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FREEDOM OF INFORMATION: ACCESS TO RECORDS IN THE UNITED STATES  
AND SOUTH AFRICA

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## **ABSTRACT**

This thesis examines the Freedom of Information (FOI) acts of both South Africa and the United States. It explores some of the key criteria necessary for a representative democracy – all of which are present in the governments of both South Africa and the United States – as well as why transparency is so important in promoting democratic principles. It also studies each FOI law, with a special focus on the exemptions of each act. This thesis then concludes by analyzing how each act is currently being implemented, what the strengths and weaknesses of each act are, and what challenges are currently facing each nation in regards to access to information.

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## Chapter 1

### Introduction

One of the principal pillars of a representative democracy is government transparency, meaning the public has a judicially enforceable right of access to records and meetings of government bodies. The vast array of information gathered, stored, debated and discussed by government bureaucrats and officials provides valuable resources containing information that users such as the news media, businesses, attorneys, historians, scholars, and other curious members of the general public find useful.

Open governance serves as a crucial function in advancing the democratic principle of accountability – that the rulers are governed by the ruled, declared Alexander Meiklejohn, a famed 20th Century philosopher and First Amendment scholar. “Though [officials and bureaucrats] govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power (Meiklejohn, 1961, p. 257) . . . The voters, therefore must be made as wise as possible. . . . They must know what they are voting about” (Meiklejohn, 1948, p. 25). David Banisar, a leading international transparency expert, offers another perspective to frame the positive outcomes that flow from openness: “Transparency in the decision-making process can improve citizen trust in government actions” (Banisar, 2006, p. 6).

There are many legal methods for executing rule to promote the principle of accountability. Perhaps the most vital and illuminating are open-records laws and open-meetings laws. For example, the U.S. Freedom of Information Act (FOIA) is the American open-records law for the federal governments’ many administrative and regulatory agencies (5 U.S.C. § 552b). The Government in Sunshine Act is the statute that requires agencies to make their meetings open

to the public (5 U.S.C. § 552b). One difference between these two statutes is that the FOIA includes records held by the cabinet departments, whereas the Sunshine Act does not include cabinet meetings. Further, each state has its own open-records and open-meetings laws for state agencies and their legislatures.

Specifically, this thesis will focus on access to government-held records, commonly known under the rubric of Freedom of Information (FOI). The term Right to Information (RTI) is often used interchangeably with FOI in many nations, but internationally, RTI sometimes includes meetings in addition to records. This thesis will only examine access to government-held records - so the term FOI will primarily be used.

More than 90 countries have laws that allow some form of public access to government records ("Right to Information Laws and Implementation," 2013). These laws vary from nation to nation. For example, the law can be embodied in a nation's constitution or exist solely as statutory law. The United States FOI law was created as a statutory law and remains so today.

FOI is emerging as a legal mandate by international bodies, such as the World Bank, the International Monetary Fund and the World Trade Organization (Banisar, 2006). "Numerous treaties, agreements and statements by international and regional bodies oblige or encourage governments to adopt open record laws . . . in international forums," notes Banisar (Banisar, 2006, p. 6).

Additionally, the United Nations' Universal Declaration on Human Rights (UDHR) also supports FOI. In terms of having access to government-held information, the UDHR declares that every person "shall have the right to seek and impart information" (Shrivastava, 2009, p. 27). The UDHR is considered to be the "flagship statement of international human rights" (Shrivastava, 2009, p. 27). Article 19 of the UDHR specifically states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to

seek, receive and impart information and ideas through any media and regardless of frontiers” (Article 19, *The Universal Declaration of Human Rights*, 1948).

In the mid 20th century, ideologically motivated transparency laws were emerging, as many countries were seeing the need for laws promoting access to government-held records. By the time the U.S. FOIA was enacted in 1966, only Sweden and Finland had previously enacted FOI laws (Mendel, 2008). Beginning in the 1990s, FOI laws began proliferating in both new and old democracies alike. This expansion continues today (“Transparency,” Darity, Jr., 2008).

### **Statement of Purpose**

The research conducted in this thesis is international in scope, specifically focusing on South Africa and the United States. South Africa will be studied as the international comparative focus because of its truly unique, powerful, and profound historical journey to a democratic political revolution.

South Africa overcame discrimination and repression not through a bloody war, as the United States did during the Civil War from 1861-1865. The countries resolve and closure did not come about after a set of death sentences, as did Germany during WWII and the Nuremburg trials that followed. South Africa overcame adversity by internally handling the issues through political processes. Indeed, there were bloody conflicts, thousands of deaths and jail sentences, and riots, but the issue was ultimately solved through politics. Political activists like Nelson Mandela, Denis Goldberg, Helen Suzman, Joe Slovo, and other likeminded citizens worked hard to bring about a time of change, and, ultimately, to bring a sense of democratic principles to a nation struggling to overcome hardship and tyranny (Ott, 2013).

The century of discrimination and repression was what inspired citizens to demand a transparent, democratic government. South Africa’s course to generating an FOI law is unique,

and that is what makes it such an interesting country to serve as the international comparison to the United States.

In order for a nation to uphold democratic principles, the government needs to be transparent, so that its citizens can vote, elect, and ultimately know what their government is up to. The only way for a government to be transparent is if citizens, be it the average citizen or the press, have access to information. It is important to compare the transparency in South Africa and the United States because they interpret freedom of information in different ways. In the United States, freedom of information is not a constitutional right – it is written as a statutory law. In South Africa, however, access to information is constitutionally guaranteed. It is important to compare the two laws, because South Africa had such a distinctive history and has come so far in regards to transparency and openness in just the past 20 years, whereas the United States has had an access law since 1966. Because South Africa's access law has only been in effect for thirteen years and because of South Africa's unique history and desire for transparency, South Africa's access law is unique just in its creation – thus making it a significant country to perform an analysis on.

The purpose of this thesis is to do an analysis on freedom of information, specifically in South Africa and the United States, using democratic theory and transparency in government as the foundation for the research. Through the information gathered, the similarities and differences in South Africa's FOI law and the U.S.'s FOI law will be noted. Both countries also have a very different journey to establishing democracy and developing FOI. South Africa has a rich history, and did not establish a democracy until the end of apartheid in 1994. It was the end of the apartheid regime – and thus, an end to unruly government and secrecy - that made citizens desire a transparent government, and as a result, access to information was incorporated in the 1996 constitution, and the Promotion of Access to Information Act (PAIA) was developed in 2000 and took effect in March of 2001 (Mendel, 94).

South Africa is one of the most developed countries in Africa. In terms of press information, literacy for whites in South Africa is 90 percent and literacy for blacks is 60 percent (Kumbula, 2003). Although South Africa has a very progressive access law, their current press freedom rankings are low. For the first time ever, South Africa is not ranked in the first 50 states for having the most press freedom. Although freedom of information is a reality in South Africa, recently there have been setbacks due to the enactment of the Protection of State Information Bill, which will be discussed in Chapter 4. According to the Press Freedom Index, investigative journalism is specifically at risk (Press Freedom Index, 2013).

The United States is ranked 32<sup>nd</sup> in the Press Freedom Index, making a 15 spot jump in the last year. For the 2011-2012 year, South Africa was actually ranked higher than the United States (Press Freedom Index, 2013). So while South Africa is facing challenges, the United States is making strides forward for press freedom, or so it would seem. That isn't to say that the United States isn't facing problems. There are still difficulties, specifically in regards to FOI, such as obtaining information in a timely manner and a reliance on classifying of information due to national security (Mendel, 2008). Although the United States was one of the first countries to develop an FOI law, there are still boundaries to overcome. This thesis will acknowledge the difficulties and critiques associated with both the U.S. FOIA and the South African PAIA.

### **Importance of Topic**

Access to information and government records is crucial in order for democratic principles to be upheld. FOI laws ensure that government is being transparent, which then ensures government accountability. When the people have access to their government's records, they can check and hold their government responsible for their actions. According to *Newsgathering and the Law*, access to information is important "because open government is better government"

(Dienes, Levine, & Lind, 1997, p. 418). However, many people don't have the means (be it money, time, or expertise) to request information. Thus, there needs to be a median to facilitate the people in learning their government's actions through filing requests for information. This watchdog, in many countries, is the press.

A key role of the press is to report on what the government is doing. Freedom of the press is so important because if the press cannot freely relay the information to the people, then the people will be uninformed. If the government excessively controls the press, then the media will become propaganda. Despite many countries instilling laws for press freedom, special treatment is not given to journalists to ensure the dispersal of free and accurate information. There are only a few countries that give special rights to the press in regards to freedom of information. These countries include Lithuania, Portugal, Slovenia, Russia, Kazakhstan and Tajikistan (Shrivastava, 2009). Most other countries with FOI laws do not give any special privilege to their press, but the ones that do grant special privilege do it because they recognize that government transparency and access to information is so imperative. If the press cannot obtain access to public records, then the people will be lacking information that could affect them and the trust they have in their government. A government withholding information could lead to tyranny.

Comparing the access laws of the United States and South Africa is important because the two laws are so different. The U.S. FOIA has nine exemptions, and the South African PAIA has thirteen exemptions, which will all be looked at further in this thesis. The United States only grants access through statutory law, whereas South Africa grants access through constitutional law (Section 32 of the South African Constitution). Because access is so important to upholding democracy, it is important to study these differences and learn the strengths and weaknesses of each act, as well as how implementation could be stronger.

Studying the implementation of these laws by analyzing scholarly journal articles and current cases involving FOI is important because it is crucial to understand how the law is being

implemented and whether, overall, the law is being properly upheld. A part of this thesis will be devoted to the critiques of each law. Newspaper articles and scholarly journals will serve as sources of information, and ultimately the foundation, for the overall critique. Understanding how scholars from each country interpret the acts, and if they view the implementation as being strong or weak, will be fundamental when drawing conclusions about whether the act is being upheld and if it is fulfilling its mission.

Other scholars have previously collected much of the research presented in this thesis. However, what will be offered in the conclusion is a comparison of the South African and United States FOI laws that will provide insight as to how two laws, with many similarities and differences, grant the press and the people with access to information. This comparison will offer new insight into the already existing knowledge on the topic of FOI. The information will be presented through a different lens that will provide insight as to which components of both laws allow for greater government transparency, as well as how each government is successfully, or unsuccessfully, providing their people with access to information.

### **Research Questions**

The primary research questions I will be considering are in regards to access, transparency, and democratic theory. Research questions include:

- How is access to information a fundamental pillar of democratic theory?
- How are the access laws in both the United States and South Africa being implemented?
- How are scholars, historians, and likeminded citizens criticizing the access laws?
- What issues are both countries facing in regards to implementation?

- What are the similarities and differences between the FOIA and the PAIA that are reflected through implementation of the access laws?

The focus of my research will be in regards to how the FOIA and PAIA allow the democratic principle of access to information to be implemented. These questions will be answered through my methodology, which includes examining the foundation of democratic theory and analyzing the access laws.

### **Methodology**

The methodology for this thesis is comprised of legal research to analyze the South African Promotion of Access to Information Act and the United States Freedom of Information Act. Other methodology includes literature and theory reviews. Research includes:

- Examining the South African Promotion of Access to Information Act (PAIA) and its amendments
- Examining the United States Freedom of Information Act (FOIA) and its amendments
- Reviewing the history of democracy in South Africa, specifically focusing on the apartheid era
- Reviewing democratic theory and the principles that serve as the foundation to democratic theory
- Exploring the records collected by the South African Human Rights Commission (SAHRC) in regards to the implementation of the PAIA
- Exploring the records collected in regards to implementation of FOIA

- Analyzing new laws and current cases in regards to access to information in South Africa and the United States

Database sources include the use of Lexis-Nexis for access to court cases and newspaper articles and Gale Virtual Reference Library for encyclopedia resources on historical information on democratic theory and access to information. For information regarding access in general, both internationally and for the United States and South Africa specifically, the works of Toby Mendel and David Banisar will be heavily relied upon. Most of the primary research for this thesis involves examining sources such as the FOIA and the PAIA, but secondary sources such as scholarly journals and newspaper articles will be heavily relied upon for the critique and conclusion.

### **Literature Review**

Freedom of information and right to information laws have been discussed in a variety of works, including journals, reviews, newspapers, and encyclopedias. In order to understand the importance of access to information and Freedom of Information (FOI) laws, it is necessary to recognize the history of democracy, as well as the pillars of democratic theory.

The literature of Baron De Montesquieu, John Locke and James Madison provided insight to the historical information on democracy and democratic principles. Their work served as a way of connecting philosophy to modern democracy. The *Stanford Encyclopedia of Philosophy* provided insight to the works of John Stuart Mill, and how the scholarly ideas created by Locke and Mill transformed into some of the criteria essential for modern democracy.

Published in the *Journalism and Mass Communication Quarterly*, "Open Government in the Digital Age: The Legislative History of How Congress Established a Right of Access to Electronic Information" by Martin Halstuk and Bill Chamberlin, provided information attributing

to knowledge on the growth of democracy and democratic principles. Citing sources such as the Federalist Papers and the works of Locke and Alexander Meiklejohn, this source was a great reference for further readings.

Transparency is a key pillar to democracy, and it is crucial to why having access to government records is a necessity. Access to records allows for an open and transparent government. The section titled “Transparency” in the *International Encyclopedia of Transparency* discusses all of this and more. This source covers the importance of transparency in terms of accountability, political systems, and government leaders.

Understanding FOI in general, and around the world, is crucial when doing a comparative study, because it is necessary to understand how access laws are regulated. K. M. Shrivastava presents in *The Right to Information: A Global Perspective* how FOI is viewed in nations around the world. Shrivastava also takes a perspective on international FOI as developed by the United Nations and promotes the fact that almost every country with access laws does not provide the media with special treatment in regards to FOI (Shrivastava, 2009, p. 27). Another point that Shrivastava highlights in her work is the difficulties that FOI laws face, including “the public being prepared to use the legislation; and a framework for its implementation and administration that is practical in its operation” (Shrivastava, 2009, p. 149).

A review of the literature relied upon when conducting research on FOI began with the works of David Banisar and Toby Mendel. Banisar’s work in *Freedom of Information around the World 2006: A Global Survey of Access to Government Records Laws*, focused on each individual country’s access to information laws. A large focus of his introduction is how access to information is fundamental to having citizens participate in government and decision-making. “The public is only truly able to participate in the democratic process when they have information about the activities and policies of the government” (Banisar, 2006, p. 6). A major focus of his work on South Africa is the nation’s move from secrecy to openness. Banisar also focuses on the

role of the public interest test that South Africa cites in many circumstances regarding access to information.

Mendel, in his work, *Freedom of Information: A Comparative Legal Survey* takes a more in-depth look at the access laws of countries around the world. For instance, Mendel provides narrative information on all of the exemptions, the appeals processes, and the documentation of requests for every country with FOI laws. Mendel provides a wide overview to FOI regimes, and the typical features that are necessary for a FOI law to be successful. What makes Mendel's work so significant to the creation of this thesis is his focus on the positives and negatives of FOI regimes and specifically the foundations of the FOIA and the PAIA. Both scholars acknowledged the strengths and weaknesses in both the United States and South Africa's access laws, which are key focal points of this thesis. As focused as this thesis is on the importance of access in a political standpoint, FOIA is also a major contributor to people's personal well being in terms of health care and funding, as well as the business sector, in regards to having access to information regarding the financial and economic state of the nation (Banisar, 2006). Although both of their works are dated (Mendel, 2008, and Banisar, 2006) many of the issues they discuss remain pertinent today.

For example, Mendel mentions a weakness of the FOIA to be the length of time it often takes for a request to be processed. Although the number of backlogged requests has gone down in recent years (from 130,419 in 2008 to 71,790 in 2012), according to FOIA reports, backlogging is still an issue ("What Is FOIA?," [n.d.](#)) Neither Mendel nor Banisar mention the recent drop in South Africa's state of Press Freedom, due to the Protection of State Information Bill. This is a focal point of why press freedom is struggling in South Africa.

This thesis would be incomplete without the overview of both the Freedom of Information Act (FOIA) and the Promotion of Access to Information Act (PAIA). These legal documents are referenced throughout the thesis to ensure that the law is being discussed with the

most accurate and updated information. A major focus of the research done involved studying the exemptions and the implementation of each act. Both the FOIA and the PAIA outline the exemptions as well as how the act should be implemented. The noted implementation techniques outlined within each law are then further studied to determine how strong or weak the execution currently is. For instance, many of the plans set forth in the FOIA and the PAIA have changed, or organizations have been added to assist with the implementation.

In regards to FOIA specifically, there were many supporting documents for the research conducted. The chapter in *Newsgathering and the Law* titled “Access to Federal Government Records”, by Thomas Dienes, Lee Levine, and Robert Lind provides information on FOIA regarding the procedures, fees, limitations and exemptions that FOIA presents. “Although its application has been inconsistent, the Act’s basic philosophy remains that government records are presumed to be available for public scrutiny because open government is better government” (Dienes, Levine, & Lind, 1997, p. 418). This is a main argument presented throughout much of the scholarly literature in regards to FOI laws – that although the implementation of the laws may be weak, the general goal of granting access remains the same.

The main source of information regarding the format and structure of PAIA is through Mendel, Banisar, and the PAIA act itself. The right of access to information from *both* public and private bodies is established in Section 32 of the 1996 Constitution of the Republic of South Africa. A major difference of the PAIA and the FOIA is that the South Africa grants people access as a constitutional right, whereas in the United States, access is granted as statutory law.

