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Conclusion: From Gatekeeping to Hospitality[1]

Verne Harris

Framing the enquiry

Frame 1: The nature of the terrain

The essays, case studies and anecdotes that make up this volume occupy a terrain that any concluding piece needs to acknowledge, contextualise and extend. Of course, the attributes of a terrain are, in principle, limitless. In searching for an appropriate closing for this volume — more precisely, in searching for a closing that opens more than it closes — I limit myself to engagement with three in particular.

Firstly, the focus is insistently on the implementation of freedom of information legislation in South Africa in the period 2001–07, against the backdrop of the country's transition from apartheid to democracy. While marking local specificities, here I am more interested in the (more or less) universal dynamics at play.

Secondly, with very few exceptions, the institutional terrain being interrogated is that of the 'public institution'.[2] The records being sought are public records, and the custodians of these records are public officials. This is not surprising. For although South Africa's Constitution draws the private sector firmly into the country's freedom of information regime, the applicability of the Promotion of Access to Information Act (PAIA) to what the Act calls 'private bodies' remains to be tested seriously.[3]

Thirdly, the authors write from the hurly-burly of activism. Theirs is a discourse of resistance to the gatekeepers. For me, this simultaneously expresses the extent to which gatekeeping has become a worrying feature of post-apartheid South Africa and how the country's freedom of information domain forces information requesters to pursue access disputes in court and/or by publicly naming and shaming gatekeepers.

It is always relatively easy to point out where people and institutions are getting things wrong, especially in a domain where, as this volume's contributions suggest, getting it wrong has become almost endemic. Rather than summarise the myriad shortcomings detailed in this volume, I want instead to explore two interrelated questions: why do gatekeepers become gatekeepers; and what would getting it right look like? In other words, what would a gatekeeper become if he or she were to respond to the call of justice?

Already, in what are preliminary moves, I have made a number of assumptions and offered at least one working definition. At least two more are necessary at the outset.

I am assuming 'democracy' as a fundamental frame for the enquiry. Obviously, one could quickly become submerged in debates around what democracy is. At this point, let me simply assert that there are any number of forms to democracy, and that I believe that democracy only has meaning as long as people are contesting its meaning and fighting for it to manifest itself more fully. So the term 'democratising' (a process) means far more to me than 'democratic' (a state).

Which brings me to the concept of justice. I do not believe that anyone can offer a blueprint for identifying it. Following Derrida, I do not believe that justice, ultimately, can be knowable. Like democracy, it must always be coming. It is a phantom; at most 'a relation to the unconditional that, once all the conditional givens have been taken into account, bears witness to that which will not allow itself to be enclosed within a context'.[4] The call of justice resists the totalisation of every such enclosure. It resists, if you like, what is traditionally regarded as the fundamental archival impulse — contextualisation. It is open to the future and to every 'other'. It respects — gives space to, looks again at — 'radical otherness'.[5] In the powerful formulation of Levinas (whose work had a profound influence on Derrida), justice is 'the relation to the other'.[6]

In the last decade of his life, Derrida (drawing on the work of Levinas) developed what he termed an ethics of hospitality.[7] It is predicated on the belief that the call of justice is the most important of all calls, and that the call comes to us in and through 'the other', the stranger. The beginning of ethics is a listening to, a hospitality towards, the stranger. And because for Derrida every stranger is equally important, and 'every other is wholly other', ethics confronts us with an impossible challenge.

Frame 2: The secret

Between 2001 and 2004 I dedicated my professional energies to establishing the South African History Archive (SAHA) as a freedom of information NGO.[8] My team used PAIA (which came into operation in March 2001) to test the parameters of public access to information in South Africa, to force into the public domain records that we believed were being hidden illegitimately and to build up a public archive of such materials accessible to everyone. In the process, I became identified as a troublemaker by many public institutions and, more widely, as a campaigner for transparency. Today, I am a programme

