International Scene

Toward a Culture of Transparency: Public Rights of Access to Official Records in South Africa

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Abstract: This essay's point of departure is that the public's right of access to official records and its right to place the processes of government under scrutiny are defining characteristics of democracy. An examination of official secrecy in apartheid South Africa establishes the context for an analysis of the country's restrictions on public access to official records at the dawn of a democratic era. While it is conceded that governments have a legitimate right to restrict access to certain information, it is argued that the restrictions in South Africa are weighted unreasonably against the public. At the same time, paradoxically, these restrictions do not provide adequate protection of certain legitimate interests—for instance, of individuals' personal privacy. Proposals are made for redefining the parameters of official secrecy.

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The views expressed in this article are the personal views of the two authors and do not necessarily reflect the standpoint or policy of the institutions for which they work.

"Open government is a contradiction in terms. You can have openness. Or you can have government. You can't have both."[1] This was the opinion of the archetypal British civil service mandarin, Sir Humphrey, in the British Broadcasting Corporation (BBC) TV comedy series "Yes Minister."[2] One of that series' many virtues was the humor it created out of reality; and to show that it was well based in real events, one need go no further than a circular about greater openness distributed by British Premier Margaret Thatcher's private secretary in 1979—which is classified and embargoed until 2010. Secrecy is fundamental to the British system of government, providing a model we believe to be antithetical to South Africa's requirements.

Background

If South Africa is ever to become a participative democracy it will require first, a large number of educated people, and second, information. Without background knowledge about issues and the way government has tackled and intends to tackle them, the ability of the electorate to make informed and intelligent decisions, especially in an increasingly technologically based society, is limited. Knowledge does not equal power, as the cliché would have it, but power cannot be exercised without it. Information is essential to efficient and thereby effective democracy, which is why the concept of the right to know is recognized as fundamental in democratic societies. Informed judgments and choices are attributes of a responsible citizenry.

Politicians and public servants are, understandably, not comfortable with the notion of transparency, preferring to operate beyond the glare of public scrutiny. In apartheid South Africa this was especially apparent, with government and the operations of its bureaucracies being cloaked in secrecy. Official secrecy (also known as statutory censorship) was framed in legislation that controlled vast areas of public life and gravely inhibited the press from comprehensive reporting of national affairs. This is not to say that the restrictions on public access to official records were, and still are, exceptional. Indeed, in an international context, South Africa compares reasonably favorably. But it is to say that these restrictions were manipulated to secure an extraordinary degree of opacity in government and that South Africa's national information system became grossly distorted to the benefit of government propaganda in an attempt to preserve the power of a white elite and its allies. And it is to say that as we move toward a democracy it is crucial to remember that the public's right of access to official records, and its right to place the processes of government under scrutiny, are defining characteristics of democracy. The more transparent government is, the more vigorous is democracy.

From the mid-1950s until the late 1980s, information on certain topics became difficult, and even dangerous, to acquire. Real debate on vital issues was hampered by both a dearth of information and punitive action by the government against dissenting opinion.[3] To varying degrees, information about the following was circumscribed:

- Business, foreign trade, and sanctions

[1]Quoted by Mark Fisher, Labour MP for Stoke Central, introducing the Second Reading of his Right to Know Bill to the British House of Commons, 19 February 1993.

[2]"Yes Minister" was reputed to be Margaret Thatcher's favorite television program. If true, this shows either that she has a well-developed sense of humor or none whatsoever.

[3]This was compounded by security and emergency legislation that restricted information on civil unrest and protest action, as well as by the views of the liberation movements and any organizations deemed to be "communist."

