

Access to Government Information in South Korea: The Rise of Transparency as an Open Society Principle

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Access to government-held information, often known as “freedom of information” (FOI), is more widely recognized than ever. In the past nearly thirty years, freedom of information as a right to know has emerged as a newfound area of freedom of expression. The leading FOI expert Toby Mendel, former law program director of ARTICLE 19, an anti-censorship organization in London, noted “a veritable revolution” in the right to information in 2008:

Whereas in 1990 only 13 countries had adopted national right to information laws, upwards of 70 such laws have now been adopted globally, and they are under active consideration in another 20-30 countries.... In 1990, the right to information was seen predominantly as an administrative governance reform whereas today it is increasingly being seen as a fundamental human right.¹

From an FOI perspective, South Korea is a fascinating case study. As a thriving democracy, Korea has institutionalized the checks and balances among the three branches of government since 1993, when the Korean government was taken over by a civilian president for the first time in thirty-

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1. Toby Mendel, *Freedom of Information: A Comparative Legal Survey* 3 (2nd ed. 2008) (Mendel analyzes the FOI laws of fourteen countries and the international law of FOI). *See also Chronological and Alphabetical lists of countries with FOI regimes*, FREEDOMINFO.ORG, <http://www.freedominfo.org/2016/06/chronological-and-alphabetical-lists-of-countries-with-foi-regimes/> (notes that 114 countries had recognized FOI as a legal right) (last visited on November 30, 2017).

two years.² Korea represents a rule-of-law nation in which citizens and the government resort to the courts, not extra-legal mechanisms, to resolve disputes. In this context, the FOI law in Korea has been one of the key liberalizing statutes that “make the government increasingly transparent.”³

Given that South Korea is often touted as a model case for the United States in exporting democracy abroad, Korea’s evolving experience with freedom of information deserves a systematic analysis.⁴ This is all the more compelling, considering that 2016 marks the 20th anniversary of the Act on Disclosure of Information by Public Agencies [Official Information Disclosure Act] in Korea (hereinafter, “Official Information Disclosure Act”).⁵ This statutory framework on access to government records is the Korean version of the U.S. Freedom of Information Act (FOIA) of 1966. Especially noteworthy is the growing relevance of the Korean FOI law to international and comparative law, as showcased by American legal scholars’ discussion of the 1989 case of the Korean Constitutional Court.⁶

In its 2016 report on Korea’s FOI law, ARTICLE 19 credited the “activist” Korean judiciary for the Official Information Disclosure Act that facilitated the Korean government’s embrace of “a series of democratic reforms” in the late 1980s-90s.⁷

As an increasingly “monitory democracy,” Korea has become more open as a society in recent years. The Korean FOI law has considerably liberalized the governing process in the Asian country.⁸ But its critics assert that the law has not resulted in the kind of transparency that its proponents envisioned for Korea in the mid-1990s.

2. D.S. Choi et al., *Korea*, in INTERNATIONAL LIBEL & PRIVACY HANDBOOK 159 (Charles J. Glasser Jr. ed., 2009).

3. AGNÉS CALLAMARD, SPEAKING OUT FOR FREE EXPRESSION: 1987-2007 AND BEYOND 165-66 (2008).

4. LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 577 (2002); See mail from Sandra Coliver, Senior Legal Officer for Freedom of Information and Expression at the Open Society Justice Initiative (Sept. 25 2007, 9:47:17 PM PDT) (on file with author) (“I know that Korea has some good case law on the right to know. I wonder if the case law has continued to develop in a positive way”).

5. *Gonggongkikwan jeongbo gong-gae beob* [Official Information Disclosure Act], Act No. 5242, Dec. 31, 1996, amended by Act No. 11991, Aug. 6, 2013 (S. Kor.), translated in Korea Legislation Research Institute online database, http://elaw.klri.re.kr/eng_service/lawView.do?hseq=29982&lang=ENG.

6. See SVITLANA KRAVCHENKO & JOHN E. BONNIE, HUMAN RIGHTS AND THE ENVIRONMENT: CASES, LAW, AND POLICY 244-47 (2008).

7. ARTICLE 19, *Country Report: The Right to Information in South Korea* (Jan. 21, 2016), <https://www.article19.org/resources.php/resource/38242/en/country-report-the-right-to-information-in-south-korea> (last visited Dec. 2, 2017).

8. For discussion of “monitory democracy,” see generally MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945-1975 at 234-41 (2015).

