, masked by a simultaneous discourse of commitment to transparency and open government. A court in the United States commented in a judgment over 20 years ago, that the 'history of freedom of information laws [...] is largely the history of bureaucratic resistance to revealing [... government] operations' (American Civil Liberties Union, 1982), and looking at the evidence available today, we see no reason to disagree.

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