

# A Case for Restricted Access<sup>1</sup>

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*Many Freedom of Information (Fol) regimes share two features. People requesting access to documents detained by a public authority are generally not required to demonstrate an interest. And once the document is made available to one applicant, it becomes virtually available to the whole world. Both features may appear to further the goal of openness. This is not necessarily so, as we shall see. Admittedly, most of us find it desirable to have both equality in access to State-detained documents and access to an increased amount of such documents. Still, we shall see that both requirements may conflict, which generates a dilemma for democratic theory. Depending on whether we grant more importance to "equality in access" or to "access to an increased amount", we shall either stick to the two Fol features identified above or defend an alternative Fol design. It is the latter option that will be taken in this paper.<sup>2</sup>*

*Before proceeding, one point of terminology. We shall use a distinction between "standing" and "merit". "Standing", broadly taken, has to do with whether a person is entitled to have her request or case examined on its substance by a State agency or heard by a court. Typical standing requirements include legal personality and interest. It is only once standing has been granted that the authority or court will begin to examine whether a claim is well-founded on its substance, hence to address the question of its merits.*

## Release to One, Release to All

In the absence of an interest requirement and other standing requirements, once a document detained by a State authority is being released to one applicant, it should also be released to any other applicant. The absence of having to demonstrate to the State agency a specific interest in the requested document rests presumably on the assumption that each citizen does have an equally important interest in knowing what the State is doing and on what information it bases its decisions. Hence, each citizen should have equal standing to apply for access to documents detained by State authorities. And given the consequences of "equal standing" on the merits side – as will be indicated below –, equal standing entails equal access for all *applicants*.

Moreover, once access is granted to one applicant, it is generally done without imposing restrictions on use or communicability to third parties (hereinafter: "U/C restrictions"), except for commercial use. Hence, while the absence of an interest requirement

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<sup>2</sup> Unfortunately, it will not be possible, due to space constraints, to provide the reader with a full presentation of the various Fol regimes on which this study is based. Examples come mainly from Australian, Belgian, French and US regimes.

entails that release to one applicant entitles any other *applicant* to such an access (provided that there are no other standing requirements such as nationality or age), the absence of U/C restrictions adds to it that virtually anybody in the world does have access *as a third party*. Hence, in the case of Australia, “Disclosure of information under the FoI Act is effectively disclosure to ‘the whole world’ because the act imposes no restrictions on the use of information released pursuant to the FoI request”.<sup>3</sup>

The absence of U/C restrictions and the equal standing rule are closely connected. On the one hand, U/C restrictions would be useless in a universal standing context, as third parties unable to access a document could get access directly as applicants. On the other hand, were applicants expected to demonstrate an interest in obtaining a document, the absence of U/C restrictions would make such a standing requirement pointless, for access to one applicant would entail virtually universal access. Hence, the view that “the Freedom of Information Act says that ‘any person’ may obtain information. Either all requestors have access or none do. The special needs of one, or the lesser needs of another, do not matter. The first person to get the information *may give it away; so if one person gets it, ‘any person’ may*.”<sup>4</sup> The same holds for other standing requirements such as nationality, residence or age (see Bayne, 1984: 40; Eagles *et al.*, 1992: 71). And the rejection of anonymous requests would be equally problematic since, given the absence of U/C restrictions, any request of access is virtually anonymous. Still this does not mean that the absence of U/C restrictions is merely a corollary of the equal standing rule. One may consider that it also derives from the practical impossibility of monitoring the uses that each successful applicant would make of the documents he obtained access to. While monitoring and enforceability are certainly feasible in some cases involving identifiable players and traceability devices (see Roberts (2003) on the NATO system), this is not the case in general regimes. We suggest however that such monitoring and enforceability is also possible under the proposed scheme below.

## The Worst Possible Recipient Test

Release to one applicant thus entails both compulsory release to any other applicant and potential release to any third party. This may seem to be all to the benefit of openness. Does this impression resist critical examination however? It will appear that it does not, once we consider the merits stage and ask ourselves: to what extent should the identity or the purpose of access as they appear in the applicant's declarations be taken into account by the State agency in deciding whether or not to grant access to the requested document? Here is our answer in three parts.