Regardless, access to information is now indisputably entrenched as a right for Koreans as part of their open government. transparency-oriented “Government 3.0” policy of President Park Geyun-hye (2013-17) was called “a paradigm change in all state affairs,” one that prioritizes people over the State as its mode of operation.⁹ Koreans have seen a dramatic increase (250 percent) in the FOI requests from 1998, when the Official Information Disclosure Act came into force, to 2015.¹⁰ The number of FOI requests has grown since 2006, when FOI submissions were allowed online.¹¹

Korea is now experiencing the fourth phase of FOI, which started in 2004 with the wholesale revision of the Official Information Disclosure Act. The Korean government proactively releases official records without request. During the 1998-2004 period, the third FOI phase for Koreans, the government was reactive to the citizens’ requests for public records. The infantile FOI era in Korea lasted from 1989-1998, when the Constitutional Court’s recognition of the citizen’s right to information precipitated the partial access to government information. Korea was “dark” on informational disclosure prior to 1989, when secrecy pervaded the government.

This article examines how and why freedom of information in South Korea has emerged as a defining element of moving Korean society to a new level of participatory democracy. From a comparative perspective, the ongoing Korean experience with FOI should serve as a frame of reference for those interested in Korea’s development as an “impossible country” in the global 21st century.¹²

The present study focuses on the right to information in South Korea as it has evolved since the late 1980s, when the right was first read into the constitutional guarantee of freedom of expression.¹³ Three questions provide the main focus of the study. First, what is the conceptual and theoretical framework of the right to information in Korea? Second, how is the right to information guaranteed as a constitutional and statutory right in Korea? And finally, how has the right to information been interpreted by Korean courts?

9. Ministry of the Interior, *Open Government Partnership Self-Assessment*, in REPUBLIC OF KOREA, NATIONAL ACTION PLAN 2014-2016, 1 (2015).

10. *Annual Report on Open Information*, MINISTRY OF THE INTERIOR (Sept. 5, 2016), http://www.moi.go.kr/irt/bbs/type001/commonSelectBoardArticle.do?bbsId=BBSMSTR_000000000012&nttId=55966.

11. SANG-WOON AHN, FREEDOM OF INFORMATION LAW (Korean) 18 (2015).

12. *Id.*

13. Const. Ct., 88 Hun-Ma 22, Sept. 4, 1989 (S. Kor.).

THE RIGHT TO INFORMATION: A CONCEPTUAL AND THEORETICAL
FRAMEWORK

It is widely accepted that one of the signature characteristics of a representative democracy hinges on whether citizens can access State-held information.¹⁴ This informational access for citizens as a democratic principle is geared toward open and participatory politics. As American FOI specialist Martin Halstuk of Pennsylvania State University noted, it enables citizens to “hold government responsible for its actions and make informed decisions pertaining to self-rule.”¹⁵

From a freedom of the press perspective, access to information as an affirmative right to know for journalists is considered crucial to the “enabling environment” for free and independent media.¹⁶ The media, without laws on public access to government agency records and meetings, are usually hindered from functioning as an active, informative channel of communication for the public.¹⁷

When the South Korean government adopted a series of sweeping political reforms in 1987, access to information was one of the defining agendas for those who clamored for more than a negative freedom of expression from the State.¹⁸ Two Korea observers argued: “If the press is to play a positive role by contributing to an informed and politically active electorate in a democracy, the government should go further than abolishing or revising suppressive laws; it should establish institutional mechanisms for positively enhancing press freedom.”¹⁹

The underlying argument for freedom of information in Korea parallels “one of the principal *positive* justifications for the free speech principle: the importance of freedom of speech of an active democracy.”²⁰ This argument resonated with many Koreans, whose authoritarian rule-by-law

14. See Anthony Mason, *The Relationship Between Freedom of Expression and Freedom of Information*, in FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION: ESSAYS IN HONOUR OF SIR DAVID WILLIAMS 225 (Jack Beatson & Yvonne Cripps eds., 2002).

15. Martin E. Halstuk, *Freedom of Information*, in 5 THE INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATION 1889 (Wolfgang Donsbach ed., 2008). For an informative theoretical discussion of access to information as a right to know in American law, see Sigman L. Splichal, *The Right to Know*, in ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE 3-22 (Charles N. Davis & Sigman L. Splichal eds., 2000).

16. See generally Monroe E. Price & Peter Krug, *The Enabling Environment for Free and Independent Media* 41-47 (2000).

17. GLOBAL JOURNALISM: TOPICAL ISSUES AND MEDIA SYSTEMS 58 (Arnold S. De Beer ed., 5th ed. 2009).

18. Kyu Ho Youm & Michael B. Salwen, *A Free Press in South Korea: Temporary Phenomenon or Permanent Fixture?* 30 ASIAN SURVEY 314-17 (1990).