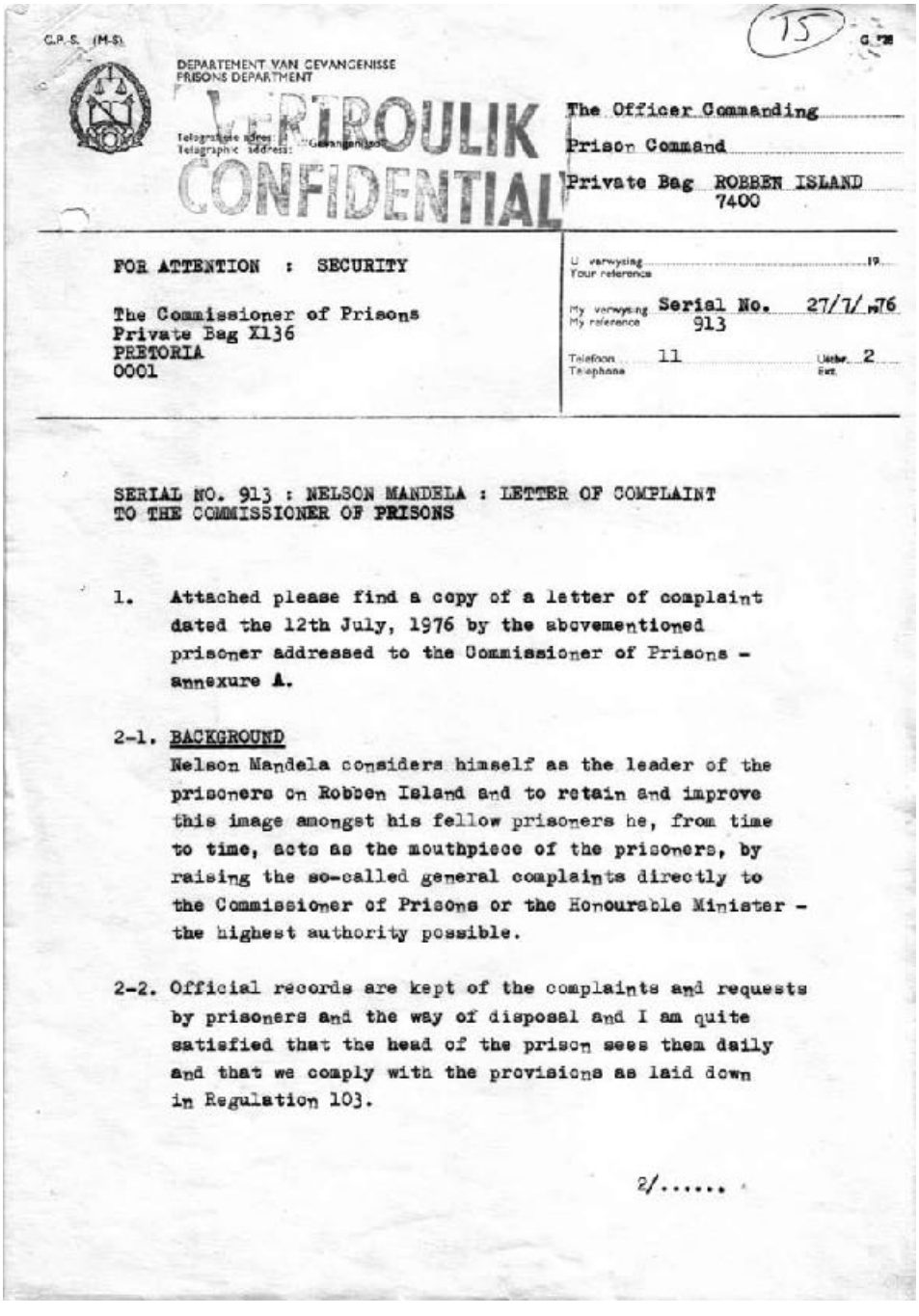
manager at the Nelson Mandela Foundation with primary responsibility for Madiba's archive. In this role, I have developed — some would say ironically — an acute awareness of the need to protect 'sensitive' information.

I offer this as anecdotal evidence of how 'positioning' within the structures of society informs the attitudes of individuals to transparency. I could easily pile on the anecdotes at this point, but let me offer just two others to suggest a pattern. Firstly, take the case of Nadine Gordimer's authorised biography.[9] Here an author identified as a lifelong advocate of transparency falls out with her biographer over his reluctance to respect her desire for certain secrets to be kept, and de-authorises the project. Secondly, in 2005 I was privileged to participate in a discussion with two justices of the Constitutional Court. They agreed that it would be detrimental to due process for them to document the internal decision-making processes of the court: although such documentation would provide fascinating and valuable historical evidence, it would at the same time undermine the safe space critical for judges in the sensitive business of determining constitutionality.[10]

All of us believe — and our 'positioning' frames and modulates the belief — in the notion of a legitimate secret. The concept of freedom of information has to live with this notion. Arguably — and I will pursue this argument later — what we call freedom of information, as an endeavour, is precisely about resisting the illegitimate secret.