First, there is the backdoor argument (Bayne, 1996: § 76; Sambon, 1996: 248). It holds that the authority detaining the requested document should operate a requestor-blind examination at the merits level, for it would be too artificial to separate the standing level (absence of interest requirement) and the merit level, where the possibility would exist of taking the purpose of the applicant's request into account. Taking into account the characteristics of the applicant at the merits level would amount to reintroducing an interest requirement at the standing level through the backdoor. Here is an example of this view:

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<sup>3</sup>Australian Law Reform Commission & Administrative Review Council, *Open Government: a review of the federal Freedom of Information Act 1982 (Report N°s 77 & 44)*, 1995 : 129.

<sup>4</sup> US Dept. of the Air Force v. Federal Labor Relations Authority, 838F.2d 229 (7th Cir. 1988)(our italics).

"(...) whether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made. Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request. Thus (...) the rights of the two press respondents in this case are no different from those that might be asserted by any other third party, such as a neighbor or prospective employer. As we have repeatedly stated, Congress "clearly intended" the FOIA "to give any member of the public as much right to disclosure as one with a special interest [in a particular document]" (...).<sup>5</sup>

Second, there is the view according to which the purpose and identity of the applicant *can* be taken into account at the merits level insofar as they represent a possible purpose and a possible type of requestor (among others). It is thus irrelevant whether the alleged use is erroneously attributed to the applicant or whether the latter in fact has another use in mind, since the declared purpose only plays the role of a possible purpose here. Here is the rationale behind this view: if there are no U/C restrictions, the document may end up in anybody's hands. It is thus the authority's duty to envisage all sorts of possible uses, in order to offer genuine protection to the rights and interests protected by the exemptions to access. As part of these possible uses, the alleged use expected from the applicant herself is clearly relevant. It is relevant insofar as it draws attention to *one* possible use that may or not justify a denial of access. Of course, other uses not mentioned by the applicant will have to be considered as well by the State agency, some of them being able – may the case arise - to justify a denial of access.

The "backdoor" and the "declared use as possible use" views can in fact be reconciled. We may well argue that the declared purpose of the applicant should not be such that we would *grant* him access while denying such an access to other applicants who would not have referred to such a purpose. It also means that invoking a purpose that is insufficient to justify access should not play against the applicant if there are other possible reasons that would constitute sufficient grounds for disclosure (e.g. mere curiosity v. life-or-death issue). In short, if there are no good reasons to deny access, and if there is at least one good reason to provide access, the fact that the applicant would not have actually invoked the latter reason should disadvantage her. Here, defenders of the backdoor argument are right. However, this does not entail that the declared purpose of an applicant cannot be used to *deny* access to a document, if it is representative of a possible use, given the absence of U/C restrictions. If the declared purpose is sufficient to deny access, it will play against the applicant simply because access should then be denied to any applicant anyway. Here, defenders of the "declared use as possible use" view are right. Notice that the "backdoor" view bases itself on the equal standing aspect whereas the latter draws argument from the absence of U/C restrictions. The two sides of "Release to One, Release to All" are thus mobilized in turn.

Third, we can now move to the last part of the answer, which is also its key one. The declared purpose of a request should not be ignored if it represents a possible use able to justify a denial of access (declared use as possible use). It should be disregarded if other purposes would be strong enough to justify disclosure anyway (backdoor argument). Let us now add that State agencies should also not stick to it if they believe other types of use would certainly justify non disclosure. State authorities have important interests and rights to protect and this will affect their decision as to whether or not to grant access. If they are expected to

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<sup>5</sup> US Dept. of Justice v. Reporters Committee, 489 US 749 (1989)

balance the importance of openness with these rights and interests, they should certainly consider all sorts of possible third parties or alternative applicants in whose hands the document may also end up. The relevant test is thus the "worst possible recipient" test. As Hammitt (1990: 27) puts it, "if agencies believe that they must evaluate all requests using the exact same standards, then they are prone to adopt a worst-case scenario, to imagine that every requester is the KGB, or an aggressive business competitor, or any number of possible requesters who should not be given access to certain information". Indeed, should an authority concerned with the "national security" exemption or with the "business confidentiality" one, not envisage that the document may end up in the hands of, respectively, a spy or a competitor?