- Capital punishment, especially racial bias in sentencing
- Conscientious objection to military service
- Corruption and cases of fraud
- Detention without trial and the treatment of detainees
- Liberation movements and their activities and policies
- Mental health institutions
- Military incursions into Angola and repression in Namibia
- Nuclear power and the development of nuclear weapons
- Oil supplies and reserves
- Police involvement in repression in South Africa
- Prisons and the treatment of prisoners
- Territorial consolidation of black homelands (bantustans)
- Weapons procurement and development

These are all topics about which voters and taxpayers have a right to be well informed. Current legislation restricting access to relevant information can be classified very broadly as follows:

- Acts that control official information (e.g., Archives Act, Protection of Information Act, Statistics Act)
- Acts that restrict information from all sources on specific topics (e.g., Nuclear Energy Act, Petroleum Products Act)
- Acts that regulate administrative and legal functions (e.g., Criminal Procedure Act, Disclosure of Foreign Funding Act, Inquests Act)
- Other acts extending government power (e.g., Indemnity Act, Internal Security Act, Publications Act)

Did South Africa explode a nuclear device in the southern Indian Ocean on 22 September 1979, and if so, who else was involved? Which countries have transferred technology to South Africa in the course of developing its arms and nuclear industries? Who lost the country $30 million in 1979 by paying twice for a stolen cargo of oil from the tanker *Salem*? Why did the plane of the president of Mozambique, Samora Machel, crash just inside South Africa in October 1986? Was the South African Airways plane Helderberg carrying volatile material for Armscor, South Africa's armaments corporation, in defiance of international air traffic regulations, when it crashed off Mauritius in 1987? Who was responsible for the deaths of numerous anti-apartheid activists?[4] These are all legitimate questions of public interest to which we have a right to expect a comprehensive answer. In each case, our knowledge is deficient, hampered by official secrecy.

Official Secrecy and the "New" South Africa

The situation has improved slightly since 1990 without major changes to legislation. The exceptionally high level of secrecy began to break down as government confidence waned and investigative journalism flourished, reinforced by lessons learned by the democratic movement during the State of Emergency, 1985–1990. The *Weekly Mail, Vrye Weekblad*, and *New/Sunday Nation*, for instance, published exposés on certain aspects of prisons; psychiatric hospitals; the activities of hit squads and "special forces"; arms supplies to Rwanda, Iraq and Israel; oil supplies; and the Inkathagate funding scandal.[5] The authorities have threatened legal action in some cases but seem less sure of themselves than they were a few years ago. From this, it is possible to draw the lesson that watertight con-

[4]Some of the more notable assassinations involved Richard Turner (Durban, 1978), Matthew Goniwe and three companions from Cradock (Eastern Cape, 1985), and Anton Lubowski (Windhoek, 1989).

[5]This involved the covert funding of Inkatha, the governing party in the KwaZulu homeland, through the security police.

trol in the sphere of information requires confidence on the part of the authorities. During 1992, laws about the police and prisons were relaxed; and Reg Rumney, writing in the *Weekly Mail* about oil supplies, remarked that he was able to work, for the first time in years, without the fear of "the Special Branch paying visits to researchers who asked too many questions about the . . . industry."[6]

However, Max du Preez, editor of *Vrye Weekblad*, was convicted and fined under the Protection of Information Act in 1990 for publishing news that an institute attached to Stellenbosch University acted as a conduit for information to the National Intelligence Service. The same act was invoked in a fraud case, which revealed the fact that the Civil Cooperation Bureau (CCB, a covert operations unit of the South African Defence Force) was interfering in the affairs of another state. No further evidence about this interference was allowed in court. In November 1990, the trial of a conscientious objector, Michael Graaf, was hurriedly adjourned when he revealed details about security force actions in Namibia as part of his evidence, thus infringing the Defence Act. As Mathew Blatchford remarked, "The armed forces operate in secret, a secrecy protected by a huge number of interlocking statutes. . . . Without this concealment the South African public might have been revolted by what the armed forces have done."[7]

Secrecy has been a worrying and prominent feature of the "new" South Africa. Commentary on the Conference for a Democratic South Africa (CODESA) in 1992 and on the work of the Advisory Committee on Land Reform (ACLA)[8] has been especially critical of the secrecy involved. A particularly worrying current issue is that concerning South Africa's nuclear weapons. In 1991 South Africa signed the Nuclear Non-Proliferation Treaty, which opened up its stockpile to inspection by the International Atomic Energy Authority (IAEA). The IAEA fears that because the nuclear program was secret and unmonitored for so long, weapons-grade material is undocumented. U.S. government sources suggest that the South African authorities have shredded documents concerning the nuclear program and may have fabricated records showing how much enriched uranium it produced. There is a major worry that material unaccounted for may fall into the wrong hands. Hidden from the public was the fact that South Africa had developed battlefield nuclear weapons that could be launched from Armscor's G5 and G6 guns, capable of projecting a 2 kiloton warhead 42 kilometers. Another fact that was carefully concealed was the amount of international assistance given to this country. The image of a robust, defiant economy becoming self-sufficient in armaments was largely propaganda; enormous amounts of assistance were provided by Germany, the United States, France, Canada, and Israel.[9]