19. *Id.*

20. ERIC BARENDT, FREEDOM OF SPEECH 108 (2nd ed. 2005).

administrations viewed their management of government records as a means to “control the people” underlying their Government 1.0.²¹

Citizens in a newly democratic Korea wanted to be more assertive and less passive in consuming the information from their government agencies. They demanded a more effective free speech system that “depends upon an abundance of law materials feeding into the system.”²² Access to information enables public bodies to be more accountable to citizens by allowing them to participate fully in public discourse.

What’s the “right to know” as a concept? Constitutional law professor Kun Yang, who has served as the chair of the Korean government’s Board of Audit and Inspection, stated in 2014:

The right to know is categorized as two rights, depending on its characteristics. First, it’s a right to know in its negative sense: a right not to be impeded in accessing information. This is a right to liberty, as explicitly stated by the Basic Law of Germany Secondly, it’s a right to know in its positive sense: a right to petition to the government for informational disclosure. This is a right to petition. Our country’s Official Information Disclosure Act provides for the right to know in this sense, and it is comparable to the Freedom of Information Act of the U.S.²³

Professor Yang’s insights on the right to know are similar to the theoretical and conceptual framework of the right to information, as articulated by the Constitutional Court of Korea in 1992, when it recognized the right to know as emanating from freedom of speech and the press.²⁴ As if it applied the U.S. free speech theory to Korean law on access to information, the Court held that such a right was vital to any democratic society because it promotes individual and societal values such as self-fulfillment, search for truth, participation in political decision-making, and the balancing of stability and change.²⁵ The Court also recognized that by making the government responsive to the people, the right to know provides an important “checking value.”²⁶

21. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 209 (2003) (Rule by law is differentiated from rule of law in that the former allows law to be used “as a tool of the rulers, not a constraint on them,” while the latter allows law to constrain the rulers); Zin-Im Jung & You-Seung Kim, *The Government 3.0 Era: Issues in the Freedom of Information System*, 39 KOREAN JOURNAL OF ARCHIVAL STUDIES (Korean) 45, 50 (2014).

22. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 671 (1970).

23. KUN YANG, CONSTITUTIONAL LAW LECTURE (Korean) 576 (4th ed. 2014).

24. Const. Ct., 89 Hun-Ka 104, Feb. 25, 1992 (S. Kor.).

25. See THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3-15 (1966); Const. Ct., 89 Hun-Ka 104, Feb. 25, 1992.

26. See generally Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 Am. B. FOUND. RES. J. 521-649 (1977).

As the Constitutional Court of Korea indicates, the *negative* free speech argument is relevant to FOI.²⁷ For a practical exercise of freedom of speech, the government should *not* inhibit citizens from knowing what public authorities are doing and how they are doing it. In this context, the right to receive information about and from government and public authorities is primarily a liberty in the sense of “freedom from.”

CONSTITUTIONAL AND STATUTORY FRAMEWORK ON THE RIGHT TO INFORMATION

The Constitution of Korea has no specific provision on the right to information.²⁸ As already noted, however, freedom of information has been inferred from freedom of expression: “All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association.”²⁹ The Constitutional Court has recognized the implied “right to know” as a constitutional right to free speech.³⁰ It is one of the notable examples in Korea’s constitutional law in which the Constitutional Court has been boldly innovative in recognizing new rights by reading the text of the Constitution broadly.³¹

The law governing the access to information in Korea is the Official Information Disclosure Act enacted in 1996.³² The FOI statute was wholly amended in 2004 to remedy various defects of the law while promoting citizens’ right to know and ensuring the transparency of the governing process within the context of the Korean government.³³ The revised law proclaims its purpose as:

[T]o ensure people’s rights to know and to secure people’s participation in state affairs and the transparency of the operation of state affairs by prescribing matters necessary for people’s requests for the disclosure of information kept and controlled by public institutions and the obligations of public institutions to disclose such information.³⁴

The State agencies among the public institutions under the FOI law encompass the three branches of the government—that is, the National Assembly, the judicial branch, and the executive branch—and the

27. Const. Ct., 89 Hun-Ka 104, Feb. 25, 1992 (S. Kor.).

28. *Daehanminkuk hunbeob* [Constitution] (S. Kor.).

29. *Id.* Art. 21(1).