But what is a 'secret'?[11] I define it as the story that refuses the invitation to be told. The refusal can be made in advance — we identify information (and the story that frames it) that in particular circumstances, or in any circumstances, we will not disclose. Or, in the circumstances that pertain at the time when the invitation comes, we are not comfortable about acceding to the request for disclosure. The refusal can be made consciously — we hold the story in memory, but defer its telling; or unconsciously — the story is held in the play of shadow behind memory, in the hidden place, awaiting our engagement with it, our own telling of it. Of course, there can be no hard boundary between what we call consciousness and the unconscious. As James Hillman puts it, 'whatever consciousness casts light upon at once creates a shadow. The moment we see more clearly, we become more blind and cannot see behind what we see, the other side of what we see'.[12]

Readers might argue that I am losing the institutional frame of my enquiry. The point is a simple one — to understand institutional secrecy, we must begin with the individual. The hidden places are part of the psychic architecture that each one of us carries. Secrecy is the stuff of daily life, individually and collectively.[13] In institutions, we see the same dynamics at play. Behind 'protection' of information, behind every refusal to provide access to a record, I would argue, is a story refusing to be told. The 'classified' record is best understood as the container of stories at one time regarded as ones not to be disclosed except in prescribed circumstances, if at all. And consider the access refusals based either on an organisation not knowing that it possesses a certain record or on the organisation's failure to find such a record. Do these refusals not mark an institutional space that we



C.P.S. (M-S)

DEPARTEMENT VAN GEVANGENISSE
PRISONS DEPARTMENT

VERTROULIK
CONFIDENTIAL

Telegrafiese adres: Gevangenisse
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The Officer Commanding
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Private Bag ROBBEN ISLAND
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FOR ATTENTION : SECURITY

The Commissioner of Prisons
Private Bag X136
PRETORIA
0001

U verwysing / Your reference
My verwysing / My reference Serial No. 27/7/76 913
Telefoon / Telephone 11 Lêer / Ref. 2

SERIAL NO. 913 : NELSON MANDELA : LETTER OF COMPLAINT TO THE COMMISSIONER OF PRISONS

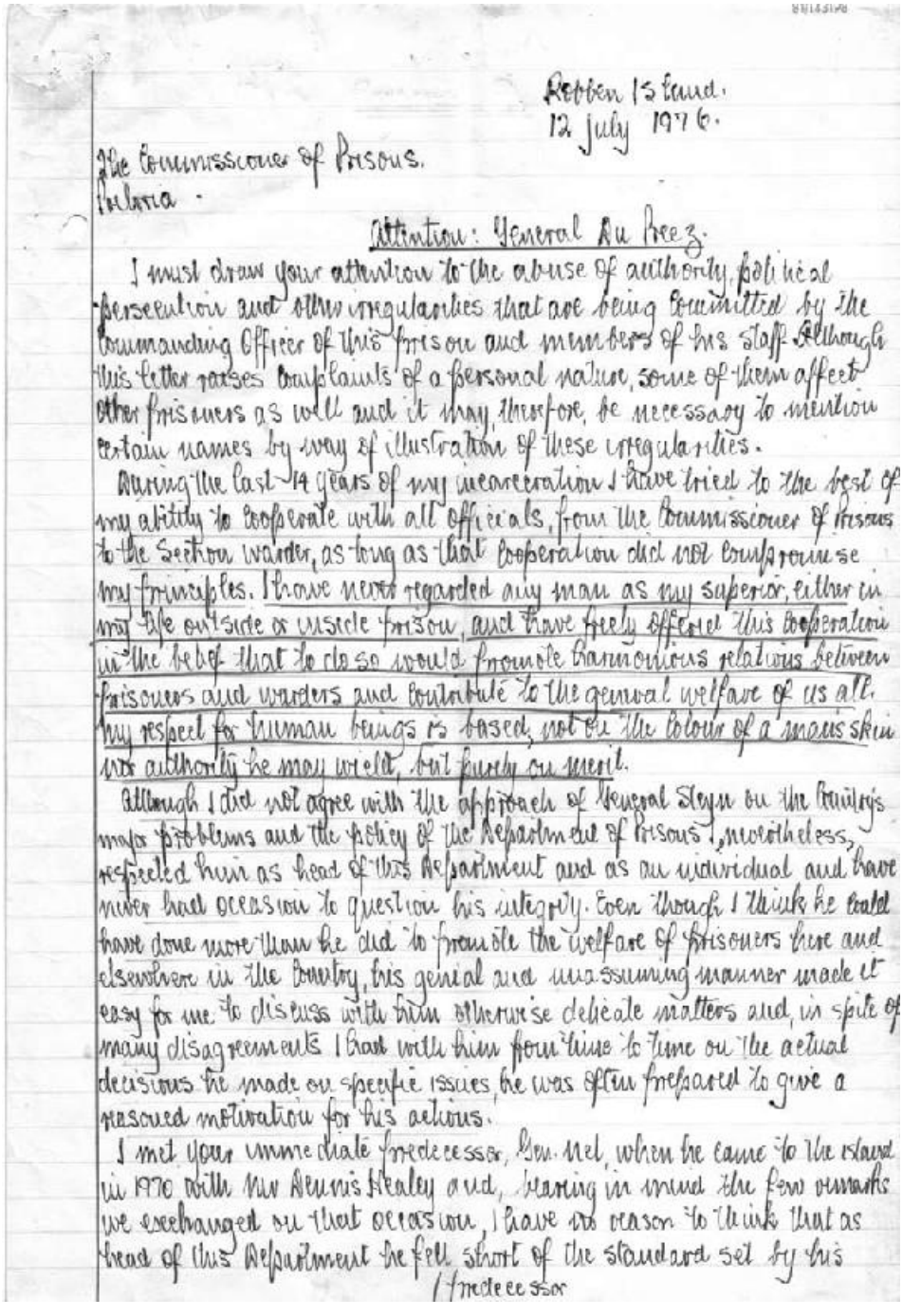
1. Attached please find a copy of a letter of complaint dated the 12th July, 1976 by the abovementioned prisoner addressed to the Commissioner of Prisons - annexure A.

