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***Legal and Strategic Framework for Entrenching the Right to
Public Information as the Bedrock of the Culture of
Transparency and Accountability in African Countries***

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**Legal and Strategic Framework for Entrenching the Right to Public Information as the Bedrock
of the Culture of Transparency and Accountability in African Countries**

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Introduction

Citizen and media right to access to information generated and received by public institutions is essential for controlling corrupt practices, which flourish wherever there are low levels of transparency and accountability. This paper explores the theoretical basis as well as the ethical and political justifications for the right, and introduces the legal and strategic framework for using information access to promote the culture of transparency and accountability, especially the promotion and exercise of personal right of access to public information of value to public interests.

The paper uses the right to information (RTI) law as a concrete instrument for enabling broad citizen right to information and the cognate government obligation to provide mandatory access to citizens and other legal persons, as a means of demonstrating openness, transparency and accountability in its operations. The primary goal is to demonstrate why it is imperative for the core RTI law to be supported by other instruments to form a full complement of information framework.

Information rights advocates and anticorruption officials can use the framework to gain strategic insights into information-related lapses that allow corrupt practices to flourish, and hence design policies and advocacy programmes to target the weaknesses.

Transparency, Accountabilities and Information

Jenkins and Goetz argue that the link between transparency and accountability is unassailable on an abstract plane but not very obvious in operational terms, as transparency is often conceived of in terms of making procedure clear and removing discretionary control, but without a corresponding elaboration of pre-conditions for producing the desired effects. Accountability, in common usage, can mean any number of things: that officials must explain, "that is account for" their actions - which makes accountability almost synonymous with transparency; and that officials must "take responsibility" for their actions - but whether this is to be judged on procedural grounded or in terms of impact is unclear (Jenkins and Goetz, 1999).

Here, I go further to define accountability as the quality of being willing and able to render adequate account to each or all stakeholders for public resources managed or deployed on their behalf or for their benefit, and for conducting any business that affects the public individually or collectively. Accountability involves the responsible and lawful use of authority or opportunity in a way that ensures effective production of valuable and appropriate outcomes for a defined group.

Transparency on the other hand is the quality or condition of allowing maximally unaided viewing of an entity - signifying the absence of dubious or illicit activity within. A transparent organization therefore affords a general ease of obtaining service and concluding transactions with neither extra barrier in form of bribery nor uncertainty of process and outcome. It also involves operators acting with the full knowledge and lucidity to meet expectations.

It is the clearness of the purpose and process as well as the openness of associated actions that makes an operation or transaction transparent. The clearness or pellucidness ensures that the workings of an institution are in full view of the public through the undistorted, broad and intensive transmission of information emanating from it. In other words, the workings of a transparent organization or operation, is made clear and accessible by the information prism through which it is seen.

The analysis above implies that transparency and accountability on their own have no conceptual clarity, operative mechanism or effects. Their vagueness is removed when information is associated with them in operational terms. This is to say that it is information quality and content that effects transparency, and determines the level of accountability. Therefore improved information disposition should be the foundation of a culture transparency and accountability.

In this context, information is defined as communicated knowledge concerning particular fact, subject, or event, which may trigger fresh insights for informed action.

Access to Information: A Basic Human Right or A Political Right?

Walzer (2007), in *Thinking Politically* identified the essential interconnections between the concept of rights and two enabling concepts: agents and enforcement, in the ability of individuals to enjoy or exercise their rights. For Walzer, "rights-talk" is more often critical than ideological, because it has become the main language with which we talk about protection of one another. And especially because it is often the powerless and the vulnerable who desperately need protection, and the activist who strive to meet the needs of the weak that commonly need "to talk the talk", hence the need to maintain the talk about rights. Governments, nationally and multilaterally, are the agents of rights protection, as well as the enforcer. Without the provider of protection, without an enforcer, it is no much help for people whose rights are at stake, Walzer asserted. This dependency makes it necessary for activists and policy leaders to continually work to enlist governments to enact, protect, and enforce the respect of rights.