South Africa had a long journey to democracy, overcoming prejudice and racism during the Apartheid era. That time period of unrest is a major reason why access to records is established in the South African constitution. “This is one of the more progressive right to information laws in the world, no doubt a reflection of the profound mistrust of government the apartheid era instilled in people” (Mendel, 2006, p. 94). Whereas the U.S. FOIA has 9

exemptions, the South African PAIA has 13 – very narrow and specific, in the hopes of eliminating the number of requests that aren't disclosed (Mendel, 2006)

The effect that access to information has on free speech is important to recognize. The Press Freedom Index shows the level of each country's press freedom in relation to one another. 2013 was the first year that South Africa wasn't ranked in the top 50 states for having the most press freedom, with a ranking of 52nd. For 2013, the United States was ranked 32nd. Although South Africa is one of the most developed countries in South Africa, the Protection of State Information Bill is putting investigative journalism at risk ("Press Freedom Index 2013," n.d.). The Protection of State Information Bill (also known as the Secrecy Bill), along with the *PAIA Annual Report 2011/2012* presented by the South African Human Rights Commission, demonstrate that although South Africa is viewed as an African country with a powerful FOI law, recent implementation has been weak.

Articles from noteworthy newspapers and scholarly journals will serve as secondary resources. The newspapers that will be relied upon from South Africa are the *Sunday Times* and the *Mail & Guardian*. A major difference between the PAIA and the FOIA is that PAIA covers private bodies as well as public bodies. However, private bodies have recently been under scrutiny.

Much of the recent controversy in South Africa regarding PAIA is in relation to a new bill called the Protection of State Information Bill (commonly referred to as the Secrecy Bill). It has been passed, and people are waiting on President Jacob Zuma's signature for it to be enacted. Writer for the *Mail & Guardian*, Sarah Evans, wrote on January 2<sup>nd</sup> of this year that the Secrecy Bill is on the top list of things to watch for this upcoming year. "It has only to be signed by President Zuma before it becomes law. And, as the M&G has previously reported, a Constitutional Court challenge, probably headed by opposition parties and civil society groups, will doubtlessly follow" (Evans, 2014).

The reports collected by the South African Human Rights Commission (SAHRC) for the 2011/2012 year will be used when comparing the data regarding requests for both South Africa and the United States. For the 2011/2012 report, there were 24,857 national requests received. 20,383 of those were granted in full, 164 were refused in full, and 165 were refused partially. There are other circumstances that the SAHRC report classifies requests as, such as requests granted for the public interest and requests that went to internal appeals and access was granted (“Annual Report 2011/2012”, 2012).

FOIA reports are submitted and can be viewed at the National Archives and Records Administration (NARA). The annual FOIA reports show documentation for the number of requests, the exemptions relied upon, etc. FOIA.gov also provides general data for the number of FOIA requests received, requests granted in full, requests granted in part, and the number of backlogged requests. As much of this thesis is in regards to the comparison of the FOIA and the PAIA, this data will be closely relied upon. There were 651,254 requests made for records in 2012. 50.33 percent of those were released in full. 43.06 percent were released in part, and 6.61 percent were denied in full. The number of backlogs is still astronomical – 71,790 – despite being down by more than 10,000 from the previous year. However, in 2010 the number was even lower with 69,526 backlogged requests (“What Is FOIA?,” n.d.). Clearly, backlogging is still a major problem facing the FOIA, and journalists are recognizing this issue and discussing it.

U.S. newspapers that will be relied upon for research regarding FOI implementation will primarily be the *New York Times* and the *Washington Post*. There have been numerous responses to the backlogging of requests. For example, in an article from the *New York Times* on January 29<sup>th</sup>, 2012, writer Matthew Wald discussed the long wait in response to a request. “On Jan. 4, The New York Times received a final response from the Defense Department to a FOIA request made on June 1, 1997. The department sent it by Federal Express, Priority Overnight” (Wald, 2012).

Wald later goes on to say that documents granted access to through FOIA typically make front-page stories. However,

It is increasingly difficult to pry records that should be open out of federal agencies. A study last year by the Coalition of Journalists for Open Government found that FOIA requests were becoming more backlogged, waits for information were getting longer and agencies were saying "no" more often, using one of nine exemptions in the law for such considerations as national security or privacy (Wald, 2012).

Wald notes that having access is important – it makes front-page news and is often of great public interest. However, with the backlogging so extreme, these matters are often not published.

A recent article published in *Quill* titled “There Goes The Sun” focuses on how FOIA implementation is holding up under the Obama administration. Author Kara Hackett recognizes that the faults within FOIA are the government’s use of the Espionage Act of 1917, as well as the government’s lack of addressing the shortcomings of the acts. Hackett also recognizes the affect that FOIA has on whistleblowers (Hackett, 2013).

The reports collected by each country will serve as the basis for the comparison of how strong or weak current implementation techniques are, and how it is affecting news media. Articles from journalists will serve as the power behind the comparison, because they represent many of the people speaking out in each country about the strengths and weakness the access laws. There has not been a recent comparison between different countries FOIA laws. Banisar and Mendel provided a foundation for how each country compares in terms of FOI legislation. Although both scholars focus on the issues within each regime, both works are dated. There has been very little scholarly literature in regards to the PAIA in recent years. Much of the information on PAIA is derived from noteworthy newspapers in South Africa – and almost all are criticisms of the act, with a few exceptions. The scholarly literature on the FOIA is primarily in regards to the Obama administration, and his grand promise for more press freedom with minute implementation. This thesis will provide a better understanding of how both the United States and

South Africa have transcended since previous studies on their FOI regimes, as well as compare the two for strengths and weaknesses in recent and current implementation.

### **Summary of Chapters**

This thesis on access to information in the United States and South Africa will be organized into 6 chapters (with this current chapter serving as chapter 1).

Chapter 2: *Democratic Theory*. Access to information is a key pillar to democratic theory. This chapter will delve into the other pillars, while also looking briefly at the history of democracy. It is important to understand the foundation of democracy before diving into access to information, because the other pillars are equally as important.

Chapter 3: *The United States Freedom of Information Act*. The U.S. FOIA serves as the outline of the access to information law. The FOIA also serves as the model to information laws around the world. Access in the United States is provided under statutory law. This chapter will provide an overview of the law, the exemptions, and the implementations.

Chapter 4: *The South African Promotion of Access to Information Act*. The PAIA serves as South Africa's access to information law. Written under Section 32 of the South African Constitution, PAIA has thirteen exemptions, many of which are similar to the exemptions in the FOIA. This section will provide an overview of the act, the exemptions, and the reports gathered by the South African Human Rights Commission (SAHRC).

Chapter 5: *Criticisms of the PAIA and the FOIA*. Issues regarding implementation of the acts, as well as the strengths and weaknesses of each act, will be discussed here. The primary sources cited in this chapter will be newspaper articles and scholarly journals that revolve around where and how implementation of the PAIA and the FOIA are strong or weak.

Chapter 6: *Conclusion*. The final chapter will review the key points in the research gathered, and will examine the gaps, strengths, and weakness of each act. Overall, it will assess the FOIA and the PAIA, noting how the strengths and weakness vary, as well as what each country could improve on in regards to access to government records.

## **Conclusion**

This research project will help advance public knowledge of both the U.S. FOIA and the South African PAIA. Although much of the information is pulled from existing research, the conclusion of this thesis will provide new insight into an already existing literature. This thesis:

- Provides a detailed overview of the U.S. FOIA and the exemptions as well as the South African PAIA and the exemptions.
- Provides an in-depth look at the pillars that serve as the foundation for democracy and how access to government records is essential to democratic theory.
- Assesses the critiques of each law, respectively, through the study of scholarly journals and newspaper articles.
- Assesses how each law is implemented. As important as the law itself is, implementation is crucial to understanding how each country is allowing open access to records and whether or not the government and the advisors are upholding the law.

In short, this thesis will examine how each country has adopted its freedom of information law and how successful each country has been in its implementation. At the conclusion of this overview of the materials to be presented in this thesis, chapter 2 will provide an examination of the principles necessary to form the foundation to a representative democracy, including access and transparency.

## **Chapter 2**

### **Democratic Theory**

#### **An Introduction to the History of Democratic Theory**

It is important to recognize the foundational role that access to information plays in democracy and the role it serves fostering and maintaining a democratic republic that is of the people, for the people, and by the people. Not only political scientists, historians, social scientists, and scholars believe it is their right to have a transparent government, but so do the politically aware and educated public.

Indeed there have been a series of changes in government policies since the Freedom of Information Act went into effect in 1966. The principles of democratic theory, the focus of this chapter, are essential to understanding the necessity of transparency and the public right of access to government held records.

A republic is a form of government in which elected officials represent the people and their wants, and democracy represents the processes that make governance by and for the people possible. The theories of republicanism and democracy developed in Greece. In ancient Athens, despite the facts that there were slaves and certain hereditary privileges granted to some rather than others, the people of Athens abided by a system in which some individuals could participate directly in voting and policy decision-making.

Athenian procedures are held to have been democratic in the sense that everyone was supposed to have an equal opportunity to state a case and influence decisions, even if, in some cases, individuals had ultimately to accept decisions that they had previously resisted (Benn, 2006, p. 700).

This system emerged around 500 B.C., and has been a fundamental building block of democracy since. For instance, people had equal opportunity in this early Athenian democracy, which also holds true in today's forms of democracy. That being said, the Greeks engaged in a form of democracy that was more direct than the U.S. representative democracy. In Greek democracy, each educated, non-slave male participated in decision making through either lot or vote. When using the voting system, the majority ruled (Benn, 2006). Many of the modern democratic principles, including the electoral process and majority vote, were derived from this relatively nascent form of democracy in Athens.

Although Athens served as a foundation for what a democracy should be, there were many influential philosophers and developers that contributed to modern-day democracy. One of the greatest influencers on developing the U.S. democratic principles was English philosopher John Locke. Locke, who in 1690 wrote a seminal work on democracy, titled the *Second Treatise of Government*, was a proponent of the Social Contract theory, originally developed by Thomas Hobbes. This theory has come to be known as the first principle of republican philosophy. Hobbes' Social Contract theory is based upon the State of Nature, recognizing that no citizen should want a country without governance and leadership (Friend, n.d.). The State of Nature is ultimately a state without governance, where force is power and the people are free to do as they please. Ultimately, the State of Nature ends badly, as William Golding illustrated in the celebrated and Hobbes-philosophy based parable "Lord of the Flies."

"The Social Contract is the most fundamental source of all that is good and that which we depend upon to live well. Our choice is either to abide by the terms of the contract, or return to the State of Nature, which Hobbes argues no reasonable person could possibly prefer" (Friend, n.d.). The State of Nature is a hypothetical state in which men are equal, there is no leadership, and men are self-interested.

The basic definition of the Social Contract theory “is the view that persons’ moral and/or political obligations are dependent upon a contract or agreement among them to form the society in which they live” (Friend, n.d.). Essentially, the Social Contract theory is the forming of a code amongst the people that they agree upon and oblige to follow. The definition of Social Contract theory evolved over the years, but is essentially based on the idea that a contract and governance is necessary to avoiding a return to the State of Nature.

Locke’s version of the Social Contract theory, although also grounded in the State of Nature concept, regards the State of Nature differently than Hobbes did. Locke does not view the State of Nature as an existence in which people are free to do whatever they so please with absolutely no infusion of moral principles – which is how Hobbes viewed it.

According to Locke, the State of Nature, the natural condition of mankind, is a state of perfect and complete liberty to conduct one’s life as one best sees fit, free from the interference of others. This does not mean, however, that it is a state of license: one is not free to do anything at all one pleases, or even anything that one judges to be in one’s interest (Friend, n.d.).

In Locke’s *Second Treatise of Government*, he discussed the Social Contract theory – in which men form government and decide on the rules of their governance through decisions agreed upon by the majority.

Whosoever therefore out of a state of nature unite into a community, must be understood to give up all the power, necessary to the ends for which they unite into society, to the majority of the community, unless they expressly agreed in any number greater than the majority. And this is done by barely agreeing to unite into one political society, which is all the compact that is, or needs be, between the individuals, that enter into, or make up a commonwealth (Locke, n.d., sec. 99).

This would allow “humanity” to keep their freedoms as recognized in the State of Nature but also have protection and organization in the form of governance (Friend, n.d.). In Section 63 of the *Second Treatise of Government*, Locke wrote, “The freedom then of man, and liberty of acting according to his own will, is grounded on his having reason, which is able to instruct him in that law he is to govern himself by, and make him know how far he is left to the freedom of his own

will” (Locke, n.d., sec. 63). To form these views, Locke redefined the State of Nature by assessing the Law of Nature. “The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions” (Locke, n.d., sec 6). Thus, by combining these two models – State of Nature and Law of Nature – Locke created a theory in which the State of Nature is not a violent state, like Hobbes believed it to be.

The Law of Nature allows people to form a compact – a community wherein the people are subject to the majority. “For when any number of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body, which is only by the will and determination of the majority” (Locke, n.d., sec. 96). This “one body” is charged with making decisions for their view of the public’s best interests, rather than the interest of the individual – a very utilitarian view, where one should act for the greatest good of the greatest number of people. This idea of the social compact (the majority body formed within Social Contract Theory) working for the greater good, along with majority agreement, were instilled into the foundation of the United States.

Indeed, Thomas Jefferson modeled the idea of a social compact when he wrote the Declaration of Independence. He actually noted several of Locke’s major points from *The Second Treatise of Government*. He paraphrased Locke’s language, but the original source is obvious to Locke scholars. An example of how Jefferson referenced Locke’s ideas was through the “consent of the governed” when citing the need to be free from Great Britain, and form an independent nation (“The Declaration of Independence: A Transcription,” n.d.). James Madison later echoed Jefferson’s (Locke’s) sentiments in Federalist Number 49. Basically, what these men all agreed upon, when founding this democratic nation, was that the people needed to be governed by a

body who would represent the majority. This system would serve as a way of protecting our life and liberty through a combination of freedom and governance.

Another influential proponent of modern democracy, specifically in western political philosophy, was Baron de Montesquieu. His work, specifically his 1747 work *The Spirit of the Laws*, encouraged many democratic nations, including the United States, to create a system of checks and balances to be incorporated into all levels of government. Montesquieu's influence is chiefly responsible for the United States developing the legislative, executive and judicial branches (Articles I, II, and III of the American Constitution, respectively) of government in order to keep a separation of powers. This system, which contributes to the American checks and balances function, ensures that one governmental body and its leadership does not accrue too much power. It maintains balance by giving certain groups or people specific functions. It allows certain bodies to check other bodies from abusing their powers, and ultimately prevents tyranny (Bok, ed., 2003). This will be studied further when discussing checks and balances and separation of powers being fundamental components of democracy.

Montesquieu not only provided the modern form of democracy with structural systems, but also with leadership systems as well. He divided republicanism into two spheres – democratic and aristocratic. With aristocratic republicanism, the power is in the hands of the elite and privileged. With democratic republicanism, leaders are chosen based upon their “virtues” and what they have to offer the people. Montesquieu defined this virtue as “the love of the laws and of our country” wherein public interest held more importance than individual interest (Baron de Montesquieu, 1777, book 4 ch. 5). He stated that this type of virtue is only found in democratic nations. “In these alone the government is intrusted (sic) to private citizens. Now, government is like every thing else: to preserve it, we must love it” (Baron de Montesquieu, 1777, book 4 ch. 5).

Alexander Hamilton supported Montesquieu's view of democracy, as seen in Federalist Number 9. He believed that Montesquieu developed a representative democratic republic that

could withstand external and internal pressures, and when applied to the United States, could “repress domestic faction and insurrection” (Hamilton, n.d.).

Likewise, James Madison, in Federalist No. 47, expressed his agreement with Montesquieu’s viewpoint on checks and balances and the separation of government departments. “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny” (Madison, 1788). Madison further expounded that if the whole power of one department is enacted by another department with complete other powers, “the fundamental principles of a free constitution are subverted” (Madison, 1788). Simply stated, as Acton observed, excessive accumulation of power in any one sector of the government would undermine the freedoms that the Constitution grants, ultimately leading to tyranny.

Definitions of “democracy” often vary, depending on the scholar defining the term. Often the words “democratic” and “republic” are used interchangeably, wrongly so. The section below is dedicated to exploring the characteristics and guidelines of a *representative democratic system*.

### **Characteristics of a Democratic Republic**

The characteristics of a democratic republic are important to understand in order to recognize why freedom of information is so crucial. The meanings of “republic” and “democracy” are quite different. The form of government is called the republic, which, as stated earlier, means that there are elected officials to represent the people. The actual processes are democratic, meaning that the people vote either directly for or against issues, or elect representatives with the supreme power to decide on issues. There are two types of democracies – direct (also referred to as pure or participatory), and representative. A direct democracy is when

individuals vote on every single issue. “It denotes extensive and active engagement of citizens in the governing process, often through participatory devices such as initiatives and referenda, and emphasizes the role of the citizen as an active agent in self-legislation and a real stakeholder in governance” (“Democracy, Representative and Participatory,” Darity, Jr., ed., 2008, p. 283) A representative democracy is when individuals vote and appoint representative officials who work on behalf of the people. The citizen becomes the “watchdog” and the client, and the government remains “accountable” for the people (“Democracy, Representative and Participatory,” Darity, Jr., ed., 2008, p. 283). Both the United States and South Africa are representative democracies.