2-1. BACKGROUND
Nelson Mandela considers himself as the leader of the prisoners on Robben Island and to retain and improve this image amongst his fellow prisoners he, from time to time, acts as the mouthpiece of the prisoners, by raising the so-called general complaints directly to the Commissioner of Prisons or the Honourable Minister - the highest authority possible.

2-2. Official records are kept of the complaints and requests by prisoners and the way of disposal and I am quite satisfied that the head of the prison sees them daily and that we comply with the provisions as laid down in Regulation 103.

2/.....

Figure 1 and 2 (pp. 241- 242). Excerpts from a classified record in Nelson Mandela's official prison archive. The record is still not declassified and technically should not be in the public domain.



Robben Island.
12 July 1976.

The Commissioner of Prisons.
Pretoria.

Attention: General Du Preez.

I must draw your attention to the abuse of authority, political persecution and other irregularities that are being committed by the Commanding Officer of this prison and members of his staff. Although this letter raises complaints of a personal nature, some of them affect other prisoners as well and it may therefore be necessary to mention certain names by way of illustration of these irregularities.

During the last 14 years of my incarceration I have tried to the best of my ability to cooperate with all officials, from the Commissioner of Prisons to the Section warder, as long as that cooperation did not compromise my principles. I have never regarded any man as my superior, either in the outside or inside prison, and have freely offered this cooperation in the belief that to do so would promote harmonious relations between prisoners and warders and contribute to the general welfare of us all. My respect for human beings is based, not on the colour of a man's skin or authority he may wield, but purely on merit.

Although I did not agree with the approach of General Steyn on the country's major problems and the policy of the Department of Prisons, nevertheless, respected him as head of this Department and as an individual and have never had occasion to question his integrity. Even though I think he could have done more than he did to promote the welfare of prisoners here and elsewhere in the country, his genial and unassuming manner made it easy for me to discuss with him otherwise delicate matters and, in spite of many disagreements I had with him from time to time on the actual decisions he made on specific issues, he was often prepared to give a reasoned motivation for his actions.

I met your immediate predecessor, Gen. Nel, when he came to the island in 1970 with Mr Dennis Healey and, bearing in mind the few remarks we exchanged on that occasion, I have no reason to think that as head of this Department he fell short of the standard set by his

predecessor

might legitimately name ‘unconscious’?[14]

A final point, to which I shall return before I move to other concepts and assumptions informing this enquiry: the notion of ‘contract’ is deeply embedded in the concept of secret. Not always, but most often, the boundaries protecting hidden places are contracted. Think about clothing as a simple example. Without being drawn into the larger questions of social and institutional dress codes, I note merely that fundamental to dress is the recognition of the need to keep certain parts of the body hidden in public space, and that contract informs what is regarded as appropriate coverage. Every time we get dressed in the morning, more or less consciously we acknowledge the legitimate secret and engage a web of contracts.

Frame 3: Freedom of information

Up to this point, I have been disclosing what I regard as the primary frames within which I choose to address the question of access to information. Now I want to focus on the concept commonly named ‘freedom of information’. I begin with three theses that will form a basis for the subsequent enquiry.