Jenkins and Goetz (1999) classified the right to information as a first-generation, civil-political right, which elaborates an individual's stake in the state, as opposed to a second-generation, basic needs-economic right such as the right to food, shelter, education and health which defines the individuals expectations from the state; and third-generation, group rights, such as cultural rights.

Certain authors caution that legal RTI should not be located within the human rights discourse or even the broader right to know movement which includes the right to freedom of expression, but should be restricted to the very specific mechanism of gaining access to required information (Darch and Underwood, 2005). Yet, it has been demonstrated clearly by the work of the Mazdoor Kisan Shakti Sangathan (MKSS) - which translates as the Workers' and Farmers' Power Organization - in the Indian Rajasthan, that the right of the poor to access to information is as important, if not more important than the right to food, because the access to government information may actually determine who gains access to jobs and government provided food supplies (Jenkins and Goetz, 1999).

This leads us to the fact that those who may have the greatest obstacles to gaining the right to information, due to their lack of literacy, time and organizational resources, may actually be the ones that need it the most. In more fundamental civil-political sense, if democracy is "the government of the people by the people for the people," it follows that a democratic government is only an agent of the people. Hence government-held information belongs to the people in the first place. Therefore, individual RTI and by corollary, transparency in government should never be contested. And if the transparency and accountability is assured through greater information access, governance process will result in equitable outcomes for the people, especially if applied across the entire governance spectrum and sectors: local, state, national, regional and global; and public, private and civil organizations, for if one segment is left in the shade, transparency can hardly be achieved.

Why a Right to Information Law is Necessary

It has not been taken for granted that people in power in any place will grant full rights to individuals, hence the efforts made at the international, national and local levels to devise conventions and enact laws to enunciate and protect various aspects of rights of the individual. International instruments that represent major efforts to universalize freedom of access to information, and freedom of expression include the United Nations' Universal Declaration of Human Rights (Article 19), the United Nations International Covenant on Civil and Political Rights (Article 19), the African Charter on Human and People's Rights (Article 9), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 10), the International Covenant on Economic, Social and Cultural Rights, and the Commonwealth Human Rights Initiative.

The best-known statement of the various provisions is Article 19 of the United Nations' Declaration of Human Rights, which reads:

"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".

By ratifying the Universal Declaration and other instruments, nation states commit themselves to its provisions that must then be reflected in the law and practice of the country.

Many countries with relatively new constitutions make provisions for the right to information. However, experience has shown that the enforcement and exercise of this right requires elaborate legislative processes and strategic institutions for it to work well, hence the need for a separate law on it. In fact it is said that 'judges and constitutional scholars in the United States were not quick to identify the right of access within such a broad 'right to know' provided in conventions (Doyle, 2001).

This legal skepticism among legal professionals led the former Chief Justice of United States, Warren Burger to advise in 1978, that public access to government information be determined instead by "carefully drawn legislation," and the "political forces in American society" (Hoefges, Halstuk, & Chamberlin, 2003). This line of argument has made the enactment of such laws an imperative in democratic societies. Besides RTI appropriation requires a more political and legal muscle, because "it aims, in a deeply subversive way, to reconfigure the relationship between the state and the citizen by specifying how and under what terms politicized knowledge is shared - in other words, by reconfiguring at least partially the nexus of knowledge and power" (Darch and Underwood, 2005).

Public access to government information is assured in two ways. First, limits are placed on the ability of a government to censor those who would report on its activities, and second, legal rights are granted to individuals to obtain government records of various types. In neither case is the individual's freedom absolute, but in both, there is a strong presumption that government action should not be shielded from public view (Goldberg, 1994).

The main legal measure, which a State may take to demonstrate its commitment to freedom of access to information and freedom of expression, is the enactment of right to information law (Amonoo and Azubuike, 2003). The main features of a freedom of information law are:

- a) There is a statutory presumption that all government records are open to the public;
- b) Only those records specifically exempted in advance by the Act or by other statutes may be withheld; and
- c) Individuals are empowered to request to see that government records about themselves are accurate and are not being misused;
- d) No matter how embarrassing or inconvenient a disclosure might be, an agency cannot withhold information from a legal person who requests it; and
- e) Legal persons can ask the courts to compel a government body to release information illegally withheld.