Hammitt's (1990) point is that "universal standing" is a double-edged sword. Our view is that whenever the "worst possible recipient" test (and the super-cautious approach it entails) is the right one, it derives as much from the idea that any applicant should be granted access once one of them has been given access (equal standing), as from the view that once an applicant got access, the document may well end-up in the hands of any third-party, given the absence of U/C restrictions. Requiring applicants to demonstrate an interest would thus not be sufficient to avoid super-cautiousness if no U/C restrictions are being added.

Now, should authorities adopt the "worst possible recipient" test in "release to one, release to all" contexts? When important rights or interests are at stake, there is no reason why the authorities should not take seriously the risk for the document to end up in the hands of a "worst possible recipient". Perhaps the test may involve balancing the probability for the document to reach a "worst possible recipient" and the amount of harm that would follow. All sorts of circumstances may be relevant here (the reputation of the applicant, the availability of broadcasting technologies,...). Still, the "worst possible recipient" test should remain the standard test whenever important rights or interests are at stake. In contrast, there are probably other cases where an "ordinary layperson" test would do. Take the "misleading documents" exemption. It aims at ensuring that the technical nature of a document will not mislead people as to its content and implications – a similar problem arising by the way in consumer protection regulation. Such "paternalistic" grounds are generally used to delay – as opposed to deny - access, allowing a civil servant to prepare an explanatory note. When dealing with such types of exemptions that do not involve the protection of interests as important as national security or rights as precious as privacy rights, relevant authorities do not seem to use a "most silly person" test. Instead, they seem either to refer to a notion of ordinary layperson,<sup>6</sup> or even to base themselves on the expertise of the actual applicant himself.<sup>7</sup> Both appear to be sound strategies, for the strictness of the test should remain proportionate to the importance of the right or interest protected by the exemption at stake.

### **Restricted Access to Documents, Enhanced Access to Information**

The "worst possible recipient" test is actually being used in at least some Fol regimes, sometimes in an implicit manner. And whenever it is not, it should, for the reasons exposed above. It is thus clear that while "release to one, release to all" seems at first sight to constitute an openness-enhancing component of Fol regimes, it may in fact turn out to have a significant implication (super-cautiousness due to the "worst possible recipient" test) that is clearly openness-adverse. The question is: could we not

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<sup>6</sup> Administrative Appeals Tribunal (Australia), *Re Cleary v. Department of the Treasury*, June 10, 1993, N° A92/164 AAT, 18 AAR 83, at al. 38.

<sup>7</sup> Belgian CADA, advisory opinion 94/43, Dec. 19, 1994, *CADA Annual Report 1994*, p. 42 (our transl.)

then restrict access to documents (hence, derogate from the equal standing rule) in a way that would in fact increase the amount of access to information that citizens may benefit from? Are there no ways of slicing the access-to-documents cake in a more unequal manner, with the aim of increasing the size of the access-to-information cake that all citizens may access? To put things still in a different way, should we not prefer a wider indirect access to information, to a lesser but more equal direct access to information? Two questions are thus in order. First, would this alternative constitute a more desirable situation (desirability issue)? Second, do we dispose of the means of reaching it (feasibility issue)? We answer – sketchily – each question in turn.

As to the desirability issue, there are many circumstances where secrecy is in fact being relied upon to promote information transfers. There are thus cases where more information can be gained (i.e. generated or transferred) for better decisions through less transparency. This is what underlies the "frankness and candor" idea, used extensively as a rationale not only for Executive privilege (see Griffin, this volume), but also for medical secrecy or double-blind refereeing in academic journals. After all, it is no surprise that "confidentiality" finds its roots in "confidence". The present case for restricted access is slightly different, although it participates in the same logic of restrictions on access aimed at contributing to information transfers. Here, the source of the problem is the following. In principle, the State could treat raw documents in a way that would remove any data susceptible of harming for example people's right to privacy or the defense interests of the State. As a matter of fact, such selective disclosure of documents is being achieved in some regimes. It raises two problems though. First, the patent lack of resources of most States does not allow them to do so on a systematic basis. Second, there may be good reasons to prefer some independent treatment of such raw documents to a State-based treatment that runs the risk of abusive censorship.