Perhaps the most blatant potential use of secrecy is found in the Further Indemnity Act of 1992, which provides for a National Indemnity Council to meet in secret to de-

[6]R. Rumney, "A Little Light on the Oil Industry" *Weekly Mail* 9 (23), 11 June 1993, 21.

[7]*Democracy in Action* October-November 1990, 15.

[8]An editorial in *Farmer's Weekly* complained that membership of ACLA was based on political appointments and that ACLA's recommendations were secret. It argued that the judicial process should be used to settle land claims in open courts so that justice could be seen to be done.

[9]S. Coll and P. Taylor, "Is Pretoria Being Honest on Nuclear Weapons?" *Guardian Weekly* 148 (13), 26 March 1993, 18; S. Laufer and A. Gavshon, "The Real Reasons for SA's Nukes." *Weekly Mail* 9 (12), 26 March 1993, 3; P. Van Niekerk, "Whose Information is It Anyway?" *Weekly Mail* 9 (12), 26 March 1993, 4; *Guardian Weekly* 148 (14), 2 April 1993; *Southscan* 8 (13), 14 May 1993, 138.

cide who should receive indemnity for political crimes. Evidence and documentation are strictly confidential (Section 10 of the Act). This measure was rejected even by South Africa's unrepresentative, pre-April 1994 parliament and forced through via the appointed President's Council. Enforced amnesia about the past is no beginning for a society requiring openness.[10] Hilda Bernstein writes evocatively in a recent essay on South Africa's history as one of "torn and missing pages."[11] We need to complete some of those pages by finding out who did what to whom and why: reconciliation requires truth and justice. South African journalist Philip van Niekerk argues persuasively that "there are matters of honour, of setting the record straight, of making sense of the sad history of our country that still require the truth."[12]

Another tool (and, ultimately, the most effective) in securing enforced amnesia is the deliberate destruction of official records. Numerous cases of such action have been documented and many more alleged since the late 1980s. They point to a widespread and systematic endeavor to eliminate incriminating material. Perhaps the most blatant example surfaced in 1993 when the National Intelligence Service (NIS) advised central government departments to destroy certain classified records, especially those concerning the work of the National Security Management System (NSMS). The action rested on a state-generated legal opinion that exempted classified records from the operation of the Archives Act. Lawyers for Human Rights contested the validity of the action in a Supreme Court application, which resulted in an out-of-court settlement effectively overturning the legal opinion. All the parties involved agreed that classified records qualify as archives in terms of the Archives Act and that their destruction can be authorized only by the director of archives.

The long-term survival of security police files is an issue that has been addressed frequently. At the Library and Information Workers (LIWO) Conference held in Cape Town in 1992, Albie Sachs,—lawyer, former political detainee, and adviser to the African National Congress—pointed out that these files constitute the most comprehensive biographical dictionary in South Africa. Some would say, knowing the amount of inaccurate information they contain and something about the experience of revealing police files in East Germany,[13] that their continued confidentiality is perhaps a good thing. There is also the fear that documents seized from anti-apartheid organizations by the security police over the years have been destroyed.

There are thus two main reasons why South Africans should be concerned about freedom of information and its relation to a future democratic society. First, South Africans must reclaim their history. Any nation that has an incomplete understanding of its past rests on shaky foundations and there are parallels here with the German experience after the Second World War. Second, government must be made accountable, especially in the light of the historically repressive role of the South African state. In view of this, South Africa needs to develop freedom of information rights, law, and practice concentrating not just on the relation between government

[10]C. E. Merrett, "Amnesia by Decree," *Index on Censorship* 22 (5–6) 1993, 21–22.

[11]H. Bernstein, "Discovering Exiles," *Southern African Review of Books* 5(4) (July/August 1993): 12.