The Right to Information in Africa

How has Africa fared in this area? Predictably, not well. To date, only three countries have information rights laws in effect. Worst still, one can confidently say that South Africa is the only African country that is making appreciable efforts to apply the law. In several other countries, related bills have remained in the legislative

pipeline for undue length of time. For example: Nigeria's *Freedom of Information Bill* which was a subject of a great deal of struggle by civil society groups was introduced in the parliament in 1999, took nine years to pass, but the proponents have not yet managed to get it signed into law. Jude Igbanoi in an article in 14 July 2008 issue of *This Day* newspaper describes the bill as the subject of "unprecedented debate, wrangling and bickering between the nation's lawmakers and various stakeholders." He argues that the assembly's reluctance to enact the bill stems largely from their perceptions that the bill would give too much power to the media; while it was actually designed to empower citizens more than the media and help stem Nigeria's endemic corruption (Igbanoi, 2008, cited by cited by freedominfo.org)

A Fresh Push for Universalization of the Right to Information

International efforts are being intensified to get governments to enact and enforce RTI laws. In July 2008, former U.S. President Jimmy Carter forwarded the *Atlanta Declaration and Plan of Action for the Advancement of the Right to Information* to all heads of state and leaders of the major international organizations and financial institutions, and urged them to enact the right of access to information laws, including their implementation and enforcement. The Atlanta Declaration and Plan of Action was the product of the Carter Center's International Conference on the Right to Public Information, held February 27-29, 2008 in Atlanta, Georgia. Two African ministers of information were among the 125 participants representing governments, civil society, international organizations, private sector, donors and scholars from 40 countries.

The Declaration encourages all stakeholders to take concrete steps to establish, develop, protect and promote the right of access to information. Recognizing the value of the right of access to information in building the culture of transparency and accountability, The Atlanta Declaration stated that the need for such openness applies to all intergovernmental organizations, including the United Nations, international financial institutions, regional development banks, and bilateral and multilateral bodies. (Carter Center, 2008).

A Framework for Information

Availability, awareness and accessibility are the three main attributes of information disposition of an institution or a country (Azubuike, 2008).

Availability

Availability of information is the first order attribute. Information is available if it exists, organized in a retrievable and usable manner, and can be made easily available to authorized persons.