There are many principles present in representative democracies. Among free and open societies, especially in the west, there are a number of qualities these nations have in common. Among those, here are some of the leading characteristics, which are present in both the United States and South Africa: elections and referenda, majority rule, constitutionalism, a bill of rights, rule of law and due process, separation of powers and checks and balances, regulatory agencies, access to government (records and meetings), federalism, robust public discourse, equal opportunity, and independent and diverse news media. Certainly these are not the only characteristics that comprise a representative democracy, but there is no denying that these are widely viewed and internationally accepted.

To put the aforementioned criteria in any order of importance would create priority, and each criterion is important in its own, unique way. Every characteristic works with or as a part of the other characteristics to serve as the pillars that support the concept of a democratic republic. The following order serves as no reference as to which characteristic holds more importance than another. As government transparency is the focus of this thesis, access to government in the form of records and meetings will be discussed first.

Access to government held information allows for government *transparency*, which is crucial to having a democratic republic (“Transparency,” Darity, Jr., ed., 2008, p. 434). Having a

transparent government includes openness of both records and meetings. The Freedom of Information Act (FOIA) is the U.S. law that protects people's right of access to records, whereas the Government in the Sunshine Act is for the promotion of access to meetings. "The Government in the Sunshine Act (P. L. 94-409, 90 Stat. 1241) requires that meetings of federal agencies with multiple members—agencies headed by a collegial body, a majority of whose members are appointed by the president with the advice and consent of the Senate—must be open to public observation" (Edles, Berg, & Klitzman, 2004, p. 143). There are more than 60 organizations that fall under the regulation of the Sunshine Act, however, any act with only one person as a head, such as the Cabinet, are excluded (Edles, Berg, & Klitzman, 2004, p. 143). Tom Bugnitz claimed that democracy works when nations' citizens can make informed decisions, and apply that information when going to the polls to vote. In order for there to be informed citizens, there needs to be an informant – typically the news media (Bugnitz, 2008). When the media cannot report on meetings and records held by the government, then the people are lacking pertinent information to make decisions.

Transparency has been crucial in terms of having a democratic republic since the works of Jeremy Bentham and James Madison. "Democratic theory has long emphasized that an accountable, truly democratic polity must make its decisions public to its citizens" ("Transparency," Darity, Jr., ed., 2008, pg. 434). Bentham referred to this early idea of transparency as "publicity", whereas Madison called government without transparency a "farce or tragedy" (Madison, 1973, p. 473).

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives" (Madison, 1822, p. 690).

Both Bentham and Madison's ideas recognize that public access to government held records are a necessity, and a lack of access could lead to devastating results, such as the abuse of authority,

corruption, inefficiency, and, ultimately, tyranny. They may not have instilled the laws that are currently in place today, but they recognized that access was fundamental to democracy. “Public business is the public’s business. The people have a right to know. . . . Without that, the citizens of a democracy have but changed their kings.” (Cross, 1953, p. 13). As Lord Acton noted, “Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion” (Dalberg-Acton, 1906).

Transparency leads to government accountability, which is crucial to developing a democratic republic. When citizens are informed, they can hold the government responsible for their actions. “Accountable governments need first to inform the public of their actions and intentions and, second, to offer mechanisms through which they can be punished for not being representative” (“Transparency,” Darity, Jr., ed., 2008, pg. 434). Transparency is necessary in order for there to be government accountability (“Transparency,” Darity, Jr., ed., 2008). In his memorandum of June 1967, Attorney General Ramsey Clark referenced the importance of open government in relation to democracy and FOI laws.

If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public” (as cited in Holifield, 1972).

In order for people to have faith in their government – for them to consider candidate’s qualifications, vote and elect – they need to know their government’s actions. Transparency leads to accountability, which leads to trust.

Elections and referenda is a key part of having a representative democracy. As previously stated, in representative democracies like the United States and South Africa, the government acts as the agent for the people – they are elected by the citizens to make decisions, unlike in a direct democracy where the individuals vote on every issue. Referenda are typical in direct democracies; however, they are also used in representative democracies, for instances such as

voting “yes” for capital punishment, or “no” for allowing abortion in certain states. Still, with so many citizens and so many issues to be voted on, it is often less complex to have representatives make the decisions. Elected representative officials determine what to do regarding issues that are too complex or too technical for all citizens to vote on, and they are able to make the most informed decisions. This plays a key role in having open and transparent government, because in order for the people to elect the official that best represents them, they need to be informed of how those officials are performing and what decisions they have made in the past. This applies to majority rule as well, because majority rule is how representatives are elected into office, and, again, without transparency, how are the people supposed to know the actions of candidates in their previous positions?

Majority rule is necessary to understand when discussing elections and referenda. This principle relates to Locke’s Social Contract theory. Forming a community, or a compact, is forming a type of majority rule in and of itself. When two people are running for office, in most cases, the victor must receive more than half the votes. For an election with more than two candidates, the person with the most votes is the victor. Sometimes, an issue has to be agreed upon by a certain margin. For example, in the United States, when the Constitution is being amended, there must be consent from two-thirds of the House of Representatives and the Senate, followed by consent from three-fourths of the states (“Constitution of the United States,” 1787, art. 5). Majority rule embodies the disparate ideas of Locke and Hobbes – that commitment to one another, and the forming of a community, can create natural governance by a free people. However, there needs to be written law in order to help ensure consistent governance in applying due process and the rule of law in the people’s best interest. The common form of this written law is Constitutionalism.

Constitutionalism serves as the written law for the rules, procedures and limits of government and governance. In other words, it lays out the details, processes and structure of the

“contract,” much like the contract presented in Hobbes’ Social Contract Theory. The U.S. Constitution serves as a guide for what the government can and shall do; it enumerates the powers of the central government, as well as states how many representatives each state should have in Congress and how the electoral process will work (“Constitution of the United States,” 1787, n.d.) Ideally, the objective is to limit power in order to prevent the rise of tyranny, while still ensuring that the government is operating on behalf of the people. Transparency makes it possible for journalists, historians, watchdog groups, whistleblowers, and members of the general public to ensure that the laws written in the constitution are being upheld. The Constitution only dictates what the government is allowed to do. In both the United States and South Africa, the Bill of Rights serves as the Constitutions pair that limits the powers set forth in the Constitution.

While the Constitution enumerates the powers government shall exercise, the Bill of Rights sets clear limits enumerating what the government cannot do. Using the United States as an example, the Bill of Rights is represented in the first 10 amendments to the U.S. Constitution ratified in 1791. This difference between the Constitution’s objectives and the Bill of Rights objectives is another form of checks and balances, analogous to the separation of powers enumerated in Articles I-III of the U.S. Constitution (stating the powers of the House of Representatives, the Senate, Congress, the Executive and Judicial powers).

During the debates on the adoption of the Constitution, its opponents repeatedly charged that the Constitution as drafted would open the way to tyranny by the central government. Fresh in their minds was the memory of the British violation of civil rights before and during the Revolution. They demanded a “bill of rights” that would spell out the immunities of individual citizens (“Bill of Rights”, 1791).

A bill of rights acts on behalf of the people and their rights, protecting them from the power the government attains from the laws set forth in the Constitution. Again, here transparency is necessary to make certain that the people’s rights are being upheld, and that all are being treated fairly by the legal system in regards to rule of law.

Rule of law is, in its most basic form, a guideline of how laws are made, how people are bound to the law, how interpretable the law is, how the law is applied, and how it pursues the liberty of the people (“Rule of Law,” Darity, Jr., ed., 2008). In effect, it is the proposition that all people are equal under the law, and this nation is governed by laws and not by man. No one person is above the law and legal justice is carried out regardless of a person’s status, wealth, or connections.

At its most basic level, the term refers to a public order in which general, settled rules are applied consistently, that is, in which laws are applied according to their own terms rather than more or less severely, more or less often, according to the status of those to whom they are to be applied (Frohan, 2011, p. 6).

Due process applies to how law is carried out. “The due process clause of the Fifth and Fourteenth Amendments requires that statutory provisions be sufficiently definite to prevent arbitrary or discriminatory enforcement by a prosecutor” (Phelps & Lehman, eds., 2005, p. 419). The Due Process Clause states that no one should be “deprived of life, liberty or property without due process of law”. It protects people’s rights as guaranteed by the Bill of Rights, while also prevents their rights from being taken advantage of from the laws written in the U.S. Constitution. “The doctrine seeks to prevent arbitrary government, avoid mistaken deprivations, allow persons to know about and respond to charges against them, and promote a sense of the legitimacy of official behavior” (Hall, 1992, p. 236). Due process is a rule of law that applies to everyone, and thus requires the treatment of every case to be the same from beginning to end. Without transparency and an open government, there would be no way of knowing if all citizens are being treated fairly and legitimately throughout legal processes.

When talking about the characteristics of a democratic republic, and how transparency is necessary to every characteristic, checks and balances and separation of powers can be paired together. Separation of powers allows the concept of checks and balances to be executed. As previously stated, Montesquieu, as well as Locke, were big influencers on the U.S. democratic

principles, and Montesquieu specifically proposed the separation of powers by the development of the judicial, legislative, and executive branch. However, even before Montesquieu, Aristotle proposed the idea of “mixed” governments to prevent types of corruption (“Separation of Powers, Darity, Jr., ed., 2008). Separation of powers was not always believed to be a fundamental principle of democratic theory, although “it gave impetus to the spread of democracy by offering a way of reconciling the will of the people with the rule of law” (“Separation of Powers,” Darity, Jr., ed., 2008). It allowed the idea of democracy to spread because it insured that law would not disregard the natural rights of the people. If any one section of the government achieved too much power, they would have the opportunity to abuse that power. Again, transparency is a way of ensuring that this concept of checks and balances is serving its duty in that no one section of government accumulates excessive power.

Regulatory agencies and administrative agencies are subject to FOIA laws, as well as the Cabinet. Major U.S. federal regulatory agencies include, but are certainly not limited to, the Federal Communications Committee, the Federal Trade Commission, the Food and Drug Administration, and the Equal Employment Opportunity Commission. Each agency has specific areas of society that they overlook and regulate, and are able to enforce laws because individuals who are informed of that particular area of regulation staff them all. “Regulatory agencies normally combine the powers to make rules, to adjudicate controversies, and to provide ordinary administrative services, functions corresponding to the legislative, judicial, and executive powers of the separate branches of government” (Kommers, 2000, p. 2147). Regulatory agencies are monitored on a local, as well as national scale. Every state has its own FOI law, and federalism, another pillar of democracy, allows states to have the power to oversee certain FOI regulation.

Federalism is another pillar crucial to the foundation of democracy, and is generally present in most representative democracies. Briefly stated, it is the relationship between the federal government and the states or provinces. Federal constitution almost always supersedes the

state constitutions. Both bodies having written constitutions allows for the bodies to work together, yet separately, without one body overpowering the other (“Federalism”, Darity, Jr., ed., 2008, p. 113). Federalism, like many other criteria necessary for democracy, is solidified to aid in the prevention of a government’s body taking a rise to tyranny. It allows law to be conducted, *for the people*, on both a state and federal level. The 10<sup>th</sup> Amendment of the U.S. Constitution grants States the powers that are not dedicated as federal law and the 9<sup>th</sup> Amendment also grants people their ensured rights that aren’t covered in the Constitution. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people” (“Constitution of the United States”, 1787, amend. 9). In South Africa as well, each of the nine provinces has its own legislatures, and can create provincial laws (“The Legislative Process,” 2004).

Robust public discourse is achieved in a number of ways, e.g. speech, religion, peaceful assembly, petition, etc. Public discourse allows people to shed light on issues that otherwise wouldn’t be noted, and government transparency is crucial in fostering that communication. In the U.S. Constitution, these rights are enumerated in the First Amendment. It has been interpreted over the years to include assembly in both private and public locations. This amendment protects workers on strike, rallies by groups such as the Ku Klux Klan and Neo-Nazis, civil rights advocates, etc. “Sometimes these efforts have galvanized public support or changed public perceptions. Imagine a civil rights movement without the March on Washington or the women’s suffrage movement without ranks of long-skirted, placard-carrying suffragists filling city streets” (Hudson, n.d.) Although there are certain limits on the right to public discourse, such as the “time, place and manner” restriction, they are in place to help prevent the occurrence of possible damage or congestion that is unrelated to the content of the message being conveyed in the assembly or speech.

Having independent, non-government diverse news media is necessary to preventing monopolization of the media, and avoiding propaganda. This means that the government cannot control what the press releases. If the government ever got control of the medium (i.e. the press), they would then have control of the message. Although there are restrictions as to what can be said over broadcast airwaves (which are regulated by the government), news media content in general needs to be diverse and not overpowered by the government. Media ownership rules in regards to mergers between newspapers and radio or television broadcast stations are regulated and reviewed by the Federal Communications Committee. Writer for the *Federal Communications Law Journal*, Edwin Baker, argues that examining media concentration is a necessity for diversity, equal voice, and the monitoring of media power (Baker, 2009). “A central reason to favor media ownership dispersal is to broaden the distribution of voice within the democratic public sphere” (Baker, 2009, p. 655). By keeping the press free and diverse, it allows many people and ideals to be represented in the media. Furthermore, transparency allows these free and diverse news media outlets to inform the public about government actions, whether it reflects positively or negatively on the government and its representatives.

Equal opportunity is a prevalent issue when it comes to employment, federal aid, healthcare, education, athletics, etc. It allows for all citizens to be treated fairly, and in representative democracies, where the government acts for all people, equality for all is imperative. The Equal Employment Opportunity Commission (EEOC), for example, is in charge of making sure that there is equal opportunity for men and women in the workplace. Educational Opportunities section of the Civil Rights Division of the United States Department of Justice “enforces several federal civil rights laws which prohibit discrimination on the basis of race, color, national origin, language, sex, religion, and disability in schools and colleges” (“Civil Rights Division Educational Opportunities Discrimination,” n.d.). The EEOC, as well as other

commissions established to ensure equal opportunity, fall under the jurisdiction of the FOIA, and thus are required to disclose records, promoting openness and transparency.

### **Conclusion**

Democracy today is very complex, and, as it has been said, messy. Every democratic nation has different laws, rights, and freedoms. However, the 12 aforementioned criteria are crucial for fostering and maintaining a democratic republic. Locke, Montesquieu, Hobbes and others – philosophers, scholars, journalists and historians – were essential originators in the development of democracy in the United States. Each of their works focused on specific pillars of the foundation of democratic theory. Their contributions shaped the United States, and many other democratic nations, into what it is today.

It is important to understand that the pillars of democracy all work with one another, and all point to a need for transparency and access to government held records. Access allows the people to learn what their government is doing. It serves as a way of checking and balancing the actions of government. Freedom of information establishes transparency, and it is a step to ensuring that democratic principles are upheld. In order for a democracy to be successful, it must be governance by the people, for the people. If there is no, or extremely limited, access to government records, people can not be sure that the government is protecting their life, liberty, and freedoms. The criteria necessary for a democratic republic - elections and referenda, majority rule, constitutionalism, a bill of rights, rule of law and due process, separation of powers and checks and balances, regulatory agencies, federalism, robust public discourse, equal opportunity, independent and diverse news media and access to government (records and meetings) – ultimately lead to government transparency. Grave consequences – tyranny among them, can occur without all 12 criteria instilled in a nation's foundation. Without government transparency,

no government body can be held responsible for its actions, and there is no accountability. The reason each pillar was discussed, rather than just access to information (as it is the focus of this thesis), was that each of these pillars relate to the need for open and transparent government, and it is crucial to understand that all of these pillars work with one another to promote democracy and democratic principles. The next chapter will explore how the U.S. FOIA serves as a model to FOI laws around the world.

## **Chapter 3**

### **United States Freedom of Information Act (FOIA)**

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The United States was one of the first countries to enact FOI into its laws. The Freedom of Information Act (FOIA) was signed by President Lyndon B. Johnson in 1966 and put into effect one year later. The FOIA is a statutory law that provides access to government records. “Although its application has been inconsistent, the Act’s basic philosophy remains that government records are presumed to be available for public scrutiny because open government is better government” (Dienes, Levine, & Lind, 1997, p. 418). Access leads to government transparency and accountability. However, FOIA was not the beginning of government transparency for the United States.

The Administrative Procedures Act enacted by Congress in 1946 required the publication of government information, and that every agency should “make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules” (Clark, 2001, sec. 3). Although this act was not nearly as broad in scope as the FOIA is now, it was a start in the direction of government transparency by allowing access to records. That being said, as recognized by FOI scholars Martin Halstuk and Bill Chamberlin, there were many loopholes with the APA, and extreme vagueness in regards to information that agencies could withhold (Halstuk & Chamberlin, 2006). According to Section 3 of the APA, requesters were to only be granted access if they were “properly and directly concerned” with the information they sought after (as cited in

Halstuk & Chamberlin, 2006). Ultimately, this meant that requesters were often denied access if the information they wanted was not about them.

In the 1950s, members of the news media and likeminded members of Congress, “began advocating for a more comprehensive law” (Banisar, 2006, p. 158). It was not just the desire of the press for access to information. There was a “system of secrecy” among the federal agencies that kept government-held information from the press and members of the general public, including attorneys representing clients, public interest and watchdog groups and historians and other scholars (O’Reilly, 2000, p. 10). “It was not external forces alone which brought freedom of information from press desire to federal law” (O’Reilly, 2000, p. 10).