[12]P. Van Niekerk, "The Riddle of the Red Herrings," *Weekly Mail* 9 (34), 27 August 1993, 27.

[13]People discovered that their spouses or children informed on them, information they might have been better without. In South Africa there is also the distinct possibility that false information supplied to the police out of malice or ignorance is now accepted as truth and that the reputations of honorable people will be sullied forever. The irony of freedom of information achieving the ends of a now disgraced and disbanded security police would be complete.

and individual, as in some countries,[14] but on redressing socioeconomic inequities as well.

Transparent Government: Principles, Methods and an Archival Perspective[15]

It is widely accepted that governments have a legitimate right on behalf of the citizenry as a whole to restrict access to certain information. The parameters of this right need not be, however, as wide as most governments would like us to believe. Certainly the South African government's systematic use of secrecy laws in the apartheid era is insupportable—a use meant to confuse the security of the state with the protection of party political and other sectional interests, and to cover up human rights abuses, corruption, and maladministration. In a real sense the state became dedicated to secrecy, and dissent was equated with treason. Transforming official secrecy by both defining its legitimate parameters in a democracy and providing the instruments for testing its validity in specific instances will be one of the major challenges facing postapartheid South Africa.

The health of a nation is dependent upon a good measure of dissent and unfettered questioning. One of the speakers in the freedom of information debate in the British House of Commons in February 1993 described secrecy as a "corrosive disease." Philip van Niekerk has made the telling point that the litmus test of any political movement's commitment to society is its policy on freedom of speech and information;[16] and Tony Heard (a former editor of the *Cape Times*) quite correctly argues that "deceit, secrecy and obfuscation have been the norms for four decades" and points to the danger of "trip switching from one sterile era of conformity to another."[17]

Official secrecy will not be reduced to reasonable proportions by legislative reform alone: for instance, by repealing statutory censorship clauses embedded in a multiplicity of laws and loosening the Protection of Information Act. The right to information must be entrenched in a constitution or Bill of Rights guaranteed by an independent judiciary. A climate of greater openness can be assured in the long term only by changes in the attitudes of individuals and groups and by a radical alteration of the national ethos. South Africans must become less deferential to those with political and economic power, more cynical about their motives, and more ready to challenge them, if necessary, in imaginative ways.

This is embodied in calls for a strong and resilient civil society independent of government, in which trade unions, the churches, the press, universities, the professions, and librarians and information workers act as society's watchdogs in such matters. Certainly there can be no such freedom without a vigorous, pluralistic, free press with high standards of journal-

[14]In Australia, 28,247 freedom of information (FOI) requests were received in 1991–92, at a cost of $A12.7 million. Full-time equivalent staff employed on FOI matters were 203. Most of the requests (92%) concerned veterans' affairs, social security, taxation, immigration, and local government, and ethnic affairs. Other issues (about 6%) included education, housing, defense, police, and foreign affairs. Only 4 percent of requests were refused entirely, and 19 percent in part (Australia. Attorney-General's Department. Freedom of Information Act, 1982. *Annual report, 1991–1992.* Canberra: Australian Government Publishing Service, 1992).

[15]Little has been written on the topic of freedom of information in South Africa. See, however, M. Robertson, (ed.). *Human Rights for South Africans* (Cape Town: OUP, 1991), 131–7; A. Sachs, *Protecting Human Rights in a New South Africa* (Cape Town: OUP, 1990), 52, 145; A. Sachs, *Advancing Human Rights in South Africa* (Cape Town: OUP, 1992), 37, 213.

[16]P. Van Niekerk, "Banging the Rights Drum (But the Sound Jars)." *Weekly Mail* 9 (9), 5 March 1993, 6.

[17]A. Heard, "Honesty Will Be the Government's Best Policy" *Weekly Mail* 9 (31), 6 August 1993, 36.

ism, especially in the field of investigative reporting. This is a unifying issue, which should appeal also to conservative elements in society as it has potential for more efficient government, greater accountability, and a higher quality of decision making.