Awareness

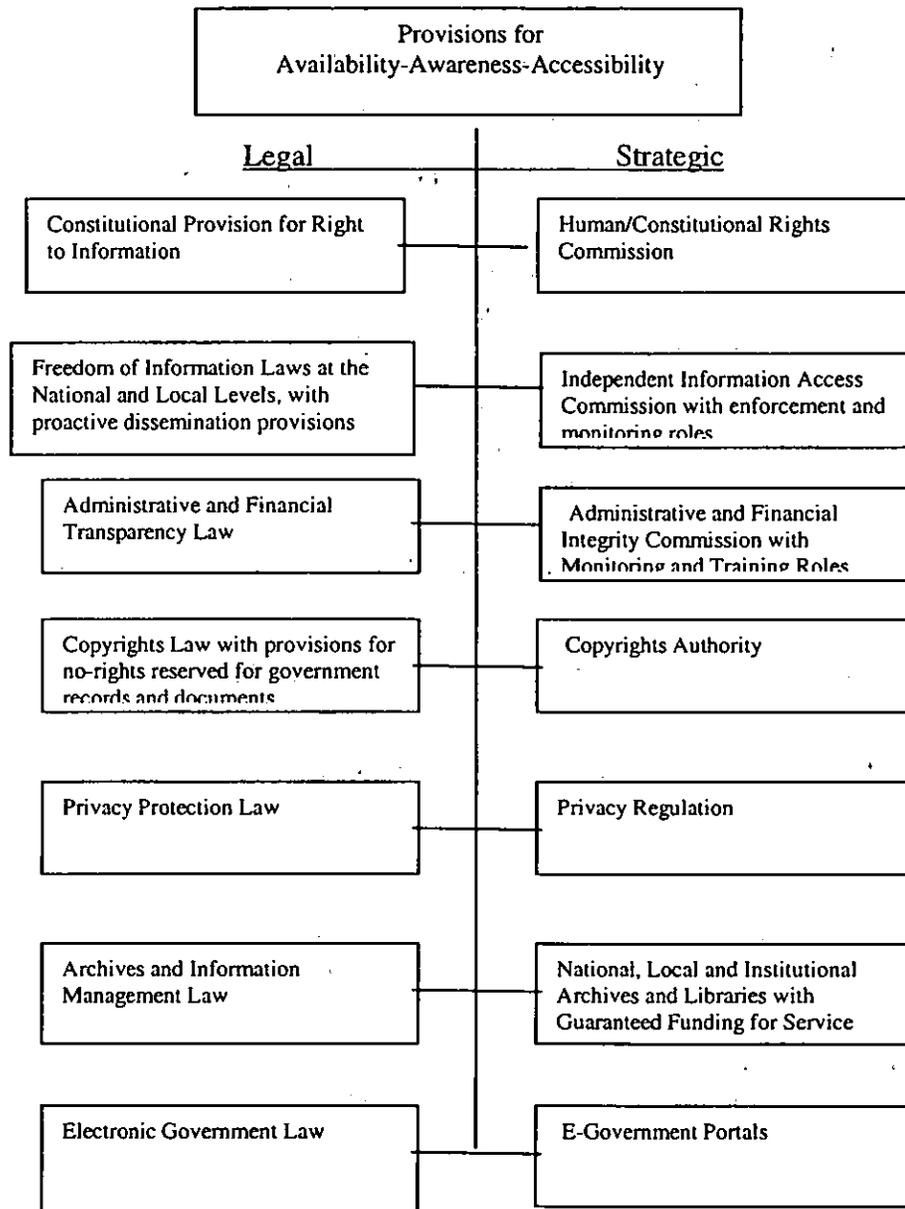
A person's awareness of the availability of information of personal or public interest/value in a known place is the second order attribute. If one is not aware of the availability of certain information, one is not likely to seek to access it.

Accessibility

Accessibility of the available and needed information is most important attribute of information disposition. A piece of information is accessible to a person, if the person can obtain it, decipher it, and put it to use if necessary. It is important to note that accessibility goes beyond getting one's hand at a document, it includes being able to understand its content in a way that can facilitate valuable action.

None of these attributes can occur automatically, they have to be made to happen. In a polity or an economy, comprehensive legal and strategic frameworks for bringing them about are needed, without which the talk of the right to public information would not translate into action for transparency, accountability or openness.

Legal and Strategic Information Framework for Transparency and Accountability



The legal and strategic framework lays down the variety of complementary legislation and institutional arrangements required to ensure that records and documents of public interest that can shed light on the activities of public functionaries and institutions are organized and placed at the disposal of citizens. The above figure illustrates the main components of a legal and strategic framework for ensuring optimal implementation of the right to information

No matter how comprehensive a RTI law is, it cannot function effectively without adequate associated legal instruments such as constitutional provision, copyright law, privacy law, and others. I have listed related ones in the framework diagram above.

The Need for Strategic Information Institutions and Systems as Part of the Framework

Often lawmakers and policy-makers conclude robust laws without the necessary institutions and tools for implementing them. As Darch and Underwood (2005) pointed out, there are two key components to organizational compliance, namely capacity to comply, and willingness to comply. When either of the two is lacking, implementation is hampered.

Pickover and Harris (2001) also identified three main drawbacks with regard to the successful management of the transition to an RTI culture in South Africa as, first, the problem of inadequate public information about what records are kept, since citizens can hardly claim access to files about which they know nothing. Second, organizations do not, by and large, operate efficient record keeping systems, either for paper or for digital records. At the provincial level, record keeping (including selection for destruction) is either "out of control or in complete chaos". Digital documentation is equally disorganized. Third, there is little capacity for the provision of workable public access. Many departments and other bodies "seem to assume that they can rely on existing staff already heavily overburdened by other responsibilities", he reported.