As a response to the need for a more comprehensive law, the FOIA took effect in 1967. The press was a big proponent for the passing of the FOIA. O’Reilly discussed the fact that although journalists do not need the FOIA to present hard-hitting news (they can still release a story with the help of witnesses and undisclosed sources despite “security precautions”), the press does not like the fact that agencies can cover up the work they are doing (O’Reilly, 2000). Despite the fact that the press desired the FOIA, the law does not grant them special privilege, although recent amendments created a fast track for handling requests from journalists. “It must be observed that the press impetus in favor of the Act was not a desire to have solely press access to federal files. The public’s access to records, not solely that of the press, was won by passage of the Freedom of Information Act” (O’Reilly, 2000, p. 17).

FOIA, in its most basic form,

allows any person or organization, regardless of citizenship or country of origin, to ask for records held by federal government agencies. Agencies include executive and military departments, government corporations and other entities which perform government functions except for Congress, the courts or the President’s immediate staff at the White House, including the National Security Council (Banisar, 2006, p. 159).

These “records” that FOIA grants access to are papers, letters, reports, manuals, computer files, photos, films, sound recordings, and more (Dienes, Levine, & Lind, 1997). Public bodies

under FOIA are not just expected to get requests and research through their files for the information. These bodies are also required to publish records regarding their structure and functions, as well as other rules and decisions regarding their institution (Banisar, 2006).

The FOIA has been amended in significant ways several times. In 1996, the Electronic Freedom of Information Act (EFOIA) was enacted. The EFOIA, actually an amendment to the FOIA statute, “ensured that individuals have access to government records regardless of format, including electronic format” (Piotrowski, 2007, p. 24). Congress was compelled to pass this requirement because as government records increasingly were gathered and stored in computers, beginning in the 1970s, agencies were not required to grant FOIA requests to information contained in databases (Halstuk & Chamberlin, 2001). Some agencies were notorious for providing requesters with thousands of pages containing the sought after information. However, with the information available online, tools such as the “search” and “find” keys could be put to use to find the necessary materials and to eliminate the waste of thousands of sheets of paper (Halstuk & Chamberlin, 2001). EFOIA also requires agencies to release the information in any format requested, including all digital formats (5 U.S.C. Sec. 552, 1966). The electronic amendments made it possible for FOIA requesters to harness the power of technology, as it has evolved over the years, to obtain government information more efficiently. This EFOIA of 1996, therefore, made a profound contribution to access with the emergence of the Internet, which around that time was becoming quite popular.

The EFOIA amendment also required each federal agency to create a Web site that explained the agency’s function, its policies, the agency’s structure and officials. Furthermore, the agency Web sites must have a direct link to the FOIA to explain how to use the law to acquire information. Any information that is requested at least three times must also be made available online for each agency by providing a directory of links to frequently requested records (Banisar, 2006).

The Openness Promotes Effectiveness in our National Government Act of 2007, the last amendment Congress passed (known as the OPEN Government Act), created the fast track access for journalists, defining who, according to Congress, qualifies as a “representative of the news media” (S. 2488, 2007).

As defined in the OPEN Government Act, a “representative of the news media” is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience” (S. 2488, 2007, sec. 3). What makes the media type “news” is if the information is in regards to current events or information that would be of public interest (S. 2488, 2007).

It also directs public agencies to pay attorney fees for cases regarding the FOIA, prohibits an agency from processing fees if it failed to comply to the established FOIA time deadlines, and established the Office of Government Information Services (OGIS) (“The Federal FOIA Ombudsman,” n.d.).

OGIS is in charge of resolving the disputes between public bodies and requesters. On the OGIS website, they claim to “serve as the FOIA ombudsman -- answering questions, tracking suggestions and providing information” (“The Federal FOIA Ombudsman,” n.d.). This organization is part of the process to better implement the FOIA.

In terms of the FOIA management, it is mostly decentralized, with the U.S. Justice Department (DOJ) overseeing it. The DOJ “provides some guidance and training for agencies and represents the agencies in most court cases” (Banisar, 2006, p. 159). There are many other agencies and laws that oversee access, *not* in the form of records. Some of these are the Government of the Sunshine Act (previously discussed – concerning opening meetings of multi-agency bodies to the public), the Federal Advisory Committee Act, which “requires the openness of committees that advise federal agencies or the President” (Banisar, 2006, p. 159), the Privacy Act of 1974 that serves to provide access to people’s personal records held by federal agencies,

and the Executive Order on Classified National Security Information, which “sets standards for the classification and declassification of information” (Banisar, 2006, pp. 161).

The FOIA is not just federal law. All fifty states have laws regarding access to information. The FOIA, when enacted as statutory law, made the United States one of the first countries to adopt a federal access law. The FOIA is in regards to access to “records” held by public bodies (listed previously). According to section f(2)(A), a record is “any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format” and also any records stated in (A) “that is maintained for an agency by an entity under Government contract, for the purposes of records management” (Freedom of Information Act, 1966, sec. f(2)(A)(B)).

“Agency” is the word used in the FOIA to describe any public body that falls subject to the FOIA regulation. The FOIA is focused primarily within the executive branch of government – “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency” (Freedom of Information Act, 1966, sec. (f)(1)). FOIA does not cover private bodies “which are substantially publicly funded or which undertake public functions. This is relatively limited in scope compared to some of the more recent right to information laws” (Mendel, 2006, p. 128).

Anyone can make requests for information, however there are some limitations as to what information intelligence groups can grant foreign government or organizations access to. It is procedural that the identity of the requester is known, as well as the reason for the request (Dienes, Levine, & Lind, 1997). The reason for the request can help with avoiding fees or overcoming exemptions (Mendel, 2006). Once the proper application for information is received by the agency, the agency must make an effort to search for the information, and when granting

access, provide it in the form requested (if able to) (Freedom of Information Act, 1966, sub. (a)(3)(B)).

Once a request is sent in, the agency has twenty days to either grant or deny access. Recent amendments require the agency to grant the applicant a tracking number within ten days of the request being made (Banisar, 2006). That way, when an applicant wants to know the status of their request, they can check it with the tracking information. There is an allocated ten-day extension to the twenty-day limit for the agency to locate the requested information and to make a decision regarding whether or not the information will be disclosed. This is only for certain circumstances, and the agency must notify the applicant of the extension, as well as give them an opportunity to narrow the scope of their request or change the timeframe (Banisar, 2006). According to clause (a)(6)(B) of the FOIA, unusual circumstances that allow for a time extension are instances in which the agency must search for information at a field facility or another establishment, the agency must search through vast amounts of information in search of the needed materials in one request, or if the agency must consult with another agency or within another component of their agency before deeming if the request for access can be granted (Freedom of Information Act, 1966).

Not only does FOIA allocate more time to agencies under certain circumstances, but they also allow certain requests to be expedited, for reasons of “compelling need” – where there is threat to the life or safety of an individual or if the information would be needed to urgently make the public aware of the federal government’s activity (Freedom of Information Act, 1966, sub. (a)(6)(E)).

According to section (a)(4)(A)(i) of the FOIA,

In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to

notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies (Freedom of Information Act, 1966).

There are three levels used to assess the cost of the fee. Requests are noted as either being for commercial use, noncommercial use (educational or non-commercial scientific institution or representative of news media) or other requests (Dienes, Levine, & Lind, 1997). The Act later goes on to specify that for a request for information to be used for commercial reasons, “fees shall be limited to reasonable standard charges for document search, duplication, and review” (Freedom of Information Act, 1966, sec. (a)(4)(a)(i)(I)). If a request is in regards to educational or a noncommercial scientific institution or the news media, “fees shall be limited to reasonable standard charges for document duplication” (Freedom of Information Act, 1966, sec. (a)(4)(a)(i)(II)). Finally, for a request for another use other than the previous two, “fees shall be limited to reasonable standard charges for document search and duplication” (Freedom of Information Act, 1966, sec. (a)(4)(a)(i)(III)). For any agency that falls under (a)(4)(a)(ii) – non commercial use, education, scientific institution, news media – if the information is being requested and “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester” than the fees will be cancelled or reduced (Freedom of Information Act, 1966, sec. (a)(4)(a)(ii)). This ultimately applies to NGO’s and the news media, if they can make the case for public interest (Mendel, 2006, p. 130).

### **FOIA Exemptions**

There are nine exemptions laid out in the FOIA under which requests can be denied. Exemption 1 is heavily relied upon, and that is in reference to national security. This includes the protection of records that are in the hands of the executive branch involving national security and

foreign policy (Freedom of Information Act, 1966, sec. (b)(1)(a)). Much of the information that is denied based upon exemption 1 is confidential, secret, or top-secret. According to section 1.2 of Executive Order No. 13292, amendment to Executive Order No. 12958 for classified security information, the term “confidential” is applied to information that “shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe” (Exec. Order No. 13292, 2003, sec. (3)). “Secret” is used to describe information, “the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe” (Exec. Order No. 13292, 2003, sec. (2)). Finally, “top secret” is used to describe information, “the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe” (Exec. Order No. 13292, 2003, sec. (1)).

Each portion of each document is to be classified separately, meaning that, for example, certain information in a document can be classified as “top secret” and another portion as just “confidential”. There is an official in each agency to specify what information is classified, and records are to be declassified after ten years. Officials labeling certain portions of each document differently allows for the option of only partial disclosure (Dienes, Levine, & Lind, 1997). Many of the instances that fall under this first exemption are subject to a harm test and can be classified further as “discretionary”. In 1993, the attorney general suggested that all discretionary cases be disclosed – this was later reversed by the attorney general in 2001, stating that all cases should be carefully considered before any information be disclosed (Mendel, 2006).

Exemption 2 is for the protection of internal agency personnel rules and practices (Freedom of Information Act, 1966, sec. (b)(2)). For this exemption, “there is no harm test, although the exception itself is relatively narrow” (Mendel, 2006, p. 131).

Exemption 3 is for the protection from the disclosure of information forbidden by other federal statutes.

Significantly, however, paragraph (b)(3), the third exception, excludes from the ambit of the Law all records which are exempt from disclosure by other statutes, as long as these laws leave no discretion as to non-disclosure or establish particular criteria for withholding information. These conditions would rule out some secrecy provisions but leave in place most secrecy laws (Mendel, 2006, p. 131).

This is crucial for the Homeland Security Act. It is a “catch-all” exemption, and the only exemption in the act that may be mandatory. “To fall within Exemption 3, the statute must be the result of a positive enactment by Congress and must specifically exempt matters from disclosure” (Dienes, Levine, & Lind, 1997, p. 434). Because of the reliance on another statute in cases like these, Congress inevitably must make the decision on disclosure, rather than the agency (O’Reilly, 2000). There are certain statutes that require disclosure of information (although not many) and there are multiple that require withholding information. Specific withholding statutes involve tax records, social security records, grand jury materials, law enforcement and parole records, Central Intelligence Agency (CIA) records, the Federal Trade Commission records, and more (O’Reilly, 2000).

Exemption 4 is for the protection of trade secrets and confidential commercial information. This exemption protects the people who helped contribute the confidential information. In order to rely upon exemption 4, the agency must demonstrate that the records constitute commercial or financial information, were obtained from a person, and the information is confidential or privileged (Dienes, Levine, & Lind, 1997). Similar to exemption 2, this exemption is not subject to the harm test (Mendel, 2006).

Exemption 5 is for the protection of internal agency memoranda and policy discussions. The deliberate process privilege (most widely invoked), the attorney work-product privilege, and the attorney-client privilege are three of the main areas in which exemption 5 is relied upon

(Dienes, Levine, & Lind, 1997). “This is effectively the internal deliberations or ‘room to think’ exception” (Mendel, 2006).

Exemption 6 is for the protection of information “the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” (Freedom of Information Act, 1966, sec. (b)(6)). This, in itself, is a form of the harm test (Mendel, 2006). If FOIA conflicts with the Privacy Act of 1974, however, FOIA trumps the Privacy Act, as decided by legislation in 1984 (O’Reilly, 2000). Some things that fall under exemption 6 are names and addresses and individual financial information or solicitation. The scale for this exemption is weighted in favor of disclosure, and applies to unwarranted invasion of privacy (Dienes, Levine, & Lind, 1997).

Exemption 7 is in regards to information pertaining to law enforcement investigations. This includes records that would jeopardize criminal or civil investigations or cause harm to individuals who assist law enforcement. Exemption 7A is the withholding of records that “could reasonably be expected to interfere with enforcement proceedings” (Freedom of Information Act, 1966, sec. (b)(7)(a)). Exemption 7B comes into play if the information requested, “would deprive a person of a right to a fair trial or an impartial adjudication” (Freedom of Information Act, 1966, sec. (b)(7)(B)). This relates back to the pillar of democracy on rule of law and due process. Exemption 7C is relied upon when the information “could reasonably be expected to constitute an unwarranted invasion of personal privacy” (Freedom of Information Act, 1966, sec. (b)(7)(C)). Exemption 7D is used when the information requested would disclose information on a confidential source in regards to law enforcement and law proceedings. This also protects any information gathered from a confidential source (Freedom of Information Act, 1966, sec. (b)(7)(D)). Exemption 7E comes into play when the release of the information “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law” (Freedom of Information Act, 1966, sec. (b)(7)(E)).

Finally, exemption 7F is for the protection of people's physical safety (Freedom of Information Act, 1966, sec. (b)(7)(F)). All of the points of this exemption have built-in harm tests (Mendel, 2006).

Exemption 8 concerns information from a public body containing financial reports of institutions. There is no built-in harm test, and "although harm may often be presumed, the exception would benefit from being explicitly subject to a harm test" (Mendel, 2006).

Finally, exemption 9 is regarding "geological and geophysical information and data, including maps, concerning wells" (Freedom of Information Act, 1966, sec. (b)(9)). This is not seen in most access laws – it is rather unique to the United States, due to the oil industry. It is also not subject to a harm test (Mendel, 2006).

Although there are only nine exemptions, there are also complete and total *exceptions* to the law, in which information cannot, and will not, be disclosed. They typically are records that fall under exemption 7, but This is information concerning issues of national threat, when someone is being investigated undercover and the release of the information would hinder the investigation, records with information given by an informant who is not public with their identity (and the record has their name on it), and "records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or international terrorism" (Mendel, 2006, p. 132).

An important thing to note about the exemptions in the FOIA is that there "is no provision in the RTI Law for a public interest override" (Mendel, 2006, p. 131). Many access laws, like South Africa's, have public interest override written into the rights. Although the U.S. FOIA does not have the public interest override, they do have an exemption completely built around public interest in regards to the media and making sure that information is being filtered out if it is for the interest of public understanding.

## FOIA Appeals Process

If a requester is not happy with the results from their request, they can take up an appeal with the relevant public body. Within twenty days of receiving the results, they must state that they are unhappy with the lack of information disclosed (either in full or in part), and file for an appeal. If the appeal is refused, “the agency shall notify the person making such request of the provisions for judicial review of that determination” (Freedom of Information Act, 1966, clause (a)(6)(A)(ii)). Just as there is an additional allocation of ten days when a request is initially submitted, there is an additional allocation of ten days when an appeal is filed, and, for “unusual circumstances,” the appeal cannot be decided upon within the initial twenty days (Freedom of Information, 1966, clause (a)(6)(B)(i)). If the applicant doesn’t hear back from the public body within the allocated time, they are allowed to file an appeal directly to the courts (Mendel, 2006).

When there are issues between requesters and public bodies, OGIS works as the middleman to help with communication in an attempt to hopefully avoid court cases. OGIS’s other jobs include reviewing compliance and policy of the FOIA, offering “dispute resolution training” for the FOIA staff of public agencies subject to the law, and serving as ombudsman, collecting “comments and questions from Federal agencies and the public regarding the administration of FOIA to improve FOIA processes and facilitate communication between agencies and FOIA requesters” (“The Federal FOIA Ombudsman,” n.d.).

When issues cannot be resolved and the public body does not respond within the allocated twenty days (or the additional ten days, if granted), the applicant can take the issue directly to the courts. If it goes this far, “the court may require the public body to produce the record for its examination, in camera if warranted, and require the public body to disclose the record” (Mendel, 2006, p. 132). The court then examines the issue, addressing why the information was not disclosed, and studying the exemption that was relied upon. The court can

then levy lawyer fees to either the agency or the public officer, depending on the outcome (Mendel, 2006).

### **Conclusion**

As one of the first FOI/RTI laws, the Freedom of Information Act serves as a model for many FOI/RTI regimes around the world. The FOIA works to promote open and transparent government for the press, businesses, and, ultimately, for the people. “In the specific, short-range sense, “politics” is inevitable in the operation of the Freedom of Information Act. Disclosure in our society is an exercise of populist power, and withholding can be seen as an exercise of bureaucratic power” (O’Reilly, 2000, p. 110). The FOIA is impossible without government cooperation. Working to prevent the rise of tyranny, the FOIA ensures that the press is able to access information that can increase public understanding of important matters, ultimately allowing the citizens to hold their government accountable for its actions. Although the FOIA was not created for the media, it certainly allows news representatives to get information and relay it to the general public. With a strict set of nine exemptions, the FOIA is meant to ensure that the public is being informed of major government decisions. However, the FOIA is not perfect. Recently, there has been a surge in government secrecy and a decline in individual citizen privacy, not to mention the extreme backlogging of the FOIA requests. After a comprehensive overview of South Africa’s FOI law, these issues will be discussed further.

## **Chapter 4**

### **South African Promotion of Access to Information Act (PAIA)**

#### **History of South African Democracy**

South Africa's journey to democracy was by no means an easy one. It was stained with struggle, segregation and discrimination. The actual word apartheid can be used in many different ways – such as a time of discrimination against women or people of another race. In South Africa's case, the apartheid era was the white minority ruling against the black majority. The apartheid regime lasted from 1948-1991 (Beck, 2005).