It is the authors' contention that archival law and practice hold the key to some of the issues raised above. The Archives Act, after all, lays down the legal framework for public rights of access to official records. Until recently, South African archivists, in both professional debate and practice, tended to identify the making available of records as just one of many archival functions.[18] At last, however, there appears to be consensus among archivists in South Africa that the use of archives is the goal of all their endeavor. In its 1993 *Professional Code*, the South African Society of Archivists, for example, begins a definition of the archival mission as follows: "The archivist is responsible for ensuring the availability and use of permanently valuable archives by identification, acquisition, description and preservation."[19] This implies a powerful imperative to provide optimum access to archives, something elaborated elsewhere in the *Professional Code*.[20] However, in striving to meet this imperative, archivists are constrained by a range of often conflicting rights and interests: as the Professional Code goes on to warn in the remainder of its mission statement, "Accountability to the archives creator, employer and user should shape the performance of these tasks."

Archivists clearly do not operate in a professional vacuum, as a hypothetical situation can illustrate. A student researching the social history of Soweto requests permission to consult a hundred files. Half of these files fall within the "closed period" as defined by the Archives Act, and they have to be withheld until the director of archives has cleared them for access on the basis of a thorough examination of their contents. Guidelines are applied, and three of the files, coincidentally all dated 1977, present difficulties. One is a South African Police file containing names and addresses of police informers: providing access to it could reasonably be expected to endanger the lives or physical safety of these people. The second file is that of a government Commission of Inquiry into violence, which contains evidence submitted to it by residents of Soweto on condition that their names not be made public. Would making the file available to the student constitute a breach of confidence and/or endanger the witnesses' physical safety? The third file documents Department of Manpower services to persons with disabilities in Soweto, and it contains intelligence tests, psychological profiles, and other confidential matter relating to individuals. Providing access to it would involve an infringement of these people's right to privacy. The recommendation, a hard but straightforward one, is that access to all three files be denied. But what if another researcher requests access to these files in twenty years' time, when they no longer fall within the closed period? Legally there will be no constraint on access, but, we would submit, it is unclear whether by then the balance of rights and interests will in reality have shifted in favor of the researcher.

Archivists have a professional obligation to ensure optimum access to the archives in their custody. This is especially true of public archivists, for most of their holdings are public records. As already suggested, one of the critical gauges of democracy is the degree to which the public's right of access to such records is recognized. Nev-

[18]V. Harris, "Community Resource or Scholars' Domain? Archival Public Programming and the User as a Factor in Shaping Archival Theory and Practice," *SA Archives Journal* 35 (1993): Introduction, 5.

[19]South African Society of Archivists. *Professional Code for South African Archivists* 1993, par. 2.

[20]Ibid., paras 4.4 to 4.6.

ertheless, there are legitimate limitations on this right. The remainder of this article explores the current parameters of this right and ways in which those parameters might be revised.

Right of Access to Official Records in South Africa: The Parameters

Excluded from this discussion are South Africa's various "independent" and "self-governing" homelands, whose relevant legislation and administrative practice warrant a study of their own. Also excluded are the numerous public services that have been privatized in recent years. Suffice it to say that, while they are free to determine access provisions for records postdating privatization, their preprivatisation records are subject to the measures described below.

Official records are kept either in the state office that has generated or inherited them or in a State Archives Service repository. The fundamental guideline for public access to records *in state offices* is laid down in the Archives Act:

> Subject to provisions of any other law no person shall have access to any archives in a government office or an office of a local authority: provided that the head of such office may, in his discretion and on such conditions as he may determine, but subject to the directions of the Minister [of National Education] and the provisions of this Act and any other law, authorize any person to have access to such archives.[21]

Public access to the vast majority of official records in state offices, whatever the age of the records, is a *privilege* granted by senior administrative officials. Moreover, the power to grant this privilege is circumscribed by a range of legislation containing secrecy clauses, notably the Protection of Information Act (mentioned earlier). On the other hand, there is legislation that secures the right of access to specific categories of record in state offices—for instance, to deceased estate files in the custody of Masters of the Supreme Court—but the number of record categories covered by such legislation is insignificant.

Before turning to the position in State Archives Service repositories, two classes of state office deserve special mention. First, the so-called offices of record are defined as offices "responsible for documents which require special treatment in order to ensure that the authenticity and legality of the contents cannot be questioned."[22] These documents are exempt from the Archives Act and are in the custody of institutions such as Parliament, the Registrar of Deeds, and the Registrar of Births, Marriages, and Deaths. Some of them are governed by legislation providing for public access to their records, but others are not.