Firstly, no polity can say that it has freedom of information. This freedom, like democracy, like justice, must always be coming. What is critical is the space for contestation, for struggle, for bringing this freedom into play. Secondly, this freedom, this right, is not an absolute one. There are limits. As I have already argued, only a fool would reject the notion of a ‘legitimate secret’. On the other hand, this concept is used routinely by the powerful to deny access to information that belongs in the public domain. Thirdly, in terms of meaning, significance and power, it is not information per se that is the key resource at play; rather, the key resource is what I call ‘contextualised’ information, i.e. archive.

Scholars and commentators from many disciplines and many countries, working with a range of theoretical and epistemological frameworks, have unfolded how the exercise of political power hinges on control of information.[15] My own favourite is Noam Chomsky, whose seering critiques of democracy, in the United States especially, demonstrate how elites depend on sophisticated information systems, media control, surveillance, privileged research and development, dense documentation of process, censorship, propaganda, and so on to maintain their positions.[16] But it is Derrida and Foucault who reach most deeply in exposing the logic, even the law, underlying these phenomena. In Derrida’s words: ‘there is no political power without control of the archive, if not of memory’.[17] And Foucault, coming from a different direction, but nailing the same law: ‘The archive is first the law of what can be said’;[18] and when it can be said, how, and by whom. Both of them insist on the archive as a construction: one that issues from and expresses relations of power. Listen to Derrida elaborating this insistence in relation to media apparatuses:

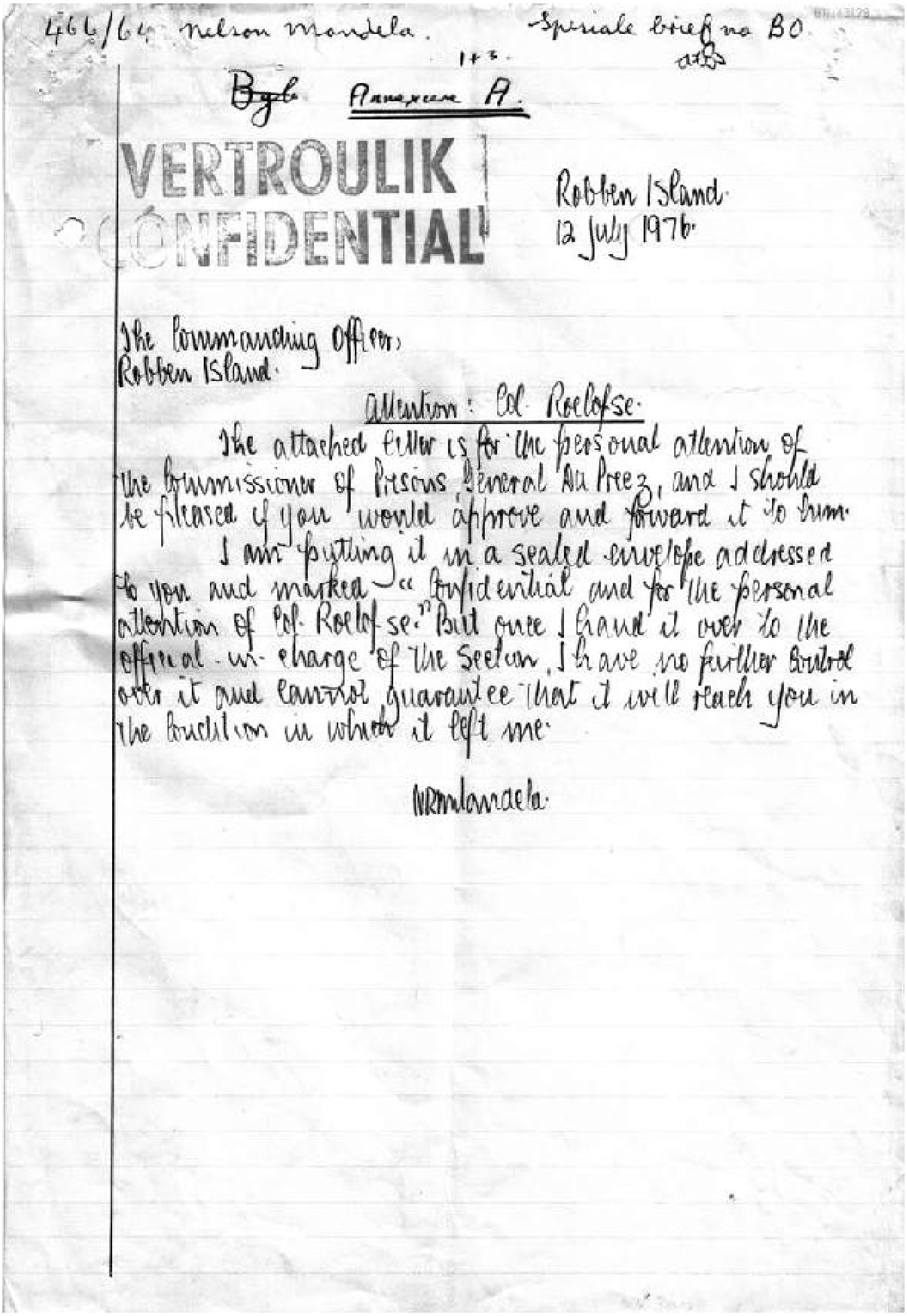
> Who today would think his time and who, above all, would speak about it … without first paying some attention to a public space and therefore to a political present which is constantly transformed, in its structure and its content, by the teletechnology of what is so confusedly called information or communication?[19]