Although apartheid didn't begin until Daniel F. Malan and his party of Afrikaner Nationalists won the election in 1948, racial segregation began in the 1800's, when the British settled in South Africa (Beck, 2005). Dutch traders landed on South Africa in 1652 while using the Cape of Good Hope as a point on the spice route from the Netherlands to the Far East. The British didn't come until 1806, but when they came, the remaining Dutch traders (also known as Boers) either fled or stayed. Those that stayed were defeated in the Boer War by the British and Afrikaners, who later formed the Union of South Africa in 1910. In 1961, the Union became a republic ("The World Factbook," 2014).

The interests of indigenous Africans were never taken into consideration when the power was in the hands of the British and Afrikaner settlers (Martin, 2005). Despite Africans being the majority, they weren't allowed to hold citizenship, and they were exiled to a small portion of the total land of South Africa (Beck, 2005). Many of these early principles of segregation only intensified with the beginning of the apartheid era.

The South African apartheid era was a time period of discrimination against blacks. There were four main points to the apartheid era:

The 'separate development' of the four official racial groups in the country; white control of every aspect of government and society; white interests overruling black interests, with no requirement to provide equal facilities for all groups; and the categorization of 'whites' (people of European descent) as a single nation and Africans as members of several distinct nations or potential nations (Beck, 2005, p. 99)

At the time when apartheid began, the whites made up only 12-13 percent of the population of South Africa. South Africa had a very diverse population (and still does), but this small white minority took control over the other three main groups – the Africans (or Bantu), Coloreds, and Asians (Beck, 2005). This segregation was very similar to the segregation of blacks in the United States – who, ironically, were fighting for their rights just as the apartheid regime was coming into full control. In South Africa, there was the basic segregation, such as the Africans, Coloreds, and Asians not being able to use the same water fountains as the white minority, and marriage discrimination laws. Then there was the more intense segregation, such as discriminatory land and political acts (Beck, 2005). Blacks were restricted of the right to strike and certain jobs were only available to the whites (Martin, 2005).

Apartheid officially began when D.F. Malan took office in 1948 representing the National Party. He, and the party, "proceeded over the next couple of decades to bring in strong laws to entrench the white minority's superiority and control of the country" (Martin, 2005). One of those laws to secure the superiority of the whites involved relocating the other races. The Baaskap period was a time of relocation for the Africans, Coloreds and Asians. From 1950 until the 1980s (when the law was revoked) it was estimated that more than 3.5 million people were relocated. However, with the implementation of Prime Minister Hendrik Verwoerd, South Africa moved from the Baaskap period, to a more sophisticated form of segregation, in which there were 10 different regions – nine for the blacks and one for the whites. That way, each region could have its own leadership, as to avoid rule from another group (Beck, 2005). This theory was known as Separate Development. "Coloreds, Asians, and Africans could not move freely about the country, could not freely choose their place of residence or employment, and could not vote or

own land” (Beck, 2005). This theory was just one of many that harmed the indigenous Africans, as well as other racial groups.

This isn't to say that there was not opposition. Opposition formed immediately after the 1948 election, and the leading opposition group was the African National Congress (ANC). Head leaders included Nelson Mandela, Albert Nuthuli, Oliver Tambo and Walter Sisulo. While South Africa was under apartheid regime, many other African Nations were gaining their independence. South Africa, meanwhile, left the British Commonwealth, lost its vote in the United Nations and was banned from the Olympic Games. Many Africans were not happy with their meager role in the country. In 1961, the ANC revolted with violence. Two years later, eight ANC members, including Mandela, were sentenced to life imprisonment (Beck, 2005). “Throughout changes of leadership of the apartheid regime, there were assassinations, and an overall relaxation of the minor details of the discrimination, still with the main idea that whites would be in power” (Beck, 2005, p. 102). Although some of the basic issues of the segregation were coming to an end, the whites still had ultimate control.

Pressure continued to brew throughout the 70s and 80s, both internally and externally. It wasn't until the election of Prime Minister F. W. de Klerk in 1989 that the apartheid era was brought to an end. He released Mandela from prison and got rid of the apartheid-era laws, the bans, and the voting system (Beck, 2005). The new voting system would now be on a one-person, one-vote basis (Martin, 2005). This gave all citizens of South Africa equality – a pillar for the foundation of democracy. A framework was agreed upon for a “multiracial, multiparty transitional government” as well (Beck 2005, p. 103). In 1994, Mandela became the first President in South African history to be freely elected by majority vote (Beck, 2005).

The first decade of freedom was a time to reconstruct, promote socio-economic change, and improve the lives of the poor. An age of openness and transparency, after the secrecy of the previous governing parties, was a necessity, and the Truth and Reconciliation Commission was

formed to help achieve that. “The Truth and Reconciliation Commission (TRC), under the leadership of Archbishop Desmond Tutu, helped inculcate a commitment to accountability and transparency in South Africa's public life, at the same time helping to heal wounds inflicted by the inhumanities of the apartheid era” (“About SA – history,” 2014). The forming of the TRC was an effort to promote a government that would not fall into oppression and tyranny.

Although the ANC still holds power today, the country is facing internal strife. “South Africa...has struggled to address apartheid-era imbalances in decent housing, education, and health care” (“The World Factbook,” 2014). The segregation and discrimination present during apartheid stained South Africa. Despite the fact that the country has moved on from apartheid and since created a democracy, there are still internal issues that the governing party and the people must face.

### **Promotion of Access to Information Act (PAIA)**

As a nation with lasting mistrust in government as a result of the apartheid era, the right of freedom of information was established in the Constitution of the Republic of South Africa, created in 1996. According to section 32 of the Constitution, “Everyone has the right of access to (a) any information held by the state; and (b) any information that is held by another person and that is required for exercise or protection of any rights” (*Constitution of the republic of South Africa*, 1996). The Promotion of Access to Information Act (PAIA) was passed by parliament in 2000, took effect in March of 2001, and was a step towards transparency and open government. As part of the preamble to the Act, this law recognizes that “the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations” (*Promotion of Access to Information Act*, 2000, p. 2). As a result of apartheid and the secrecy of

previous South African government, an age of openness was required for the success of this democratic nation. The PAIA grants anyone the access to information held by both public and private bodies, with the goal of having a transparent government by recognizing a public right to information.

The PAIA is a constitutional guarantee for the right of access to information held by public and private bodies in South Africa. The purpose of the act is to

Foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights (*Promotion of Access to Information Act*, 2000, p. 1-2).

The right of access to information from these public and private bodies is established in Section 32 of the 1996 Constitution of the Republic of South Africa.

The PAIA is known for being one of the most progressive access to information acts in the world, “no doubt a reflection of the profound mistrust of government the apartheid era instilled in people” (Mendel, 2008, p. 94). There is a narrow set of exemptions that are very specific, and there are strong procedural guarantees. There are some weaknesses to the act, such as no administrative level of appeal and no proactive obligation to publish. Initial implementation of the Act was also weak (Mendel, 2008). The exemptions and weaknesses will be discussed in further detail later in this chapter.

As previously stated, the Promotion of Access to Information Act applies to both public and private bodies. As defined in the Act, a public body is

(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or (b) any other functionary or institution when (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation (*Promotion of Access to Information Act*, 2000, p. 8).

The PAIA excludes the Cabinet and its committees as well as the judicial functions of courts and their judicial officers and individual members of Parliament. A private body, according to the Act, is

(a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity; (b) a partnership which carries or has carried on any trade, business or profession; (c) any former or existing juristic person (*Promotion of Access to Information Act*, 2000, p. 8).

Certain bodies can be considered as either public or private based upon the specific information requested. However, it is important to note that requests for records from private bodies must be because “that record is required for the exercise or protection of any rights” (*Promotion of Access to Information Act*, 2000, p. 40).

Both private bodies and public bodies have an information officer whose job it is to oversee the requests sent in for access to records. The information officer for a national department, provincial administration or organizational sector is a director or the equivalent to a director. For municipalities, the information officer is the municipality manager or the equivalent. For all other public bodies, the information officer is someone acting as a chief executive officer, or the equivalent (*Promotion of Access to Information Act*, 2000). The information officer is in charge of approving or denying requests, and making sure that the information is collected and distributed as requested. It is the information officer’s or deputy information officer’s (DIO’s) job to make sure that people are notified about the status of their request in a timely manner.

When records are requested, they are to be requested in the proper, designated format, stating the specific record requested, as well as the language wished to receive the requested record in, if granted access. The reason for the request, as well as the information officer’s assumptions as to the reason the record is being requested, is not pertinent to whether or not the request is granted (Mendel, 2008). According to Sections 25(1) and 26(1) of the Act, the request must be either approved or denied within 30 days of the request being made, allowing an additionally allocated 30-day extension if necessary. The terms of the allocated extra 30 days is

only if the request calls for extensive records, if getting the records will interfere with the work of the public or private body, if the search for the records needs to be conducted in a different town or city, or if discussion between multiple public or private bodies is needed before disclosing the information (*Promotion of Access to Information Act*, 2000). There is also a 21-day additional allocation allowed for when a third party is involved, and that body's input is necessary before disclosing the information. This can make the waiting period for the applicant up to 81 days (Mendel, 2008). There is also the issue of government assertions that the records cannot be found. When this is the case, the government must notify the applicant of the efforts that were made to locate the record.

Section 28 of the PAIA is dedicated to a severability provision to the Act, in which part of the information requested can be disclosed and part of the information can be withheld (*Promotion of Access to Information Act*, 2000). When this is the case, the applicant can file an appeal regarding disclosure of the withheld information. If the request is granted (either in full or in part), the applicant pays the appropriate fees (if there is a fee – there is not always one) and then they should receive the records immediately. Reproduction fees vary from R0,60 (\$0.05) to R35 (\$3.16). For reproduction of records owned by private bodies, fees vary from R0,75 (\$0.07) to R70 (\$6.31) (“Access to Information,” 2014).

There are general provisions to the South African Promotion of Access to Information Act. According to Section 89, one cannot be held liable for “anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act” (*Promotion of Access to Information Act*, 2000, p. 43). An offender to the Act is described in Section 90 as

A person who with intent to deny a right of access in terms of this Act— (a) destroys, damages or alters a record; (b) conceals a record; or (c) falsifies a record or makes a false record, commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years (*Promotion of Access to Information Act*, 2000, p. 43).

There are consequences for committing any of these offenses, and they are punishable by law.

According to Section 32, the South Africa Human Rights Commission (SAHRC) is responsible for collecting all of the reports submitted by the information officers of the public and private bodies. These records contain a detailed list of the number of requests received, the number of requests granted, the number of requests refused, the number of appeals made, the number of requests granted in part, etc. When the requests are refused, the information officer must cite the provision for why the record was not disclosed. Information officers must submit this report annually to the SAHRC. A copy of these reports can be found online. The SAHRC is responsible for creating a guide containing information on how one can use the Act, all the names and contact information for the information officers, the proper procedure for requesting information, and the assistance that the Commission can offer applicants throughout the request process. This guide must be updated every two years. Both the annual reports from the public bodies and the bi-annual reports from the SAHRC are also sent to the Government Gazette for publication (Mendel, 2008). The SAHRC, overall, plays the role as overseer in terms of the Act. It makes sure that the public understands how to use the Act to get access to records, and contributes to publishing how often applicants are granted access to records and how often their requests are denied.

There are exemptions to the Act, as stated in Part 3, Chapter 4: *Grounds for Refusal of Access to Records*. A very distinctive part of the Promotion of Access to Information Act is how crucial public interest is in the classification or mandatory disclosure of information. “Many of the exemptions must be balanced against a public-interest test that require disclosure if the information show a serious contravention or failure to comply with the law or an imminent and serious public safety or environmental risk” (Banisar, 2006, p. 137). This test will be discussed later, in regards to Section 46, but it is important to keep in mind when reading over the exemptions that will be discussed in detail.

## PAIA Exemptions

The PAIA has thirteen exemptions in regards to access to public records, and eight in regards to private records. “The South African regime of exceptions is generally a good one, in the sense that it is fairly limited. The harm and public interest tests are not as strong as they might be, and there are a couple of apparently unnecessary exceptions,” writes Mendel (Mendel, 2008, p. 99). He recognizes that even though some tests could be stronger, overall the exemptions are narrow and specific, making it harder to deny a request for information. The next couple of pages will discuss, in detail, the 13 exemptions in which access to public records must be denied or granted. The following list of exemptions will all be looked at further in this section.

- Mandatory protection of privacy of third party who is natural person
- Mandatory protection of certain records of South African Revenue Service
- Mandatory protection of commercial information of third party
- Mandatory protection of certain confidential information, and protection of certain other confidential information, of third party
- Mandatory protection of safety of individuals, and protection of property
- Mandatory protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings
- Mandatory protection of records privileged from production in legal proceedings
- Defence, security and international relations of Republic
- Economic interests and financial welfare of Republic and commercial activities of public bodies
- Mandatory protection of research information of third party, and protection of research information of public body
- Operations of public bodies
- Manifestly frivolous or vexatious requests, or substantial and unreasonable diversion of resources
- Mandatory disclosure in public interest (*Promotion of Access to Information Act*, 2000, p. 3).

The first exemption, under Section 34 in the Act is the protection of a third party who is a natural person. This exemption doesn't apply under certain circumstances, such as if the person had given their consent to disclosure or if the information is in regards to someone under the age of 18 and the person requesting the information is their guardian (*Promotion of Access to Information Act*, 2000). Those are just two examples – there are many specifics to all of the

provisions of the Act. This was part of an effort to minimize the exceptions, and maximize the information disclosed.

Section 35 regards the South African Revenue System. This exemption comes into play when the requested information involves tax collection legislation (Mendel, 2008). For example, if the request was in regards to legislation about the collection of money, then the request may not be granted. Information may still be released, however, if it personally applies to the reporter or the person requesting the information (*Promotion of Access to Information Act, 2000*).

Section 36 is devoted to the exemption that protects commercial information of a third party, such as trade secrets. If the disclosure of the record would cause harm to the third party, than the record falls under this exemption, and may not be released. However, if the information is already publicly available, the third party consents to the disclosure, or the records regard information that concerns public safety or environmental risk, than the request for access can be granted (*Promotion of Access to Information Act, 2000*).

The exemption under Section 37 protects information that, in disclosing it, “could reasonably be expected to prejudice the future supply of similar information, or information from the same source” that would be in the public’s best interest to have access to (*Promotion of Access to Information Act, 2000, p. 22*). Essentially, this exemption protects information that if released, could prevent a source from providing information again in the future.

Section 38 exempts information for the “mandatory protection of safety of individuals, and protection of property” (*Promotion of Access to Information Act, 2000, p. 23*). This concerns any information that, if released, could physically put someone’s life in danger. This does not just pertain to personal information, but also information that if released could put at risk the security of transportation or a building. Information regarding people under the witness protection program is also exempt under Section 38 (*Promotion of Access to Information Act, 2000*). If the

information were to be released and could disturb the protectoral procedures in place for the people in the witness protection program, then that information may not be released.

Section 39 protects police, law enforcement, and legal proceedings. Information may not be released if it would result in “the prevention, detection, curtailment or investigation of a contravention or possible contravention of the law; or the prosecution of alleged offenders” (*Promotion of Access to Information Act*, 2000, p. 31). This applies to all aspects of legal proceedings, from when the prosecution is being prepared, when it is about to begin, or if it was previously terminated (with the release of the information causing it to resume). It also applies to confidential source information related to law enforcement and information that could intimidate a witness in a criminal or law proceeding (*Promotion of Access to Information Act*, 2000).

Section 40 is the “mandatory protection of records privileged from production in legal proceedings” (*Promotion of Access to Information Act*, 2000, p. 24). The only way the information covered under Section 40 can be released is if the beneficiary of the information relinquishes their privilege to the information (*Promotion of Access to Information Act*, 2000).

Section 41 is in regards to information pertaining to the defense, security and international relations of the nation. This also applies to information that is supplied in confidence by another country (*Promotion of Access to Information Act*, 2000). Many of the details for this exemption are in regards to the creation of weapons, information surrounding hostile activities, deployment of military forces, or people who carry out roles related to the prevention of hostile activities (*Promotion of Access to Information Act*, 2000).

Section 42 regards the financial and economic welfare of the Republic, including the State and public bodies as well. Information that could negatively impact South Africa’s ability to manage the economy with the countries best interest in mind falls under the umbrella of this exemption (*Promotion of Access to Information Act*, 2000).

According to Mendel, “another unusual exception in the South African Law applies to research, either by a third party or the public body” (Mendel, 2008, p. 99). This is considered in Section 43. If the information were to be released, and it would cause harm to the third party or public body, the person carrying out the research, or it would hinder the actual research, than the information officer may refuse to grant access (*Promotion of Access to Information Act*, 2000).

Section 44 is devoted to protecting the operations of public bodies, such as meeting minutes, policy formulations, recommendations, etc. This includes consultations, advice, or reports. If the information would be released and has the potential to “frustrate the success of that policy”, then the request may not be granted (*Promotion of Access to Information Act*, 2000, p. 37). Although much of this exemption deals with policies and reports, it also pertains to testing, examining and auditing procedures. The request for records regarding that information may be denied if the release could jeopardize those procedures. This is also the exemption that protects information that a person gave and believed would be kept in confidence (*Promotion of Access to Information Act*, 2000).