A second atypical class of state office is the South African Defence Force (SADF). Many countries recognize the particularly sensitive nature of military records and a need for longer-term confidentiality. In South Africa, the Archives Act allows for a separate SADF-controlled archives repository and makes access to SADF archives dependent upon approval from the minister of national education acting in consultation with the minister of defence.[23] In effect, the public enjoys no right of access whatever to military archives, no matter what their age. A person wishing to consult records related to the First World War is as dependent upon the discretionary

[21] *Archives Act* (no. 6 of 1962, as amended) Section 9(6). The act's definition of *archives* embraces all records, both current and noncurrent.

[22] State Archives Service, *Handbook* (Pretoria: State Archives Service, 1991), 15:35.

[23] *Archives Act*, Section 9(7).

power of the two ministers' delegated officials as someone researching the 1975 invasion of Angola. Access to classified records is dependent on the successful negotiation of a security clearance process, which can take anything between six weeks and six months.[24]

The Archives Act requires that offices subject to it transfer their permanently valuable records to a repository of the State Archives Service when the records reach thirty years of age, unless the minister of national education authorizes extended retention.[25] Such extended retention has been authorized in numerous cases, always on the grounds that the records concerned have longer-term (sometimes indefinite) administrative value to the state office that has custody of them. Examples of this type of record are contracts, agreements, maps, and plans. While there is little doubt that the extended retention arrangement is appropriate in these cases, it does mean that, for as long as the records remain outside the custody of the State Archives Service, no right of access to them is enjoyed by the public.

Public access to records older than thirty years in an Archives Service repository is unrestricted, unless the minister of national education withdraws access on the grounds of "public policy."[26] Given that the Archives Act does not define what is meant by "public policy" in this context, this provision affords the minister authority to restrict access arbitrarily. For example, in the 1980s it was used without public explanation to close access to records younger than fifty years of six offices (Governor-General, State President, Public Service Commission, Commissioner of Police, Inland Revenue, and Home Affairs) and to close access to the post-1910 records of a further four (Executive Council, Prime Minister, Foreign Affairs, and Information). These restrictions were lifted in 1991, and in practice constituted only a minor infringement of public access to the records concerned. Between 1980 and 1990, requests for permission to consult 2,381 items in the archives of these offices were received, and access was denied to only 9 items. Moreover, it should be noted that this case was exceptional: extended closure is applied rarely and, as far as can be ascertained, in all other cases with due regard for the interests of all parties concerned. Nevertheless, it does illustrate that it is imperative for the grounds on which public policy restrictions can be applied to be established in law.

Not all records in repositories of the State Archives Service are older than thirty years. Offices subject to the Archives Act may place records in repositories before the obligatory transfer point is reached. Public access to such records is restricted by the thirty-year closed period applicable to all official records in Archives Service repositories.[27] Access to them can be secured only with the special permission of the director of archives. As with the public policy restrictions mentioned above, in practice this restriction is far from severe: in the period 1980–1990 special permission was granted for access to 6,750 items, while permission was refused in the case of only 159 items, this despite the fact that before 1991 special access was denied to items loosely defined as "sensitive." Since 1991 the director has applied a comprehensive set of guidelines for closed period applications that identify information categories widely accepted as requiring prolonged confidentiality.[28] This is a sig-

[24]Discussion with Commandant C.M.L. Pretorius, SADF Documentation Service, October 1993.

[25]*Archives Act*, Section 6 read in conjunction with Section 3(2)(b).

[26]*Archives Act*, Section 9(2)(i).

[27]*Archives Act*, Section 9(2).

[28]These guidelines were modeled on Australian archival legislation.

nificant improvement, but it still falls short of the need for publicly debated legislation that lays down the grounds on which "closed period" applications can be refused.