These early concerns turned out to be conservative, as massive non-compliance happened down the line, within two years of implementation as depicted below:

"Use of PAIA (Promotion of Access to Information Act) by the public in its first two years of operation has been extremely limited ...it is clear that very few South Africans are using the legislation ... Freedom of information, as an idea and as a culture, has not yet taken root in the country. The media have given very little coverage to PAIA ...[and] the public does not have ready access to information about the resources available to it" (Harris, 2003; Darch and Underwood, 2005)).

Recommendations

African governments should heed the call to enact and enforce the right to information laws, as the openness which it engenders contributes to increased economic activity and reduction in poverty.

To facilitate implementation, right to information initiatives should take a holistic approach by enacting complementary laws and other instruments related to information creation, management, dissemination and access, along with creation of operational institutions and strategic instruments to enable the flow of information across vertical and horizontal spectrums of political and economic participants and stakeholders.

Proactive systems of information service should be adopted, including service-oriented e-government.

Civil society organizations should vigorously advocate for the right to information legislations and related institution-building within their national boundaries and internationally.

International development organizations should recognize that without improved legal and strategic information frameworks in African countries, efforts at improving transparency and accountability will not yield the desired result, because no institution or government can reduce corruption without developing a positive information disposition, evidenced in increased availability, awareness, and accessibility of information. Severe corruption in most cases could be linked to weak information management and information dissemination problems.

In Africa, the main challenges of policy formation and implementation process in the area of right to information and the right to know are under-researched, hence expansion of research is needed to generate diverse insights for policy formulation and implementation.

Related to weak research foundations, is the need to find alternatives to perception-based corruption measurement system as there are strong feelings in political circles against the current subjective methodologies being used by the major international monitoring agencies.

Conclusion

The culture of transparency and accountability is a matter of improved availability, awareness and accessibility of information – an illuminated institutional condition referred to here as positive information disposition. In such an environment, information is used to project the actions of functionaries to the full view of the public. Most right to information initiatives have been largely approached with legal instruments. Though legal instruments are necessary foundations, they are not sufficient to assure the appropriation of such rights. To be effective, the laws must be complemented with a comprehensive menu of strategic information management and delivery instruments and tools designed to force actions of public institutions to generate, organize, and publicize information, which the various segments of the public can cognitively and physically access with ease.

References

- ACLU (American Civil Liberties Union). 1982. American Civil Liberties Union (ACLU). (1982). American Civil Liberties Union Foundation v. Deukmejian, 32 Cal.3d 440, Supreme Court of California, 27 September. Available at <http://recollectionbooks.com/nion/ACLU.pdf> (6 October 2003).
- Amonoo, Petrina and Azubuike, Abraham 2003. Government information and democracy: African concerns and perspectives. World Library and Information Congress: 69th IFLA General Conference and Council, 1-9 August 2003, Berlin, Germany.
- Archibald, S.1993. The early years of the freedom of information act, 1955–1974, PS: Political Science and Politics 26 (1993) (4), pp. 726–731.
- Azubuike, Abraham A. 2008. Accessibility of government information as a determinant of inward foreign direct investment in Africa. In: Best Practices in Government Information: A Global Perspective. Edited on behalf of IFLA by Irina Lynden and Jane Wu. München: K.G. Saur. PP. 85-98.
- Batho Pele White Paper. 1997. White Paper on Transforming Public Service Delivery. Government Gazette, 388(18340) (1 October). Available <http://www.info.gov.za/gazette/whitepaper/1997/18340.pdf> (24 January 2005).
- Bourdieu (1977) P. Bourdieu, The economics of linguistic exchange, Social Science Information 16 (1977) (6), pp. 645–668. Full Text via CrossRef | View Record in Scopus | Cited By in Scopus (64)
- Calland (2003) Calland, R. (2003). Access to Information Act. Law report, presented by John Orr. [SAfm radio program, broadcast on 2 June]. Transcript available at <http://www.safm.co.za/transcripts/index.jsp?transcriptid=3089> (21 January 2005).
- The Carter Center, 2008. ATLANTA DECLARATION AND PLAN OF ACTION FOR THE ADVANCEMENT OF THE RIGHT OF ACCESS TO INFORMATION, February 29, 2008. <http://www.cartercenter.org/documents/Atlanta%20Declaration%20and%20Plan%20of%20Action.pdf> (Accessed 21 September 2008)
- Doyle, M. 2001. Public's right to know still a matter of debate. Sacramento Bee (14 October). Available <http://www.johnemossfoundation.org/foi/doyle2.htm> (22 September 2004).
- Dubuch (1985) Dubuch, C. (1985). Langage du pouvoir, pouvoir du langage. Politique Africaine, 20, 44–53. Available at <http://www.politique-africaine.com/numeros/pdf/020044.pdf> (21 January 2005).
- Darch, Colin and Underwood, Peter G. 2005. Freedom of information legislation, state compliance and the discourse of knowledge: The South African experience. *The International Information & Library Review*; 37(2): 277-86