It would thus make sense to identify privileged categories of persons who would benefit from restricted access. Access would only be restricted as a second best policy, made unavoidable by the "worst possible recipient test" problem, whenever exemptions to access apply. But the aim would be to identify beneficiaries of privileged access who could in turn disclose as much as possible of this information to the general public. For instance, even those who defend the Executive Privilege could still find it valuable that the type of arguments being used in executive meetings be disclosed by such a privileged applicant. Two criteria should thus be kept in mind, given the "information transfer" goal underlying the privileged access scheme defended here. *First*, the ability of beneficiaries of privileged access to extract from the documents the relevant information and deliver it to the general public. This entails the need for the applicant to identify herself, to demonstrate an interest in the documents, an ability and a willingness to exploit them and to communicate them to the public. *Second*, the State should ensure that the personal information and any other protected information contained in the document be kept secret by the privileged applicant. This entails the possibility of enforcing U/C restrictions. Let us say a few words on each of these two aspects, thus turning to the feasibility issue.

First, cases of special access already obtain in existing FoI systems. For instance, documents containing personal information may be accessed by the relevant person herself, as well as typically by those legally in charge of her interests (ex: lawyer or parent) (See e.g. Bayne, 1996: §76; CADA, 1997: 51-52). Another example is provided by unsuccessful bidders (public procurement contracts) or unsuccessful applicants for public office (typically as civil servants). The unsuccessful candidates (and

only them)<sup>8</sup> may be granted access to the files of their successful competitors through using FoI regimes. Such files typically contain personal and/or commercially sensitive information. And their use by the applicant is unlikely to be especially friendly. Still, the interests of fair competition and equality seem to outweigh the reasons for secrecy.

There is however a more interesting case, the one of academic researchers. General FoI regimes provide us with numerous cases where researchers are granted access to documents that fall within the scope of exemptions such as privacy (See CADA, 1997: 184).<sup>9</sup> Specific legislation applying to access to Archives provides an even better example of privileged access to researchers. In the case of Australia, special access to documents that are less than thirty years old requires “an outstanding record in research and publication or [...] possess an established record of outstanding achievement”.<sup>10</sup> In contrast, the French regime applicable to WWII documents opens access to French and foreign researchers (be they academic or not) as well as to higher education students preparing a dissertation.<sup>11</sup> The Australian restriction is however perfectly in line with the concern that research results be effectively made available to the public. Otherwise, privileged access would be difficult to justify. Let us add that academic researchers are not the only possible category of potential privileged applicants. We could imagine for example that an NGO constituted of reliable independent journalists be set up to deal with such raw documents, whenever their direct release to the public could not be allowed.

Second, what about the enforcement of U/C restrictions? The mere fact of being an academic researcher is not a sufficient guarantee of proper use. As the interests and rights at stake might be of great importance, we need to make sure that the privileged person does not disclose what she is not allowed to. Various strategies are available. Again, the practice of privileged access to Archives is a good source (see generally: Baumann, 1986). Here are a few ideas. First, one may allow for full examination on site while only permitting selective reproduction, as is the case for Michigan Archives.<sup>12</sup> Moreover, the purpose of access may be strictly defined. For example, in California, it is stated that “only requests from individuals conducting research for statistical or similar purposes in association with the University of California or other non-profit educational institutions will be reviewed. Genealogical research requests cannot be honored”.<sup>13</sup> There are also various ways of defining the prohibited uses once access has been granted. The 1999 Finnish FoI Act provides that for access to archival documents, the beneficiary of special access “shall undertake in writing not to use the document to the detriment or defamation of the person whom it concerns, nor to the detriment or defamation of a person close to him, nor in violation of those other interests protected by the secrecy provision” (sect. 27). This is a broad provision that contrasts with the French commitment of containment, which refers specifically

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<sup>8</sup> Belgian CADA, advisory opinion 97/66, Oct. 3, 1997

<sup>9</sup> Belgian CADA, advisory opinion 95/76, Sept. 18, 1995, *CADA Annual Report* 1995, p. 72; May 27, 1999 Finnish Act on the Openness of Government, [www.om.fi/1184.htm](http://www.om.fi/1184.htm), sect. 28

<sup>10</sup> <Art. ?.> See as well Terrill (1999)

<sup>11</sup> Circulaire of Oct. 2, 1997, <... >, at 14340, pt. 6. 2.; See as well Ducrot (1979: 23).