Lone voices in South Africa's archival profession have questioned the need for a closed period at all. They point to the examples of the United States and Canada, where a closed period has been dispensed with and rights to confidentiality are protected by statute, court decision and, in the case of the United States, by presidential executive order.[29] It must be conceded that good government requires some measure of extended confidentiality and that a closed period is an easily administered means of affording it at the same time as providing effective protection of the range of rights to confidentiality, which archivists must respect. Provision for a closed period is common practice internationally, with most countries opting for a period of thirty years. A 1979 amendment to the Archives Act reduced the period in South Africa from fifty to thirty years, although the five-yearly opening of archives means that effectively the period fluctuates between thirty and thirty-five years. However, even if the need for a closed period is accepted in principle, the question of what constitutes a reasonable period must be addressed. It is worth noting in this regard that one southern African country, Zambia, applies a twenty-year closed period.

Revising the Parameters: Proposals

In South Africa, as in most countries, the state's point of departure is that public access to official records in state offices and to records less than thirty years old in archives repositories is a privilege, not a right. With the exception of the few record categories for which legislation provides access, the public, whether academics, journalists, or casual researchers, are dependent on the discretionary powers of public servants. Academics and journalists have frequently expressed the view that this state of affairs (1) curtails access to official information unreasonably and (2) affords the state an inordinate degree of protection. More recently, support for this view has been expressed in other quarters. A South African Society of Archivists position paper, for example, argues that "access to information is a right rather than a privilege" and that "there should be free access to public information and any restrictions on this right should be defined in law." The architects of the country's new interim constitution have recognized freedom of information as one of the document's fundamental "constitutional principles": "Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government."[30] However, in its statement of "fundamental rights," the interim constitution severely circumscribes the scope of this freedom: "Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the protection or exercise of any of his or her rights."[31] Further legislation is required to provide a finer definition of the limits to the right of access.

Clearly, archivists who take seriously the imperative to provide optimum access to information need to look closely at the possibilities provided by freedom of information legislation. In particular, they need to examine the implementation of such legislation in Sweden, the United States, Can-

[29]National Archives of Canada Act, 1987; P. Carucci, "The National or Federal Archives: Systems, Problems and Perspectives," *Archivum* 26 (1991): 210–11.

[30]*Interim Constitution, Schedule 4, Section 9.*

[31]*Interim Constitution, Chapter 3, Section 23.*

ada, Australia, and France. In Sweden, for example, freedom of information is recognized as a public right in the country's Freedom of the Press Act: "To further free interchange of opinions and enlightenment of the public every Swedish national shall have free access to official documents."[32] Interestingly, Sweden first legislated freedom of information in 1766, and the freedom has been in place continuously since 1809.[33] However, the right is not an absolute one, its limits being set as follows:

> The right to have access to official documents may be restricted only if restrictions are necessary considering
>
> 1. the security of the Realm or its relations to a foreign state or to an international organisation
> 2. the central financial policy, the monetary policy, or the foreign exchange policy of the Realm
> 3. the activities of a public authority for the purpose of inspection, control, or other supervision
> 4. the interest of prevention or prosecution of crime
> 5. the economic interests of the State or the communities
> 6. the protection of the personal integrity or the economic conditions of individuals
> 7. the interests of preserving animal or plant species.[34]

These limits may seem imprecise for practical purposes, but a separate Secrecy Act, running to ninety pages of text, defines in great detail what is meant by each.

Implementation of such legislation can be costly and problematic. The U.S. Freedom of Information Act initially spawned a huge body of litigation around such matters as its interpretation; requests for either access to or destruction of records, and requests for either the prevention of access or the prevention of destruction. In addition, there were fears that it inhibited both the documentation of decision making by officials and the submission of information to federal agencies by private individuals and organisations.[35] Equivalent legislation for South Africa should pay heed to lessons learned elsewhere.

Six other aspects of public access to official records seem to demand attention. All of them could be addressed by freedom of information legislation, but they are not conceptually bound to it:

1. **Public rights of access to records in the custody of all "offices of record" should be defined in legislation.**
2. **Public rights of access to SADF records should be established in law.** Obviously, due regard would have to be paid to the longer-term confidentiality required to protect the nation's defense and security interests.
3. **If a closed period is to be retained, the question of what constitutes a reasonable period should be debated vigorously.** The five-yearly opening of archives, a clumsy and unwarranted procedure, should be dropped in favor of annual opening, which is common practice internationally.
4. **Access to closed-period records in State Archives Service repositories should be provided for in legislation**

[32]Sweden. Riksdag, *Constitutional Documents of Sweden: Amendments to the Instrument of Government, the Riksdag Act and the Freedom of the Press Act*, Stockholm, 1978, 18.