Section 45 is an exemption dedicated to “manifestly frivolous or vexatious requests, or substantial and unreasonable diversion of resources” (*Promotion of Access to Information Act*, 2000, p. 27). This is under the jurisdiction of the information officer to decide if the request is unreasonable. If collecting the records would excessively use the resources of the public body, then the information officer is under the right to deny the request (*Promotion of Access to Information Act*, 2000).

Section 46 is a very important facet of the Promotion of Access to Information Act. It is a requirement for the “mandatory disclosure in public interest” (*Promotion of Access to Information Act*, 2000, p. 27). This compels information officers to grant a request if it would reveal a failure to comply with law, a risk to the public and/or environment, or if the public interest outweighs the potential harm in disclosure brought to light by a provision in question

(*Promotion of Access to Information Act*, 2000). With the exception of the exemption in Section 35 regarding the revenue system, this component applies to every exemption.

The exemptions for access to private bodies are as follows:

- Mandatory protection of privacy of third party who is natural person
- Mandatory protection of commercial information of third party
- Mandatory protection of certain confidential information of third party
- Mandatory protection of safety of individuals, and protection of property
- Mandatory protection of records privileged from production in legal proceedings
- Commercial information of private body
- Mandatory protection of research information of third party
- Protection of research information of private body
- Mandatory disclosure in public interest (*Promotion of Access to Information Act*, 2000, p. 46-51)

Most of these are very similar to the exemptions laid out for public bodies, which is why they will not be discussed more in depth.

The South African government has created a list of exemptions that are detailed and specific. The exemptions are thorough and meticulous, making it appear more difficult for requests to be denied. According to Mendel,

The South African regime of exceptions is generally a good one, in the sense that it is fairly limited. The harm and public interest tests are not as strong as they might be, and there are a couple of apparently unnecessary exceptions. On the other hand, the exceptions are drafted narrowly in a clear attempt to ensure that only legitimately confidential information is in fact kept secret (Mendel, 2008, p. 99).

Mendel's statement that the harm and public interest tests are not as strong as they could be will be discussed further, when looking at cases that have been controversial in the fight for access to information. Overall, the South African government has provided the people with exemptions are clearly written out and defined, leaving the implementation ultimately in the hands of the information officers.

### PAIA Appeals Process

There are certain records that will not be disclosed to applicants, and those applicants may file an appeal if they feel one is called for. There are two levels of appeals – one to the public or private body and one to the courts (Mendel, 2008). An appeal against a public or private body is filed against the information officer of said public body. A third party can also file an internal appeal against the information officer to get a grant for access to the records (*Promotion of Access to Information Act*, 2008). There is no appeal to independent administrative bodies, and according to Mendel, this is a major shortcoming of the act “since court appeals are expensive and time consuming” (Mendel, 2008, p. 99).

The first step is to make an internal appeal, and if that appeal is rejected, the next step is to make a court appeal (Mendel, 2008). Both appeals must be submitted via address, email, or fax within 60 days of the decision being made, unless a third party notice is required, in which case the appeal must be made within 30 days. If the appeal is made after the allocated time, they can file a late appeal. If the information officer will not allow the late appeal, they must notify the appellant. The subject of the appeal must be clearly stated as well as the reason for the appeal. The appellant must specify whether they would like the decision of their appeal in more than just a written form, and if so, the specifics of that other type (*Promotion of Access to Information Act*, 2000).

Not all appeals require a fee, but some of them do. If the appeal requires a fee, that predetermined amount must be sent with the appeal. If a third party would be affected by the grant of access, they must let the information officer know within 21 days of notification that the request to access should not be granted (*Promotion of Access to Information Act*, 2000). Appeals to the court are the second step of the appellation process. If an appellant is still rejected from

getting record access after the initial appeal to the information officer, they can take their appeal to the court (*Promotion of Access to Information Act, 2000*).

### **Conclusion**

The South African Promotion of Access to Information Act is a very progressive right to information act, and this is evident in the strict list of exemptions, as well as the fact that access to records is a constitutional right. The exemptions are very meticulous, making it difficult for a refusal to be made. According to Mendel, implementation is not at its strongest. Later in this paper, criticisms of the act will be discussed. One of the reasons that implementation is not as strong as it could be is due to the reports that the information officers provide to the SAHRC. According to the SAHRC, the information implementation and compliance levels are low (*PAIA Annual Report 2011/2012*, n.d.). Despite the weak implementation, the PAIA is certainly a step towards an open, transparent government – much different than the secretive, closed-government of the apartheid era. South Africa has come a long way, and its government still has a ways to go.

## Chapter 5

### Criticisms of the PAIA and FOIA

#### Introduction

After discussing the formalities of both the U.S. Freedom of Information Act (FOIA) and the South African Promotion of Access to Information Act (PAIA), and learning about the principles that uphold a democratic nation, it is important to study how each act is currently being implemented. The study of newspaper and journal articles from noteworthy sources in both the United States and South Africa will provide examples of how and if the FOI acts in both countries are upholding democratic principles. Sources relied upon in regards to the PAIA are the *Mail & Guardian* and the *Sunday Times* (both notable newspapers in South Africa). Sources relied upon in regards to the FOIA include the *New York Times*, the *Washington Post*, and scholarly journal *Quill*. These references will provide insight on how journalists and scholars view the current implementation of their countries FOI laws. The South African Human Rights Commission (SAHRC) report on the 2011/2012 year in regards to PAIA and the National Archives and Records Administration (NARA) report on the 2012 year in regards to the FOIA will be studied for data and information regarding implementation and statistics.

Agencies from both South Africa and the United States rely on the exemptions described in the FOI laws to prevent disclosure of information. Journalists and other researchers reference many of these exemptions in their criticisms of the laws. Below is a chart, listing each countries access laws and their respective exemptions:

United States FOIA exemptions	South Africa PAIA exemptions
<ol style="list-style-type: none"> <li>1. "Information that is classified to protect national security. The material must be properly classified under an Executive Order.</li> <li>2. Information related solely to the internal personnel rules and practices of an agency</li> <li>3. Information that is prohibited from disclosure by another federal law</li> <li>4. Information that concerns business trade secrets or other confidential commercial or financial information.</li> <li>5. Information that concerns communications within or between agencies which are protected by legal privileges</li> <li>6. Information that, if disclosed, would invade another individual's personal privacy.</li> <li>7. Information compiled for law enforcement purposes if one of the following harms would occur. Law enforcement information is exempt if it: <ol style="list-style-type: none"> <li>a. Could reasonably be expected to interfere with enforcement proceedings</li> <li>b. Would deprive a person of a right to a fair trial or an impartial adjudication</li> <li>c. Could reasonably be expected to constitute an unwarranted invasion of personal privacy</li> <li>d. Could reasonably be expected to disclose the identity of a confidential source</li> <li>e. Would disclose techniques and procedures for law enforcement investigations or prosecutions</li> <li>f. Could reasonably be expected to endanger the life or physical safety of any individual</li> </ol> </li> <li>8. Information that concerns the supervision of financial institutions</li> <li>9. Geological information on wells" ("What Are Exemptions?," 2011)</li> </ol>	<ol style="list-style-type: none"> <li>1. "Mandatory protection of privacy of third party who is natural person</li> <li>2. Mandatory protection of certain records of South African Revenue Service</li> <li>3. Mandatory protection of commercial information of third party</li> <li>4. Mandatory protection of certain confidential information, and protection of certain other confidential information, of third party</li> <li>5. Mandatory protection of safety of individuals, and protection of property</li> <li>6. Mandatory protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings</li> <li>7. Mandatory protection of records privileged from production in legal proceedings</li> <li>8. Defence, security and international relations of Republic</li> <li>9. Economic interests and financial welfare of Republic and commercial activities of public bodies</li> <li>10. Mandatory protection of research information of third party, and protection of research information of public body</li> <li>11. Operations of public bodies</li> <li>12. Manifestly frivolous or vexatious requests, or substantial and unreasonable diversion of resources</li> <li>13. Mandatory disclosure in public interest" (<i>Promotion of Access to Information Act</i>, 2000, p. 3).</li> </ol>

While the FOIA only has nine established exemptions, four less than South Africa's thirteen, the exemptions basically cover the same material. Both countries have a law enforcement, national security, and personal privacy exemption. Operations of public bodies, as well as financial and commercial information is also protected in both the FOIA and the PAIA. The differences lie in the protection of geological information, specifically on wells, stated in the FOIA, as well as the frivolous and unreasonable request exemption and mandatory disclosure in public interest exemption stated in the PAIA.

### **FOIA Implementation Overview**

The National Archives and Records Administration (NARA) is in charge of collecting information from public bodies regarding FOIA requests and submissions. This information is then compiled into annual reports.

Overall, there were 13,746 requests processed in the 2012 fiscal year. 1,173 were granted in full, 348 were granted in part or refused in part, and 29 were refused in full based on one of the nine exemptions. There were thousands of other requests that were full denials for other reasons, such as requests withdrawn, the request being a duplicate, or for a fee-related issue. For example, the largest portion of this section was under the headline of "no records," and there were 11,314 that were denied for this reason (*Freedom of Information Act (FOIA) Report, 2012*).

Breaking down the exemptions, exemption 6 (personal privacy) was relied upon 180 times (the most out of any exemption). However, exemption 1 (national defense and foreign relations) was a close second, being relied upon 178 times. Although exemption 7 (law enforcement) was relied upon in total 214 times, it was broken up into each sub-exemption, with exemption 7(C) having the most at 83 (*Freedom of Information Act (FOIA) Report, 2012*).

The median number of days for a simple request to be responded to was 6, which falls well under the deadline of 20 days. However, the average number of days was 57.5, well outside of the range, and the highest number of days was 3,509 (well over 9 years). For complex requests, the median number of days was 357 and the average number of days was 917, with the highest number of days being 4,932. There was an expedited processing category, with the highest number of requests being only 22 days, barely exceeding the mandatory 20-day limit. At the end of the 2012 fiscal year, there were 7,610 backlogged requests, and 5 backlogged appeals (*Freedom of Information Act (FOIA) Report, 2012*).

One of the actions that the NARA claims that they are taking to improve the FOIA and FOIA regulation is staffing the National Declassification Center (NDC). “This initiative will, over time, improve our ability to facilitate the review of classified records among our archival holdings that have been requested under the FOIA, thereby, reducing our processing times for such requests” (*Freedom of Information Act (FOIA) Report, 2012, p. 25*). Another initiative the NARA is taking to assert that the FOIA is being implemented in the best way possible is that the NARA is taking records into their archival holdings sooner than 30 years, which is the typical time allocation for records to be placed in their archives.

These ‘younger’ records are consequently accessioned with more restrictions imposed by the originating agency, requiring access under the FOIA and greater consultation with the original agencies prior to opening. This has increased both the number of FOIA requests and the time needed to respond, as NARA waits for the completion of the referral process” (*Freedom of Information Act (FOIA) Report, 2012, p. 26*).

Hopefully, with the NARA staffing the NDC and adding records to their archives sooner rather than later, the process for getting records that are typically more difficult to maintain will be easier, thus allowing a more open and transparent government.

The Obama administration has been harshly criticized for their lack of follow-through in regards to promising a more transparent government. That being said, they are making strides to promote openness. Through the foundation of the Open Government initiative and the

FOIAonline, established by the Environmental Protection Agency, the notion of transparency is being pressed. FOIAonline works with six agencies to ensure that records are being published online, thus making processing requests easier because all of their documents are online in searchable formats (Hackett, 2013). However, when these agencies are deciding what they publish online, what is being withheld? This is allowing the agency to determine what gets made public and searchable and what does not.

The Obama administration is taking positive initiatives in regards to the FOIA. According to the Center for Effective Government, the Obama administration has answered more FOIA requests than any previous administration and was also the first to release White House visitor records (Hicks, 2013).

One of the major issues in regards to the FOIA that journalists are noting nationwide is the overall response time to FOIA requests (*Freedom of Information Act (FOIA) Report*, 2012). “While NARA has made strides to enhance performance on the processing of FOIA requests, we are still faced with significant challenges” (*Freedom of Information Act (FOIA) Report*, 2012, p. 25). One of the challenges listed is in regards to budgeting and staffing. However, two other issues are in relation to the Official Military Personnel and the Presidential Libraries. Requests from the Official Military Personnel files take a long time to be processed, and getting records from the Presidential Libraries is a lengthy task, because many of the documents are subject to the Presidential Records Act as well as the FOIA. Another negative is the lack of authority that NARA has to declassify information (*Freedom of Information Act (FOIA) Report*, 2012).

It takes investigative journalists a vast amount of time to find out if their request for information is approved or denied. In regards to the FOIA, “The law can be a powerful tool for the public and the news media to discover all manner of mal-, mis- and nonfeasance by government agencies and officials. But using it can be a cumbersome and time-consuming process - errant officials may be long gone from government by the time you get the documents”

(Kamal, 2013). Kamal cited the example of co-worker Craig Whitlock's request for an inspector general (IG) report that took seven months to obtain. A Department of Defense IG spokesperson commented that for matters of privacy, the document had to be seriously studied before being released to the public. "But, FOIA experts acknowledge, these are subjective balancing acts between privacy and the public's right to know, and the conclusions vary from one inspector general to another" (Kamal, 2013). It seems that here, the issue lies not at the fact that the document took 7 months to obtain – rather that there is inconsistency in the balancing of FOIA exemptions and allowing access to information.

The extreme backlogging of requests is another prevalent issue concerning journalists and hindering investigative journalism. On Jan. 4<sup>th</sup> of 2012, the *New York Times* finally heard back about a request lodged in June of 1997. A 14-year wait for a response regarding access to information does not fit the 20-day mandated response time. "When President Obama took office, he declared that the federal government should operate under the presumption that documents should be released, unless there was a reason not to do so. The Bush administration had tightened up on releases after the Sept. 11 attacks. But the delays are still extensive" (Wald, 2012). Editorial article from May 25<sup>th</sup>, 2012, later goes on to vent further about the Obama administration fueling the age of secrecy. This editorial focuses on the torturing of detainees by the United States, and the governments actions to cover up the activity. "The Obama administration has added to its string of victories in a tawdry pursuit -- making overly expansive claims of secrecy and executive power to deny full disclosure of torture and other abuses of prisoners committed during the George W. Bush administration" ("A Court Covers Up," 2012).

An age of secrecy was established after September 11<sup>th</sup>, 2001. Kara Hackett, writer for *Quill* journal, focused her article, "There goes the sun," on the transition of openness from the Bush administration to the Obama administration. The Bush administration established a new era of withholding information that was not prominent in the United States for years. "In the years

after the 9/11 attacks, the government overclassified an estimated 50 to 90 percent of classified information and used more than 100 arbitrary markings to hide unclassified information from public view” (Hackett, 2013, p. 19). The events of the past few years have showed minimal change.

During Obama’s 2008 campaign, he promised a new level of transparency by protecting whistle-blowers and promoting government-wide openness, even if the release of documents would embarrass government officials. However, “this standard has reporters and open government groups asking for answers when Obama’s administration fails to deliver – or worse, resorts to prosecuting federal whistle-blowers for revealing government wrongdoing” (Hackett, 2013, p. 19). It seems as though the Obama administration is promising one thing while enforcing another. “But at the same time Obama is streamlining ‘sensitive but unclassified’ markings, he is overseeing the harshest prosecution of unauthorized leaks of information in U.S. history” (Hackett, 2013, p. 20).

“The Obama administration has used the Espionage Act of 1917 seven times, more than all previous presidents combines, to prosecute federal employees who expose government waste, fraud and abuse” (Hackett, 2013, p. 20). Journalists around the United States are noticing that the Obama administration is falling through on their pledge, especially in regards to the promised protection of whistleblowers. Hackett’s idea to ‘strike while the iron is hot’ is an initiative to fix the problem of government secrecy *now* – to hopefully achieve greater openness before the concealment of records becomes an even larger problem.

Co-op contributors for the *New York Times*, also serving as members of the President’s Review Group on Intelligence and Communications Technologies, recognize that government intrusion on personal privacy is an issue of growing concern for many citizens during this digital age. They concluded that the government needs to be more open in regards to issues concerning the National Security Administrations’ (NSAs) tapping of phone and Internet lines.

We need more transparency in the system. Congress should enact legislation to authorize telephone, Internet and other providers to disclose to the public general information about orders they receive directing them to provide information to the government. Moreover, the government itself should disclose, on a regular basis, similar general information about the orders it has issued in programs whose existence is unclassified (Clarke, Morell, Stone, Sunstein, & Swire, 2013).

They later go on to argue that a strict balance between privacy and intrusion needs to be met that will allow issues of national security and concern to be investigated “while erecting strong foundations to safeguard individual privacy, dignity and liberty as well” (Clarke, Morell, Stone, Sunstein, & Swire, 2013).

Another issue in the current implementation of U.S. FOIA is the increase in redacted information. “The Center for Effective Government said Wednesday [of Sunshine Week] that the administration's rate of response to FOIA requests had improved in 2012 but that the percentage of replies with redacted information had grown” (Hicks, 2013). Even though fewer requests may be denied, there is still information that is being redacted before the disclosing of information. There is also a reliance on the national security exemption that protects much information from being released, as well as an inconsistency in implementation among public bodies. All of these factors are attributing to the negative view that scholars and citizens are taking on the current implementation of the FOIA (Hicks, 2013).