The confusion in this naming of 'information' and 'communication' stems from an underestimation — sometimes an ignoring — of what Derrida calls 'fictional fashioning': 'No matter how singular, irreducible, stubborn, distressing or tragic the "reality" to which it refers, "actuality" comes to us by way of a fictional fashioning.'[20] Information is always fashioned, always constructed. Derrida clears away the confusion by deploying the term — the concept — 'archive'. In its Derridean deployment, 'the archive' is the law determining meanings and significances — the law, if you like, determining contexts. Here, beneath the surface whirl and clatter of information, is where the instruments of power are forged. Instruments that in their most fundamental of operations create and destroy, promote and discourage, co-opt and discredit contexts. Archivists have conceptualised what they do around their special expertise in context. But it is the archon, the one who exercises political power, who is the purveyor of context and who is the archetypal archivist.

The practical implications of this for those who use freedom of information laws and mechanisms are a legion. Seasoned information requesters have learnt to identify the subtler archontic tools — those that reach beyond delaying tactics, various means of obstruction and obfuscation, and crude refusals. For instance, it is relatively easy to overwhelm a requester with irrelevant information, thus diverting the request and obscuring significances.[21] Or information can be released without any indication of the existence of a mass of related information.[22] Or information can be released with vital contextual information masked or severed.[23] The one who controls contexts is the one who controls meanings and significances. This is why, I would suggest, the ruling elites in the United States can afford to permit what is generally regarded as an extremely generous national freedom of information regime. This is why wars undertaken by the US military can now be documented by the media so densely and in such detail: 'embedded' journalists provide the military with a critical means of controlling the construction of archive; such journalists have entered a contract that ties them irrevocably into the military's archontic agenda.

Frame 4: Contest and contract

If the archive is indeed the law determining contexts, and if it is a law informing even the most established of democracies, then how do we measure democracy?[24] To this question, Derrida responds decisively, and not surprisingly, in archival terms: 'Effective democratisation can always be measured by this essential criterion: the participation in and the access to the archive, its constitution, and its interpretation.'[25]



466/64 Nelson Mandela. Spesiale brief no 80.

143.

Bylae Annexure A.

VERTROULIK
CONFIDENTIAL

Robben Island.
12 July 1976.

The Commanding Officer,
Robben Island.

Attention: Col. Roelofse.

The attached letter is for the personal attention of the Commissioner of Prisons, General Du Preez, and I should be pleased if you would approve and forward it to him.

I am putting it in a sealed envelope addressed to you and marked "Confidential and for the personal attention of Col. Roelofse." But once I hand it over to the official-in-charge of the Section, I have no further control over it and cannot guarantee that it will reach you in the condition in which it left me.

NRMandela.

Figure 3. Another excerpt from Nelson Mandela's official prison archive.

Two points can be made here. Firstly, we diminish freedom of information, we trivialise it, if we remove it from this frame. Secondly, if power is exercised through the construction of archive, then the locus of participation in the exercise of power is precisely the processes of the archive's construction. And that implies contestation, for society is always an assemblage of competing interests and perspectives. As the British intellectual Richard Hoggart has reminded us, '[a] well-running democracy will constantly quarrel with itself, publicly, about the right things and in the right way'.[26] Even in democracies, of course, there are limits — there must be limits — to contestation. Hoggart points to these with the notion of quarrelling 'in the right way'. Here he suggests the space for contract. Hovering behind the suggestion is the notion of a more or less transcendent social contract. This is a notion that I wish to avoid, as it involves a different set of questions and a different kind of debate. Quarrelling in democracies is regulated by a web of contracts that are expressed in constitutions, laws, codes and agreements. It is the contract constituted by this web that I refer to here and in the remainder of the chapter.