Goldberg, Steven. 1994. Public access to government information. Freedom Papers No. 6., September 1994. (Available at <http://usinfo.state.gov/products/pubs/archive/freedom/freedom6.htm>)

Harris (2003) Harris, V. (2003). Using the Promotion of Access to Information Act (PAIA): The case of the South African History Archive. [Rev. ed. January]. Available http://www.wits.ac.za/saha/publications/FOIP_update_jan2003.pdf (21 January 2005).

Harris & Hatang (2002) Harris, V., & Hatang, S. (2002). Reviewing South Africa's access act after one year. [April]. Available http://www.wits.ac.za/saha/publications/FOIP_1_2_HarrisHatang.pdf (13 January 2005).

Hoefges, M., Halstuk, M.E. and Chamberlin, B.F. 2003. Privacy rights versus FOIA disclosure policy: The "uses and effects" double standard in access to personally identifiable information in government records, William and Mary Bill of Rights Journal 12 (1):1-64.

Igbanoi, Jude. 2008. "FoI: The Bill With Nine Lives," This Day, 14 July. Cited in: NIGERIA: FOI proposal now the oldest unpassed bill, 17 JULY 2008, at <http://freedominfo.org/news/20080717b.htm> (Accessed 21 September 2008).

International Covenant on Civil and Political Rights. 1966. Adopted by UN General Assembly resolution 2200A (XXI) of 16 December, art.19, section 2. Available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (17 September 2004).

Jenkins, Rob and Anne Marie Goetz (1999). Accounts and accountability: theoretical implications of the right-to-information movement in India. *Third World Quarterly*, 20(3) Special issue on The New Politics of Corruption (June): 603-622.

Kearney, G. and Stapleton, A. 1998. Developing freedom of information legislation in Ireland. In: A. McDonald and G. Terrill, Editors, *Open government: Freedom of Information and privacy*, Macmillan, Basingstoke (1998), pp. 167-179 (Quoted in Snell 2001).

Meagher, Patrick. 2005. *Analytical Tools for USAID Anticorruption Programming in The Europe & Eurasia Region*. Washington, DC: USAID

ODAC (Open Democracy Advice Centre). 2003. *Open Democracy Advice Centre (ODAC). (2003). The challenge of implementation: The state of access to information in South Africa*. Cape Town: Open Democracy Advice Centre. Available http://www.opendemocracy.org.za/documents/results_SA_OSJI_study.doc (24 January 2005).

ODAC (Open Democracy Advice Centre). 2004. Government fails to open up. Complaint laid with public protector. Civil society calls for creation of information commissioner. Media release, 21 October. Available http://www.opendemocracy.org.za/documents/government_fails_to_open.html (24 January 2005).