### **PAIA Implementation Overview**

As aforementioned, the SAHRC is in charge of collecting reports from public and private bodies in terms of the PAIA regulations. Deputy chairperson for the SAHRC commented in the 2011/2012 PAIA report about the need for press freedom and access to information. “SA’s Constitution enshrines the right of access to information. It is a right that is integral to all other rights – civil, political, economic, social and cultural. It is integral to our conception of

democracy (*PAIA Annual Report 2011/2012*, n.d., p. 2). The SAHRC provides reports on the collection of access requests, approvals and denials. They publish the information in a bi-annual report. The report also discusses the role of the media in regards to the PAIA. They focus on how important two newspapers, *the Sunday Times* and the *Mail and Guardian*, are in relaying information about compliance with PAIA to public bodies (*PAIA Annual Report 2011/2012*, n.d.).

According to the SAHRC 2011/2012 report, nationally, there were 24,857 requests for access received for the 2011/2012 year. 20,383 of those were granted in full, 721 were granted in the public interest, and 164 were refused in full. 113 of those refusals were from the South African Police Service (which was also the department that received the highest number of requests). 165 requests were refused partially (*PAIA Annual Report 2011/2012*, n.d.). There were not any applications of appeal for this time period in regards to a refusal of a grant to access. Most people who are denied access cannot afford to litigate – those that can are typically media and individuals with money, and they attain a private attorney for the litigation (*PAIA Annual Report 2011/2012*, n.d.).

One great example of how the PAIA is being successful is in the 809 admissions to requests as a result of the information being of public interest. “These high volumes are a positive reflection on public institutions’ openness and responsiveness” (*PAIA Annual Report 2011/2012*, n.d., p. 31). 695 of the requests to the South African Police Services were on a ground for refusal, but were granted under the basis of public interest (*PAIA Annual Report 2011/2012*, n.d.) The public interest exemption is a unique trait to South Africa’s access law, and it has been proving quite successful. Overall, there has also been an increase in the usage of the PAIA, which is significant to note (*PAIA Annual Report 2011/2012*, n.d., p. 31).

Although there has been an increase in the usage of the PAIA, more awareness of the PAIA is necessary in order for the act to continue to be successful. “Instances where certain departments report on nil return out weight the number of institutions that accurately recorded

requests received” (*PAIA Annual Report 2011/2012*, n.d., p. 31). The departments in question are service delivery institutions – and considering the fact that there were many protests across the country in regards to these institutions, the submission of a report stating no requests were made is questionable. “Analysis of these reports concludes that public bodies need to invest in mechanisms to ensure that PAIA requests are properly recorded and responded to accordingly” (*PAIA Annual Report 2011/2012*, n.d., p. 31).

Their SAHRC’s conclusion for the 2011/2012 report is as follows:

The overall findings reveal that implementation is generally low across all tiers of government. Reasons for low implementation and compliance levels is attributable to a lack of awareness, adequate resources and the lack of buy-in from executive management of public institutions to ensure that PAIA is implemented accordingly (*PAIA Annual Report 2011/2012*, n.d., p. 25).

More awareness of the PAIA and its rules and regulations is not just necessary for the public bodies and for citizens, but also for the DIOs (deputy information officers) in charge of handling requests and submitting reports to the SAHRC. Many DIOs don’t understand the litigation and therefore do not submit reports that contain accurate information (*PAIA Annual Report 2011/2012*, n.d.). In order for the SAHRC to report accurately, there must be compliance with the DIOs in recording truthful information.

The SAHRC noted another issue in regards to the PAIA implementation as a lack of government preparedness and a defiance to execute the law:

Government readiness to meet the demand for information remains consistently low... Bureaucratic resistance to implement access to information rights includes the failure to provide manuals (to ensure people-friendly access to the right); difficult requirements for processing information requests and the ineffective PAIA enforcement mechanisms (to ensure compliance by public and private bodies and mandatory obligations in PAIA) (*PAIA Annual Report 2011/2012*, n.d., p. 3).

A huge threat to the openness and transparency of the government of South Africa is the Protection of State Information Bill, which has only to be signed by President Zuma before being put into effect. This bill was proposed, and amended,

To provide for the protection of sensitive state information; to provide for a system of classification, reclassification and declassification of state information; to provide for the protection of certain valuable state information against alteration, destruction or loss or unlawful disclosure; to regulate the manner in which state information may be protected... (*Protection of State Information Bill*, 2013).

Much of the current controversy regarding FOI is in relation to this bill. Initially, this bill was produced as the Protection of Information Bill, but was amended in 2013, and further renamed as the Protection of State Information Bill.

For the first time ever, South Africa is not ranked in the top 50 nations for having press freedom. “Investigative journalism is threatened by the Protection of State Information Bill” (“Press Freedom Index 2013,” 2013). Journalists, commentators, and analysts are concerned about how this will affect their access to information, and, ultimately, government transparency. When the state begins regulating what information the public is granted access to, how can citizens be informed of the actions of their government? How can citizens hold their government accountable and responsible for the state of the nation?

A section of the *PAIA Annual Report* for 2011/2012 is dedicated to the Protection of State Information Bill (referred to by many journalists and critics as the Secrecy Bill). The SAHRC made submissions to governing bodies regarding the Secrecy Bill, in hopes of protecting the public’s right of access to information. “The submissions made by the Commission raised concerns on the sanctions imposed by the Bill, the impact of the Bill on research and institutions of learning, the classification regime and the public interest” (*PAIA Annual Report 2011/2012*, n.d., p.15). The bill is causing imminent threat to the amount of access the public can have to information, ultimately working against the PAIA. As previously stated, investigative journalism is at great risk due to the Secrecy Bill. If the Bill gets passed, much information that would otherwise be disclosed will be held classified. Information previously available could be *reclassified*. It is understandable that some state held information be held classified, for example, under the exemptions laid out in the PAIA (for example, reasons concerning national security or

personal privacy). However, the Secrecy Bill would only expand on the exemptions and further allow more information to be withheld.

The SAHRC notices one weakness of the Secrecy Bill as the factor that there are “broad definitives” surrounding the classification of information outlined in the Bill (*PAIA Annual Report 2011/2012*, n.d.). The PAIA was an attempt to establish just the opposite of that – 13 clear, precise exemptions for when information should and should not be disclosed. Because of this reason, and others (such as the infringement on the PAIA and the lack of accounting for public interest), the SAHRC deems the Bill as “unconstitutional” (*PAIA Annual Report 2011/2012*, n.d., p. 16).

Despite our Constitution, a culture of secrecy is still deeply entrenched, as the response to anti-corruption whistleblowers has shown. Institutional secrecy has to be tackled if the right of access to information is to be used as a mechanism to combat corruption in society and to make government more socially responsive. The apartheid state frustrated efforts at obtaining information on people who were detained, tortured and killed. Its secretive state machinery enabled the perpetuation of daily violence, exploitation, oppression and discrimination. The Protection of State Information Bill thus has dangerous potential to erode the supremacy of PAIA (*PAIA Annual Report 2011/2012*, n.d., p. 2).

The initial bill brought about many protests from media and informed citizens alike.

Writers Denise Williams and Thabo Mokone, for the South African *Sunday Times*, wrote in 2012 about the proposed bill being sent back to the National Assembly for revisions. “In an apparent bid to quell fears that the bill seeks to protect corrupt officials more than whistle-blowers and journalists, the ANC agreed to relax a number of clauses” (Williams & Mokone, 2012). One of those issues was that part of the bill was presumed to protect corrupt officials rather than whistle-blowers who obtained classified information. Another one of the issues was in regards to a lack of protection for citizens either possessing or publishing classified information. The ANC agreed to relax its terms in regards to whistle-blowers, but not in regards to the latter issue of protection for publishers.

Another controversial part of the original Secrecy Bill was that it demanded that this new bill would overshadow any other bill, including the PAIA. The public outcry regarding this matter was so huge that the ANC took it out as part of the most recently amended bill (Williams & Mokone, 2012).

Although Zuma sent the bill back to parliament to make revisions, writer for the *Sunday Times*, Sam Mkokeli, remarks that Zuma's rejection of the bill should not be celebrated. "President Jacob Zuma sent the disputed secrecy bill back to parliament on Thursday not so much to review its draconian elements as to correct its spelling and grammar, insiders said yesterday" (Mkokeli, 2013)

There are other problems facing South Africa and the PAIA besides the Secrecy Bill. There were multiple cases regarding PAIA that were of public interest in 2013. Most noteworthy were the cases involving the costs of President Zuma's home in Nkandla and the 2002 election in Zimbabwe. "It is by no means clear, for instance, that much of the reportage on the Nkandla upgrades - based in part on classified documents - would have been possible without journalists and editors facing potential jail sentences. And this would apply both to the media that first broke the story and to all repetitions, including on social media" (Milo, 2014). Journalists and publishers are facing the threats and consequences of jail sentencing for releasing information based on records that could be considered classified. The threat of jail sentencing is another concern that will only hinder the level of press freedom in South Africa.

Now, more than ever, is a time to rebuild the FOI law. Looking back on fundamental freedoms, commenter/analyst for the *Mail & Guardian*, Sandile Ngcobo, believes the government of South Africa needs to reflect on the nations past and see if they have maintained the democratic principles that were envisioned when creating the constitution 20 years ago. 2013 also marked the 100<sup>th</sup> anniversary of the Native Land Act of 1913, which was a huge step towards segregating the blacks. With these two pertinent historical anniversaries, Ngcobo made the point

that people should be able to publicly debate the political and moral issues facing South Africa *today*. “Our ability to debate these issues constructively and devise solutions to these and other pressing issues facing our constitutional democracy depends crucially on our ability to receive accurate information pertaining to these issues” (Ngcobo, 2013).

“Access to information can be an essential tool in combating corruption and other maladministration practices. Secrecy is a fertile ground for inefficiency, wastefulness and corruption” (Ngcobo, 2013). If the Protection of State Information Bill is enacted, what stands between the people being able to question their government and fight for the fundamental rights they should have as citizens of a democratic nation? Will an age of dishonesty and secrecy yet again sweep the nation of South Africa?

## **Chapter 6**

### **Conclusions**

As this thesis attempted to demonstrate, the need for access to information is a fundamental human right. Therefore, Freedom of Information (FOI) laws have been proliferating since the mid 20<sup>th</sup> century from roughly 14 to more than 90 ("Right to Information Laws and Implementation," 2013). Since its enactment, the U.S. Freedom of Information Act (FOIA) has served as a model for FOI and RTI (Right to Information) laws around the world.

Indeed, South Africa's Promotion of Access to Information Act (PAIA) is embodied in the nation's constitution, and provides the general public the right to gain access to government held information and even information from private entities that do business with government. Because of South Africa's distinctive journey to democracy and adoption of an FOI law, it stands in sharp relief to many comparable laws around the world, making it worthy of close examination.

The PAIA is, as many nations, modeled after the FOIA, and thus they share many structural similarities. However, there are also a number of differences between the two laws. The problems come down to current implementation, and also the different challenges facing the two nations in regards to transparency, such as the proposed implementation of the Secrecy Bill in South Africa and the challenges the United States is facing in regards to a lack of protection for whistleblowers. The Secrecy Bill poses one of the biggest threats to the PAIA since the establishment of the law in 2000. The classification and reclassification of information as laid out in the Secrecy Bill will only hinder the access granted through the PAIA. Both the PAIA and the FOIA are facing setbacks in regards to a lack of protection for whistleblowers and a backlogging of requests. In the United States specifically, instead of the government protecting

whistleblowers, federal agencies attempt to conceal their activities, as this thesis sought to point out.

The purpose of this thesis was to analyze FOI, in general, focusing in particular on the laws embodied in the democratic principles that undergird the republics of South Africa and the United States. This research project examined records collected by oversight bodies such as the South African Human Rights Commission (SAHRC) and the National Archives and Records Administration (NARA), along with critiques by journalists, historians, and other scholars, as well as members of the general public who want to know what their government is up to. Furthermore, this study attempted to determine the strengths, weaknesses, and challenges each country faces in terms of government transparency.

The PAIA and the FOIA, while both promoting open and transparent governments, are facing great challenges in regards to access to information. South Africa, overcoming apartheid just 20 years ago, needs a firmly established FOI law to ensure that citizens are able to hold their government responsible and accountable for their actions. And, after an age of secrecy in the United States as a result of 9/11, Obama promised a much-needed reform in the FOI regime – but how much change has there really been?

Both South Africa and the United States have a lack of protection for whistleblowers and an extreme backlogging of FOI requests. Specific to South Africa, the Secrecy Bill is a major threat to transparency, and, ultimately, press freedom. If President Zuma signs the bill into effect, government agencies will have the opportunity to classify and reclassify information, which will ultimately damper the openness of government established through the PAIA. If the government of South Africa wishes to further establish transparency and openness, than the Secrecy Bill needs to be reconsidered before being signed by President Zuma. When investigative journalism is put at risk, than the entirety of openness is disheveled.

The grand promise from the Obama administration for a more open government during his time in office is under serious criticism – a lack of promised protection for whistleblowers and an age of covering up government officials’ activities is underway (Hackett, 2013). What should be a period of government openness is being veiled by a time of intrusion on citizen’s privacy, and secrecy within the democratically elected officials and federal agencies (Clarke, Morell, Stone, Sunstein, & Swire, 2013).

Both South Africa and the United States need to reconsider a plan for promoting a quicker response time to requests – the thousands of requests that are not granted within the initial twenty or thirty days (United States and South Africa, respectively) is too extensive.

Both countries received a similar number of requests for information (24,857 for 2011 and 2012 in South Africa and 13,746 for 2012 in the United States). However, what is interesting to note is that in South Africa, 20,383 were granted in full (over 80%), and in the United States, only 1,173 were granted in full (less than 10%).

	United States (2012)	South Africa (2011-2012)
Requests made	13,746	24,857
Requests granted in full	1,173	20,383
Requests refused in part	348	165
Requests refused in full	29	164

The United States should adopt a public interest test, much like South Africa has, which would promote a greater disclosure of information. Although many records are more likely to be released in the United States for the concern of public interest, it is not expressly written into the law, as it is in South Africa. In South Africa, the exemption that information must be released if it is in the best interest of the public was utilized for the release of hundreds of requests that otherwise would not have been disclosed. Should the United States adopt this as part of the law, it

would not only promote greater government transparency, but also help to promote the release of information and the protection of whistleblowers, if what they are releasing is for the public's best interest.

Another step that needs to be taken by both the South African and U.S. government is the education of citizens and the information officers in charge of responding to requests. Citizens need to be aware of the proper procedures for requesting records, and they also need to be aware of when their requests are not being responded to properly, and the necessary steps to take to file for appeals. For information officers and request responders, there needs to be a greater push for sticking within the designated time allocations. There also needs to be improved education for information officers on how to go about recording the records that need to be submitted to both the SAHRC and the NARA. Both the SAHRC and the NARA recognize that there are faults in the recording system, and they need to address these issues with information officers to promote better implementation.

It is absolutely imperative that the news media and wealthy corporations act as agents for the people, especially in cases of nondisclosure. There is a burden of responsibility for the media to provide oversight, and to fight challenges in courts for the right of access to information. Justice William J. Brennan, in regards to libel case *New York Times Co. v. Sullivan*, states, "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" (376 U.S. 254, 1964). How can we have "uninhibited, robust, and wide-open" debate on public issues when we don't have access to the necessary information? News media *especially* need to act as the agent representing the people, providing them with the information that will educate them on what their government is up to.

Brennan, as well as U.S. Justice Sandra Day O'Connor, recognizes that disclosure is imperative. Although there are exemptions, these exemptions are in place only to protect

information of the utmost classification. In FOIA court case *U.S. Air Force v. Rose* (1976) – a case over the nondisclosure of information regarding Air Force cadets cheating – Justice Brennan stated that although exemptions are established in the FOIA, that “do[es] not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the act” (425 U.S. 352, 361, 1976 (quoting S. Rep. 89-813, at 3, 1965)). O’Connor, in one of the first FOIA law enforcement privacy case, agrees that disclosure, rather than secrecy, is necessary in order for the people to hold their governments accountable. “It scarcely needs to be repeated that Congress's objective in requiring such disclosure was to ‘ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed’” (*FBI v. Abramson*, 456 U.S. 615, 1982 (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 1978)).

The issues I have touched upon in this thesis in regards to the challenges facing both the FOIA and PAIA must continue to be researched and analyzed. Scholars, journalists and historians must criticize and speak up for their right of access. If these informed citizens do not continuously evaluate the actions of government in regard for their right of access to information, over time, this established democratic right could face a diminution. South Africa overcame a time of immeasurable segregation and civil unrest. If the current struggle over fostering and maintaining transparency in South Africa and the United States persists, one of the fundamental pillars of democracy may crumble. Continued research on open government is necessary to help ensure the power of transparency to prevent the rise of tyranny.