We need to be wary of the penchant of those who hold power in democracies to hold up contract as a substitute for contest. Sometimes the powerful even go so far as to suggest that contestation unravels the contract.[27] These, I want to suggest, are subterfuges — strategies for entrenching power. It is to confuse law, and rights, with justice. Contracts emerge out of contestation. And the very notion of contract assumes potential contest, and puts in place frameworks and mechanisms for managing contestation appropriately. Indeed, ensuring that the contract is respected, adapted to accommodate new realities and new needs, and kept open to the call of justice hinges on our capacity to foster contestation within and around it. So that the contestants — and at times they might be bitter foes — are at the same time partners in a noble endeavour: the endeavour to bring justice.

I have argued that freedom of information must be positioned conceptually within the making of democracy; or, to use Derrida's terminology, within 'the participation in and the access to the archive, its constitution, and its interpretation'. This making — this participating, accessing, constituting and interpreting — takes place in an arena populated by diverse and often competing rights and interests. We oversimplify access to information when we typify it in terms of a transaction between a holder of information and a requester. Access to information involves and implicates the creator of a record, the owner (of the physical record, and of its intellectual content), the holder (or custodian), the controller (because the one who controls access is not necessarily the owner or the holder), the third parties named in the record, the requester, and the public (the public named in the terms 'public institution', 'public record' and 'public interest'). All these players are party to what is always a multiple transaction. The contract identifies these players, defines their rights, and establishes mechanisms for weighing competing rights and resolving conflicts. In South Africa, the contract comprises specific constitutional provisions, PAIA, a body of other laws addressing access to information, an even bigger

body of subsidiary regulations and common law.

For many, contract is the beginning and the end of ethical enquiry — getting it right is simply about applying contract correctly. In my experience over three years as an information requester, and in the experience of almost every contributor to this book, public institutions in South Africa almost as a rule adopt this approach to getting it right. Many institutions, of course, are not interested in getting it right. But those that are tend to apply contract in an extremely legalistic mode. Again, I would insist, this is to confuse law with justice. There are different ways of applying contract and there are different ways of interpreting it. Moreover, its provisions can be inadequate, confusing, contradictory, even wrong.[28] And it is not cast in stone; it can be changed. Institutions concerned about 'getting it right' must refuse to stop at contract; they must reach for justice. This imperative acquires special urgency when there are recent histories of systemic disadvantage and oppression.

South African specificities

In the second section of this enquiry, I attempted to demonstrate that secrecy is the stuff of daily life for individuals. It is no surprise, then, that institutions and states are more or less uncomfortable with transparency. And it is no surprise that the apartheid state was particularly uncomfortable with transparency. Indeed, in apartheid South Africa, state secrecy was a standard modus operandi. Interlocking legislation restricted access to and the dissemination of information on vast areas of public life.[29] These restrictions were manipulated to secure an extraordinary degree of opacity in government, and the country's formal information systems became grossly distorted in support of official propaganda. This obsessive secrecy was served not only by legislation, but also by a range of executive tools — many thousands of oppositional voices were eliminated through means such as the confiscation and/or destruction of records, informal harassment, media censorship, various forms of banning, detention without trial, imprisonment and assassination. And a story that still awaits telling is the impact of apartheid on the record-making practices of anti-apartheid individuals and organisations, in particular their reluctance to commit certain types of information to paper and their readiness to destroy records rather than allow them to fall into the hands of state operatives. This history of opacity in large measure explains the liberation movements' and other players' commitment to freedom of information during the formal transition from apartheid. It also underlies the unique features of South Africa's post-apartheid access to information regime.[30]

One of the ironies of the post-apartheid landscape is that, despite possessing a widely admired freedom of information law and despite the country's history of resistance to opacity, South Africa has proved to be a less than fertile environment for freedom of information. The evidence accumulated in the contributions to this volume suggests a wide range of impediments to this freedom: the absence of an information commissioner

to resolve disputes quickly and cheaply; the costs of going to court; incompetence; the absence of the necessary political will to make the system work; tardiness in unravelling apartheid era legislation; the deliberate frustration of legitimate interests in public access; and the paucity of resources dedicated to the implementation of legislation. But to understand why we are where we are, I would suggest, we need to identify the cultures that underlie this diverse range of impediments.