Pickover, M., Harris, V. 2001. *Freedom of Information in South Africa: A far-off reality?* Johannesburg: South African History Archive, May. Available http://www.wits.ac.za/saha/publications/FOIP_1_4_PickoverHarris.pdf (24 January 2005).

Roberts, A. 1998. *Limited access: Assessing the health of Canada's Freedom of Information laws*. Kingston, Ontario: Queen's University, April. Available at [http://www.cna-acj.ca/client/CNA/cna.nsf/object/LimitedAccess/\\$file/limitedaccess.pdf](http://www.cna-acj.ca/client/CNA/cna.nsf/object/LimitedAccess/$file/limitedaccess.pdf) (14 January 2005).

Roberts, A. 1999. *Access to government information: An overview of issues*. Transparency International, May 1999. http://www.transparency.org/working_papers/roberts/roberts.foi.html. (9 September 2004).

Roberts, A. 2001. *Structural pluralism and the right to information*. Kingston, Ontario: School of Policy Studies, Queen's University, February (SPS working paper no.15). Available http://www.queensu.ca/sps/working_papers/files/sps_wp_15.pdf (24 January 2005).

S. Schech. 2002. Wired for change: The links between ICTs and development discourses, *Journal of International Development* 14 (2002), pp. 13–23. Full Text via CrossRef | View Record in Scopus | Cited By in Scopus (11)

Snell, R. .1999. Administrative compliance and Freedom of Information in three jurisdictions: Australia, Canada and New Zealand. Paper presented to the conference 'Freedom of Information—One Year On,' St. Patrick's Hall, Dublin Castle, 23 April. Available at <http://www.ucc.ie/ucc/depts/law/foi/conference/snell99.html> (14 January 2005).

Snell, R. 2001. Freedom of Information and the delivery of diminishing returns, or how spin doctors and journalists have mistreated a volatile reform. Paper delivered to the PR2K conference, Australian Centre for Independent Journalism, 26–28 October. Available at <http://acij.uts.edu.au/pr2k/2001/snell.html> (14 January 2005).

Sorensen, R. 2003. Impact of South Africa's promotion of access to information act after three and a half years: A perspective, *ESARBICA Journal* 22 (2003): 50–63.

Sorensen, R. 2004. Statistics with respect to Promotion of Access to Information Act (PAIA): Report to National Assembly by Human Rights Commission pursuant to section 84(b) of PAIA. March. Available at http://www.wits.ac.za/saha/publications/FOIP_2_1_Sorensen.pdf (19 January 2005).

South Africa. 1996. Constitution of the Republic of South Africa 1996. As adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly. Available <http://www.polity.org.za/html/govdocs/constitution/saconst.html> (24 January 2005).

South Africa. 2000a. Promotion of access to information. Act 2. Available: <http://www.gov.za/gazette/acts/2000/a2-00.pdf> (7 October 2004).

Universal Declaration of Human Rights. 1948. Adopted by UN General Assembly resolution 217 A (III) of 10 December, art.19. Available at <http://www.un.org/Overview/rights.html> (17 September 2004).

van Huyssteen E. 2000. The Constitutional Court and the redistribution of power in South Africa: Towards transformative constitutionalism, *African Studies* 59 (2000) (2), pp. 245–265. View Record in Scopus | Cited By in Scopus (1)

Walzer, Michael (2007) *Thinking Politically*. Essays in political theory, (Selected, edited and with an introduction by David Miller); New Haven: Yale University Press.

Wieland, J. 1999. Freedom of information, in the Second Symposium of the German American Academic Council's Project 'Global Networks and Local Values', Woods Hole, Massachusetts, 3–5 June. Available from the Max Planck Institute at http://www.mpp-rdg.mpg.de/pdf_dat/wieland.pdf (7 October 2003)

World Bank. 2006. Strengthening Bank Group on Governance and Anticorruption: Guatemala. Prepared by the staff of the World Bank. December 5, 2006.

www.worldbank.org/html/extdr/comments/governancefeedback/gac-cons-jan30-pres.pdf

Oxford Reference Online. Oxford University Press.

<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t105.e2484> (21 January 2005).