[33]N. Nilsson, "Archives in Sweden Since the Second World War," *Archief—en Bibliotheekwezen in Belgie* 1–4 (1984): 33.

[34]Sweden. Riksdag. *Constitutional Documents*, 18.

[35]T. H. Peterson, "After Five Years: An Assessment of the Amended U.S. Freedom of Information Act," *American Archivist* 43 (Spring 1980): 161–68.

which (a) lays down the procedures for securing such access and (b) defines record categories that cannot be consulted. The State Archives Service's present guidelines for closed-period applications could be used as a basis for such a definition, although a comparative study of freedom of information restrictions in Sweden, the United States, Canada, Australia, and France would be invaluable.

5. **Record categories requiring closure periods longer than the closed period should be defined in legislation.** It is common practice internationally for extended closure to be used as a means of protecting the reasonable defense, security, and foreign policy interests of the state, and the right of individual citizens to privacy.[36] As argued earlier, the current reliance on public policy decisions to secure such protection invites abuse. Moreover, it fails to provide public servants with adequate reassurance that their legitimate interests will be protected. In part, this explains the deep mistrust that surfaced during the debate on the status of classified official records (discussed earlier): officials simply do not trust the Archives Act to secure them a reasonable measure of protection. Extended closure legislation would go some way toward reassuring officials that it is not necessary to destroy sensitive records.
6. **There is an urgent need for comprehensive legislation that defines the full scope of the right to personal privacy.** Until the new interim constitution recognized the protection of privacy as a fundamental right,[37] it was recognized in a variety of contexts and laws. State Archives Service employees, while not bound by the Archives Act to protect private information in their custody, had the closed period and extended closure option at their disposal. Ultimately, however, the protection afforded was haphazard and partial. One result of privacy legislation will be to extend individuals' rights of access to information about themselves in the custody of the state, but another result will be a major limitation on freedom of information. The relative values of the right to privacy and the right to information have been the subject of intense debate, notably in courts of law, in countries that have established both rights.[38] The position appears less complex when access to information is sought specifically for research purposes—as Eric Ketelaar has argued compellingly: "In a conflict between the protected freedom for some—the freedom of research—and the protected freedom for all—the right of privacy—the former has to yield."[39]

Conclusion

Apartheid South Africa was secretive to an abnormal degree, and its very survival was to a large extent based on such secrecy. Under these conditions, the press was unable to discharge its responsibility to keep the populace adequately informed. In a democracy, the public should enjoy the right of access to official information. However, this does not translate into a demand for the indiscriminate opening of all official records. On the contrary, there are numerous legitimate restrictions on this democratic right. The great American archivist T. R. Schellenberg captured the leit-

[36]See, for example, Carucci, "The National or Federal Archives," 207-211.

[37]*Interim Constitution*, Chapter 3, Section 13.

[38]See, for example, H. MacNeil, *Without Consent: the Ethics of Disclosing Personal Information in Public Archives* (Metuchen: Society of American Archivists, 1992), 61–102.

[39]E. Ketelaar, "Archives of the People, by the People, for the People," *SA Archives Journal* 34 (1992): 9.

motiv that should inform our thinking on access when he said: "Records should be open for use to the maximum extent that is consistent with the public interest."[40] A society that realizes this goal in any great measure will surely also enjoy in its public life the transparency that both demonstrates and fosters democracy. In striving for this goal, it is vital that the process itself should promote a culture of transparency; in other words, broad-based public debate should be a vital element. As Eric Ketelaar has stated so eloquently:

> In a democracy the debate about selection and access should be a public debate, subject to verification and control by the public. If one cannot discuss publicly the moral arguments for secrecy, society runs the risk of creating Stasi and KGB archives—archives not for the people, but against the people.[41]

[40]T. R. Schellenberg, T.R. *Modern Archives: Principles and Techniques* (Melbourne: Cheshire, 1956), 226.

[41]Ketelaar, "Archives of the People," 9.