<sup>12</sup> Form contractual agreement for the release of confidential mental health records for legitimate research purposes, Sect. II. D. (received from the Michigan State Archives, June 1999).

<sup>13</sup> Policies and Procedures for Use of Records Containing Personal or Confidential Information at the California State Archives, Sect. 2, CSA - L14(B), 3/96 (received from the California State Archives, June 1999).

to State security, national defense and the protection of privacy.<sup>14</sup> In addition, the uses of the information may be subject to a prior approval procedure before dissemination takes place. For example, in Michigan, the researcher shall

“Present to the Archives for review and approval a copy of any paper, article, publications, or other written material which was prepared by the researcher, or any agents, employees, and assigns thereof, before said paper, article, publication, or other written material is otherwise disseminated. [...] (s)He shall disseminate them[...] only upon receipt of written notice from the Archives that the Archives is satisfied that said paper, article, publication, or written material is in compliance with the provisions with this Agreement”.<sup>15</sup>

If properly implemented, such a prior approval strategy may provide the firmest protection of the relevant interests, although risks of abusive censorship cannot fully be excluded. Adjustments of the existing legal systems may however be needed to make such a strategy lawful, especially as it may conflict with provisions on freedom of expression. Finally, both general tort, contract and criminal law remedies can be envisaged. The 1999 Finnish FoI Act provides an example of the latter (sect. 35). In contrast, in Michigan again, there is a detailed provision stating that the Researcher shall:

“Pay to the Archives upon demand, in the event that the Researcher has failed to comply with one or more of the foregoing provisions of the Agreement and inasmuch as the harm caused by such failure will be difficult to accurately estimate, the reasonable sum of one-thousand dollars (\$1,000.00 as liquidated damages. [The Researcher shall also] indemnify and save harmless the State of Michigan, the Archives, the Michigan Department of Mental Health, and any other state agency, and all officers, agents, and employees thereof, for any costs incurred in defending any civil or criminal litigation, and for any monetary judgement which might result from such litigation, stemming from the release of confidential information, including but not limited to the release of names, to and by the Researcher, and any agents, employees, and assigns thereof.”<sup>16</sup>

It is beyond the scope of this paper to go into further details, despite numerous problems such as whether the State can exempt itself from any liability in case of restricted access, or whether it is technically possible to bind people beyond the end of the term in cases of fixed term authorizations. This shows however that not only do we have to consider the option of restricted access as a desirable one in circumstances where the “worst possible recipient” test would otherwise require secrecy. It also shows that this is a legally feasible option.

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<sup>14</sup> Form of “demande de communication par dérogation de documents d’archives publiques non librement communicables adressée a M. le Directeur des Archives de France” (received from the French State Archives, april 1999).

<sup>15</sup> Form contractual agreement... , supra note x, Sect. II, F-G

<sup>16</sup> *Ibid.* , Sect. II, H-I

## Conclusion

Freedom of information is a key ingredient in a deliberative democracy. There is certainly room for debate as to whether this or that exemption is a defensible one, all things considered, as other contributions in this volume illustrate. Still, there is no doubt that at least some exemptions to access to information are to be regarded as desirable, for the right of access to State-detained documents is not the only right that matters in a just society. We have argued that if the rights and interests protected by such exemptions are to be granted real importance, authorities should in principle rely on a "worst possible recipient" test if they operate in a "release to one, release to all" environment. This may have adverse consequences from the point of view of access to information. Such adverse effects are not inescapable however, at least if we accept the view that access to information, be it indirect, matters more than equality in direct access to raw documents. This forces us to consider seriously the option that restricted access may, somehow paradoxically, and provided that it is properly set up, contribute to, rather than reduce, access to information. In short, "release to one, release to all" should remain the rule. However, whenever justified exemptions apply, one should always consider "restricted access" as an alternative to mere denial of access. Admittedly, restricted access violates equality in direct access. Still, it may do so to the benefit of deliberative democracy.

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