In my reading of where we are, South Africa is confronted by a conjunction of cultures antithetical to freedom of information and conducive to gatekeeping. Four cultures, or clusters of culture, can be identified in particular. Firstly, our record-making cultures are poor, and in some sectors getting poorer. In certain reaches of the state, the record-making arena (from paper-based filing systems to databases, from email to financial records) is a Wild West. Secondly, many public institutions are strapped by what Iraj Abedian calls 'a culture of mediocrity and bureaucratic compliance'.[31] This culture expresses itself most frequently in an inertia fed by a deadly combination of incompetence, contempt for administrative justice and fear of displeasing higher authority. Thirdly, our cultures of information access and use are in the early stages of democratisation. The notion of access to information as a fundamental right still feels 'new'. And, fourthly, cultures of secrecy are proving extremely resilient. These latter cultures do not flow only out of the old apartheid state milieus. They also flow out of the anti-apartheid experiences of exile, the underground and mass resistance.[32] South Africa did not experience a revolution. In transitions from oppressive regimes to democracy, the nature of the transition is critical in determining subsequent access environments. A quick overthrow is the best-case scenario (e.g. East Germany). Protracted negotiated settlements give the oppressive regime time to destroy records and provide the space for more or less secret deals that stimulate sensitivity to later disclosures.[33]

Under apartheid, freedom of information was one of many strangers. And it remains so. The call of justice is to embrace this stranger and to offer it whatever hospitality we can muster.

Towards an ethics

Speaking in the decade before the introduction of freedom of information legislation in the United States, T.R. Schellenberg (an American, and one of a handful of canonical voices in international archival discourse) offered the following golden rule for getting access to information right: 'Records should be open for use to the maximum extent that is consistent with the public interest.'[34]

I think there is considerable merit in this rule. Schellenberg privileges information that is more or less contextualised ('records'), he privileges use (rather than the blander 'access') and he privileges public participation (even if only notionally). However, he exhibits no sense of standing above an abyss. He speaks out of a positivist discourse that

is assured, unreflective about its assumptions and resistant to the problematisation of conceptual foundations. What for him constitutes a 'record' is self-evident. Records 'open for use' is enough — systemic barriers to access for the marginalised, the weak and the poor fall outside his purview. The fact that 'public interest' is always already being made by a public structured in terms of prevailing power relations does not bother him. He does not sense the structurally determined impossibility of freedom of information — in contrast, say, to Derrida, for whom, in my reading, reasonable access relates to freedom of information as reconciliation relates to forgiveness or as an economy of exchange relates to gift.[35]

But I leave this beginning of a deconstruction in order to move, finally, to a delineation of an ethics that avoids Schellenberg's pitfalls. If the call of justice is indeed the most important call and if the work of providing access to information is justice (and resistance to injustice), then what should our ethics look like? The beginning of an answer takes us into that space we name 'accountability'. For the call of justice demands a response — it demands, in the first instance, a 'yes!' But it also demands a giving of account. We are all accountable to (and responsible for) the call of justice. Discourses of accountability, generally, tend to emphasise the giving of account. I believe that if we are to emphasise any particular dimension, then it should be the listening to a call.[36] As Robert Gibbs argues in his compelling book Why Ethics?: 'We begin in a conversation, where two people respond to each other …. Moreover, the listening is primary. My first responsibility arises in listening to another person, not in speaking to her.'[37] For Gibbs, as for Derrida, listening is the beginning of ethics.

My enquiry up to this point has been, precisely, an attempt to listen. In the first instance, I listened carefully to the voices of this volume's other contributors. In absorbing to their rich accounts of particular struggles, I have been trying to hear the imperatives that address us in the space we name 'freedom of information'. Within the frames that I deploy (and no doubt they are limited, not least by the specificities of my experience), a just ethics would have to respond to at least eight imperatives:

- to acknowledge the legitimate secret;
- to resist the illegitimate secret;
- to engage (honestly and generously) the contexts that give information its meanings and significances (of course, this is to engage the impossible, for contexts are infinite and ever shifting);
- to understand contract in all its complexity;
- to respect contract;
- to take responsibility for contract (in other words, the imperative is to resist the temptation to take contract as a given, as a stable template; rather, contract must be made permeable, dynamic and hospitable to contestation);

- to redress systemic barriers, imbalances and exclusions; and
- to welcome 'otherness' (in other words, to welcome the energy, the event, the process, the one that comes from outside our capacity to understand and challenges our frames of understanding)

The institution, public or private, that hears these imperatives and seeks to respond to them, in my view, is one that is beginning, at least, to move towards an ethics of hospitality — an ethics that acknowledges the gatekeeper in all of us, while reaching beyond gatekeeping. This — given the dynamics of impossibility always at play — is all that any institution, that any of us, can begin to aim at. Ultimately, it is the freedom longed for, the embrace of *a luta continua*, that defines who we are most fundamentally. It is my hope that this book will contribute to the growth of this ethics (and its enabling cultures) in South Africa. For in it is to be found the future of our hard-won democracy.