## BIBLIOGRAPHY

- About SA - History. (2014). Retrieved from <http://www.gov.za/aboutsa/history.htm#Apartheid>
- Access to Information. (2014, January 10). Retrieved February 02, 2014, from [http://www.services.gov.za/services/content/Home/ServicesForPeople/informationfromgovernment/accesstoinformation/en\\_ZA](http://www.services.gov.za/services/content/Home/ServicesForPeople/informationfromgovernment/accesstoinformation/en_ZA)
- Administrative Procedures Act, 5 U.S.C. § 1002 (1946)
- Baker, C. E. (2009). Viewpoint Diversity and Media Ownership. *Federal Communications Law Journal*, 61, 651-665. Retrieved January 21, 2014, from [http://heinonline.org.ezaccess.libraries.psu.edu/HOL/Page?handle=hein.journals/fedcom61&div=31&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults&terms=viewpoint|diversity|and|media|ownership&type=matchall](http://heinonline.org.ezaccess.libraries.psu.edu/HOL/Page?handle=hein.journals/fedcom61&div=31&collection=journals&set_as_cursor=0&men_tab=srchresults&terms=viewpoint|diversity|and|media|ownership&type=matchall)
- Banisar, D. (2006). South Africa. In *Freedom of Information around the world 2006: A global survey of access to government records laws* (pp. 136-139). Washington, D.C.: National Security Archive, George Washington University. Retrieved from [http://www.freedominfo.org/documents/global\\_survey2006.pdf](http://www.freedominfo.org/documents/global_survey2006.pdf)
- Baron de Montesquieu, C. (1777). The Spirit of Laws. In *The Complete Works of M. de Montesquieu* (Vol. 1). London: T. Evans. Retrieved January 27, 2014, from [http://oll.libertyfund.org/index.php?option=com\\_staticxt&staticfile=show.php%3Ftitle=837&layout=html#chapter\\_71122](http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=837&layout=html#chapter_71122)
- Beck, R. B. (2005). Apartheid in South Africa. In W. H. McNeill, J. H. Bentley, & D. Christian (Eds.), *Berkshire Encyclopedia of World History* (Vol. 1, pp. 99-103). Great Barrington, MA: Berkshire Publishing. Retrieved January 29, 2014, from Gale Virtual Reference Library.

- Benn, S. I. (2006). Democracy. In D. M. Borchert (Ed.), *Encyclopedia of Philosophy* (2nd ed., Vol. 2, pp. 699-703). Detroit: Macmillan Reference USA. Retrieved November 15, 2013, from  
<http://go.galegroup.com/ps/i.do?id=GALE%7CCX3446800483&v=2.1&u=psucic&it=r&p=GVRL&sw=w&asid=5edb478de296cfac839d473c503093bd>
- Bill of Rights. (1791). Retrieved March 02, 2014, from  
[http://www.archives.gov/exhibits/charters/bill\\_of\\_rights.html](http://www.archives.gov/exhibits/charters/bill_of_rights.html)
- Bok, H. (Ed.). (2003, July 18). Baron de Montesquieu, Charles-Louis de Secondat. Retrieved January 27, 2014, from <http://plato.stanford.edu/entries/montesquieu/#4>
- Bugnitz, T. (2008). Freedom of Information Act of 1966 (FOIA). In R. W. Kolb (Ed.), *Encyclopedia of Business Ethics and Society* (Vol. 2, pp. 944-945). Thousand Oaks, CA: SAGE Publications. Retrieved September 3, 2013, from  
<http://go.galegroup.com/ps/i.do?id=GALE%7CCX2660400363&v=2.1&u=psucic&it=r&p=GVRL&sw=w>
- Civil Rights Division Educational Opportunities Discrimination. (n.d.). Retrieved January 11, 2014, from <http://www.justice.gov/crt/about/edu/types.php>
- Clark, T. C. (2001). 1947 Attorney General's Manual on the Administrative Procedure Act. Retrieved from <http://www.law.fsu.edu/library/admin/1947ii.html>
- Clarke, R. A., Morell, M. J., Stone, G. R., Sunstein, C. R., & Swire, P. P. (2013, December 19). Protecting citizens, and their privacy. Retrieved from  
[http://www.nytimes.com/2013/12/20/opinion/protecting-citizens-and-their-privacy.html?\\_r=0](http://www.nytimes.com/2013/12/20/opinion/protecting-citizens-and-their-privacy.html?_r=0)
- Constitution of the republic of South Africa-108 at 32 (1996).
- Constitution of the United States. (1787). Retrieved from  
<http://www.archives.gov/exhibits/charters/constitution.html>

- A court covers up [Editorial]. (2012, May 25). *New York Times*, p. 30.
- Cross, H. L. (1953). *The people's right to know: Legal access to public records and proceedings*.  
Morningside Heights, NY: Columbia University Press.
- Dalberg-Acton, J. (1906). Letter 24 [Letter written January 23, 1861]. In *Lord Acton and his circle*. Abbot Francis Aidan Gasquet.
- De Jonge vs. Oregon. 299 U.S. 353; 57 S. Ct. 255; 81 L. Ed. 278 (January 4, 1937), 1937 U.S. LEXIS 1135.
- The Declaration of Independence: A Transcription. (n.d.). Retrieved from  
[http://www.archives.gov/exhibits/charters/declaration\\_transcript.html](http://www.archives.gov/exhibits/charters/declaration_transcript.html)
- Democracy, Representative and Participatory. (2008). In W. A. Darity, Jr. (Ed.), *International Encyclopedia of the Social Sciences* (2nd ed., Vol. 2, pp. 283-285). Detroit: Macmillan Reference USA. Retrieved March 2, 2014, from Gale Virtual Reference Library.
- Dienes, C. T., Levine, L., & Lind, R. C. (1997). Access to Federal Government Records. In *Newsgathering and the Law* (2nd ed., pp. 417-459). Charlottesville: Michie.
- Edles, G., Berg, R., & Klitzman, S. (2004). Government in the Sunshine Act (1976). In B. K. Landsberg (Ed.), *Major Acts of Congress* (Vol. 2, pp. 143-145). New York: Macmillan Reference USA. Retrieved March 3, 2014, from Gale Virtual Reference Library.
- Exec. Order No. 13292, 3 C.F.R. (2003).
- F. (2011, February). What are exemptions? Retrieved from  
<http://www.foia.gov/faq.html#exemptions>
- FBI v. Abramson 456 U.S. 615 (May 24, 1982), 1982 U.S. LexisNexis Academic 109.
- The federal FOIA ombudsman. (n.d.). Retrieved from  
<https://ogis.archives.gov/?p=//ogis/index.html>
- Federalism. (2008). In W. A. Darity, Jr. (Ed.), *International Encyclopedia of the Social Sciences* (2nd ed., Vol. 3, pp. 113-115). Detroit: Macmillan Reference USA. 113-115. *Gale*

*Virtual Reference Library*. Retrieved January 8, 2014, from Gale Virtual Reference Library.

Freedom of Information Act. (2008). In W. A. Darity, Jr. (Ed.), *International Encyclopedia of the Social Sciences* (2nd ed., Vol. 3, p. 201). Detroit: Macmillan Reference USA. Retrieved September 2, 2013, from <http://go.galegroup.com/ps/i.do?id=GALE%7CCX3045300861&v=2.1&u=psucic&it=r&p=GVRL&sw=w>

Freedom of Information Act, 5 U.S.C. Sec. 552 (1996)

*Freedom of Information Act (FOIA) Report* (Rep.). (2012). National Archives.

Friend, C. (n.d.). Social Contract Theory. Retrieved January 18, 2014, from <http://www.iep.utm.edu/soc-cont/>

Frohan, B. P. (2011). Lawless America: What happened to the rule of law. *Humanitas*, 24(1/2), 5-27. Retrieved from <http://web.a.ebscohost.com.ezaccess.libraries.psu.edu/>

Hackett, K. (2013). There goes the sun. *Quill*, 101(5), 16-23. Retrieved February 24, 2014, from <http://web.b.ebscohost.com.ezaccess.libraries.psu.edu/ehost/pdfviewer/pdfviewer?sid=97047158-7b75-4f97-8d66-3d210966679d%40sessionmgr198&vid=4&hid=119>

Hall, K. L. (1992). Due process, procedural. In *The oxford companion to the Supreme Court* (pp. 236-237). New York: Oxford University Press.

Hall, K. L. (1992). Time, place, and manner rule. In *The oxford companion to the supreme court* (pp. 874-875). New York: Oxford University Press.

Halstuk, M. E., & Chamberlin, B. F. (2006). The Freedom of Information Act 1966–2006: A retrospective on the rise of privacy protection over the public interest in knowing what the government's up to. *Communication Law and Policy*, 11(4), 511-564.

- Halstuk, M. E., & Chamberlin, B. F. (spring 2001). Open Government in the Digital Age: The Legislative History of How Congress Established a Right of Access to Electronic Information. *Journalism and Mass Communication Quarterly*, 78(1), 45-64.
- Hamilton, A. (n.d.). Federalist no. 9. In *The independent journal* (The Federalist Papers). Retrieved from <http://thomas.loc.gov/home/histdox/fedpapers.html>
- Hudson, D. L. (n.d.). First Amendment Center. Retrieved January 08, 2014, from <http://www.firstamendmentcenter.org/assembly-overview>
- Kommers, D. (2000). Regulatory Agencies. In L. W. Levy & K. L. Karst (Eds.), *Encyclopedia of the American Constitution* (2nd ed., Vol. 5, pp. 2147-2149). Detroit: Macmillan Reference USA. Retrieved January 27, 2014, from Gale Virtual Reference Library.
- Kumbula, T. (2003). South Africa. In A. C. Quick (Ed.), *World Press Encyclopedia* (2nd ed., Vol. 2, pp. 855-863). Detroit: Gale. Retrieved January 22, 2014, from <http://go.galegroup.com/ps/i.do?id=GALE|CX3409900205&v=2.1&u=psucic&it=r&p=GURL&sw=w&asid=35e331eaa862c9798e3a9e7a70e7612f>
- L. (2004). The legislative process. Retrieved from <http://www.justice.gov.za/legislation/legprocess.htm>
- The last word. Transparency for others, but not us [Editorial]. (2013, September 22). *The Sunday Times*.
- Locke, J. (n.d.). *The Second Treatise of Government*. Retrieved from <http://www.gutenberg.org/files/7370/7370-h/7370-h.htm>
- Madison, J., & Meyers, M. (1973). *The mind of the founder: Sources of the political thought of James Madison* (p. 473). Indianapolis: Bobbs-Merrill.
- Madison, J. (1788). Federalist no. 47. In *The New York packet* (The Federalist Papers). Retrieved from <http://thomas.loc.gov/home/histdox/fedpapers.html>

- Madison, J. (1822). Epilogue: Securing the republic. In *The founder's constitution* (18th ed., Vol. 1, Ser. 35, p. 690). 1987: The University of Chicago press. Retrieved March 20, 2014, from <http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html>
- Martin, G. R. (2005). South Africa. In R. P. Carlisle (Ed.), *Encyclopedia of Politics* (Vol. 2: The Right, pp. 864-866). Thousand Oaks, CA: SAGE Reference. Retrieved February 2, 2014, from Gale Virtual Reference Library.
- Meiklejohn, A. (1948). The rulers and the ruled. In *Free speech and its relation to self-government*. Retrieved from <http://digicoll.library.wisc.edu/cgi-bin/UW/UW-idx?type=turn&id=UW.MeikFreeSp&entity=UW.MeikFreeSp.p0041&isize=text>
- Meiklejohn, A. (1961). The first amendment is an absolute. *The Supreme Court Review, 1961*, 245-266. Retrieved from <http://www.jstor.org.ezaccess.libraries.psu.edu/stable/3108719?seq=2>
- Mendel, T. (2008). *Freedom of Information: A Comparative Legal Survey* (2nd ed.). Paris: United Nations Educational Scientific and Cultural Organization. Retrieved from <http://www.fas.org/sgp/foia/comparative.pdf>
- Milo, D. (2014, January 05). Fighting the good fight for press freedom. *The Sunday Times*.
- Mkokeli, S. (2013, September 15). Secrecy bill sent back for editing. *The Sunday Times*.
- New York Times Co. v. Sullivan 376 U.S. 254 (March 09, 1964), 1964 U.S. LexisNexis Academic 1655.
- Ngcobo, S. (2013, November 22). Silence and secrecy: Let us shine a light on our secrets. *The Mail & Guardian*.
- O'Reilly, J. T. (2000). *Federal information disclosure* (3rd ed., Vol. 1). St. Paul: West Group.
- Ott, S. (2013, December 10). Heroes of the anti-apartheid movement. Retrieved from <http://www.cnn.com/2013/12/10/world/anti-apartheid-heroes/>
- PAIA Annual Report 2011/2012* (Rep.). (n.d.). South African Human Rights Commission.

- Piotrowski, S. J. (2007). *Governmental transparency in the path of administrative reform*. Albany, NY: State University of New York Press.
- Press Freedom Index 2013. (n.d.). Retrieved January 22, 2014, from <http://en.rsfs.org/press-freedom-index-2013,1054.html>
- Review of the Broadcast Ownership Rules. (n.d.). Retrieved January 13, 2014, from <http://www.fcc.gov/guides/review-broadcast-ownership-rules>
- Right to information laws and implementation. (2013). Retrieved from <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/0%2C%2CcontentMDK%3A23348805~pagePK%3A148956~piPK%3A216618~theSitePK%3A286305%2C00.html>
- Rule of Law. (2005). In S. Phelps & J. Lehman (Eds.), *West's Encyclopedia of American Law* (2nd ed., Vol. 8, pp. 418-421). Detroit: Gale. Retrieved January 27, 2014, from Gale Virtual Reference Library.
- Rule of Law. (2008). In W. A. Darity, Jr. (Ed.), *International Encyclopedia of the Social Sciences* (2nd ed., Vol. 7, pp. 292-293). Detroit: Macmillan Reference USA. Retrieved January 27, 2014, from Gale Virtual Reference Library.
- S. 2488, 110th Cong. (2007) (enacted).
- Separation of Powers. (2008). In W. A. Darity, Jr. (Ed.), *International Encyclopedia of the Social Sciences* (2nd ed., Vol. 7, pp. 448-449). Detroit: Macmillan Reference USA. Retrieved March 21, 2014, from Gale Virtual Reference Library.
- Shrivastava, K. M. (2009). *The Right to Information: A Global Perspective*. Olympia Fields, IL: Lancer InterConsult.
- South Africa, Ad Hoc Committee on Protection of Information Bill, National Assembly. (2013). *Protection of state information bill* (B 6D—2010). Retrieved from [http://www.gov.za/speeches/docs/2013/info-bill\\_amendmended.pdf](http://www.gov.za/speeches/docs/2013/info-bill_amendmended.pdf)

- South Africa, Government Gazette, Office of The Presidency. (2000). *Promotion of Access to Information Act* (Vol. 16). Cape Town. Retrieved from <http://www.info.gov.za/view/DownloadFileAction?id=68186>
- Transparency. (2008). In W. A. Darity, Jr. (Ed.), *International Encyclopedia of the Social Sciences* (2nd ed., Vol. 8, pp. 434-435). Detroit: Macmillan Reference USA. Retrieved September 3, 2013, from <http://go.galegroup.com/ps/i.do?id=GALE%7CCX3045302799&v=2.1&u=psucic&it=r&p=GVRL&sw=w>
- United Nations, General Assembly. (1948). *The universal declaration of human rights*. Retrieved from <http://www.un.org/en/documents/udhr/history.shtml>
- U.S. House, Committee on government operations. (1972). *Administration of the Freedom of Information Act* (Holifield, Author) [H.R. Rept. 92-1419 from 92nd Cong.].
- Wald, M. L. (2012, January 29). Slow responses cloud a window into Washington. *New York Times*, p. 17.
- What is FOIA? (n.d.). Retrieved from <http://www.foia.gov/index.html>
- Williams, D., & Mokone, T. (2012, December 02). Modified secrecy bill going back to MPs. *Sunday Times*.
- The World Factbook. (2014, March 11). Retrieved February 03, 2014, from <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html>

## ACADEMIC VITA

Victoria Grice  
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**EDUCATION:** The Pennsylvania State University  
UNIVERSITY PARK, PENNSYLVANIA  
B.A. in Telecommunications, Minor in Business, expected May 2014  
Schreyer Honors Scholar  
Study abroad experience: Semester at Sea (summer 2012 voyage)

### PROFESSIONAL EXPERIENCE:

**Video Production Intern for Surge Business Development** PRESENT  
Videographer / Editor / Producer UNIVERSITY PARK, PA

- Managing production shoots for different commercial videos
- Shooting for different videos and interviews
- Editing videos for the different companies using Final Cut Pro

**Technical Operations Intern for CNBC** SUMMER 2013  
Transmissions / TPS / Deko / Utility / PA ENGLEWOOD CLIFFS, NJ

- Shadowed full time in the Transmissions department
- Assisted on shoots acting as utility
- Production Assistant (PA) for Delivering Alpha

**Penn State Public Broadcasting THON Documentary Intern** FALL 2011  
Organizer/reviewer of all footage STATE COLLEGE, PA

- Reviewing all footage for the documentary
- Assisting on shoots at THON events
- Creating spreadsheets to assist with dates for taping Mini THONs

### VOLUNTEER EXPERIENCE:

**Penn State Dance Marathon (THON)** 2010 - PRESENT  
Philanthropic volunteer UNIVERSITY PARK, PA

- Family Relations New Family Contact Captain (THON 2014)
- Entertainment 100 Days/Pre-THON Coordinator Captain (THON 2013)
- Entertainment Archiving Captain (THON 2012)
- Entertainment Committee Member (THON 2011)

### WORK HISTORY:

**Hempfield Area Recreation Commission** 2009-2012  
Customer Service / Front Desk / Children's Day Camp LANCASTER, PA

- Registering customers for programs and memberships
- Supervising and teaching young children

**SKILLS:** Practiced in making promotional videos for non-profits and businesses  
Experienced in creating event podcasts for Semester at Sea  
Educated in Final Cut Pro and Adobe Premiere  
Trained in operating cameras and camera equipment

### HONORS AND AWARDS:

President's Freshman Award Recipient  
Selected as Student Marshal for the Telecommunications Major  
Member of National Society of Leadership and Success  
Member of National Society of Collegiate Scholars