30. Const. Ct., 88 Hun-Ma 22, Sept. 4, 1989, (S. Kor.).

31. Ginsburg, *supra* note 21, at 226; DAE-KYU YOON, *LAW AND DEMOCRACY IN SOUTH KOREA: DEMOCRATIC DEVELOPMENT SINCE 1987*, at 86-90 (2010).

32. Official Information Disclosure Act.

33. *Id.*

34. *Id.* Art. 1.

Constitutional Court, and the National Election Commission.³⁵ So, it is wider in its scope than the Freedom of Information Act of the United States, which does not apply to Congress and the federal courts.³⁶

The Korean law defines “information” as “matters recorded in documents (including electronic documents ...), drawings, pictures, films, tapes, slides, and other media corresponding thereto that are made or acquired, and managed by public institutions for the performance of their duties.”³⁷

Korean law requires government institutions to *actively* release “any information” that they keep and manage to the public, in compliance with the people’s right to know.³⁸ In ensuring the people’s right to access government information, the public institutions have to modify relating statutes and regulations and “actively endeavor” to disclose information that the public “needs to know.”³⁹

Most significantly, the amended Official Information Disclosure Act mandates that the central administrative agencies and the public institutions (prescribed by the Presidential Decree) disclose information classified for public release, to the public through the information and communication network, “even when no request for information disclosure is made.”⁴⁰

Significantly, the broadcasting media, *both* public and private, are subject to disclosure of information under the Broadcasting Act.⁴¹ The access to information requirement of the Broadcasting Act applies to all the broadcasting stations, except KBS (Korean Broadcasting System), a government-invested corporation, and EBS (Educational Broadcasting System), which was established under the Korean Educational Broadcasting System Act. KBS and EBS as public institutions are subject to the Official

35. *Id.* Art. 2. “Public institutions” are defined as: The term “public institution” means any of the following institutions: (a) State agencies; (b) Local governments; (c) Public institutions under Article 2 of the Act on the Management of Public Institutions; and (d) Other institutions prescribed by Presidential Decree.

36. *See* 5 U.S.C. §551(1) (“agency” means “each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include: (A) Congress, (B) the courts of the United States . . .”).

37. Official Information Disclosure Act, Art. 2.

38. *Id.* Art. 3.

39. *Id.* Art. 7(2).

40. *Id.* Art. 8(2).

41. *See* *Bangsong beob* [Broadcasting Act], Act No. 3878, Nov. 28, 1987, amended by Act No. 10856, July 14, 2011, Art. 90(5) (S. Kor.), translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=2828&lang=ENG.

Information Disclosure Act.⁴² Not surprisingly, freedom of the press has been at issue when FOI requests were rejected by the broadcasting media.⁴³

While no specific government agency or public institutions are exempted from the access to information obligations under the Official Information Disclosure Act, the Act is sweeping in exempting “any information” collected or created by national security agencies in order to analyze national security interests.⁴⁴ This national security agency exemption raises a presumption of secrecy for agency records in contradiction to the Act’s priority of disclosure.

In recognition of the conflicting interests involved, the Act stipulates several grounds of exemptions to information disclosures:

- (1) Information specifically exempted by the Act and other laws;⁴⁵
- (2) Information relating to national security, national defense, unification, diplomatic relations, etc.;
- (3) Information harmful to the protection of individuals’ lives, physical safety, and properties;
- (4) Information relating to ongoing trials, to crime investigation and prevention, institution and maintenance of indictments, or the execution of sentence and security disposition;
- (5) Information relating to audit, supervision, inspection, tests, regulations, tendering contract, the development of technology, the management of personal affairs, decision-making processes and internal review processes, etc.;
- (6) Information relating to resident registration numbers and other private information of individuals;
- (7) Information relating to management and trade secrets of corporations, organizations, or individuals;
- (8) Information relating to real estate and the acts of cornering and hoarding real estate.⁴⁶

42. Official Information Disclosure Act.

43. For a discussion of the judicial interpretation of freedom of the press vs. access to information, see *infra* notes 104-111 and accompanying text.

44. Official Information Disclosure Act, Art. 4(3).

45. Among the statutes that classify certain information as secret or closed to the public and thus to be exempt from the Official Information Disclosure Act are: *Hyongsa sosong beop* [Criminal Procedure Act], Act No. 341, Sept. 23, 1953, amended by Act No. 14179, May 29, 2016 (S. Kor.), Art. 47 (S. Kor.); *Hwangyong bunjaeng jojong beop* [Environmental Dispute Adjustment Act], Act No. 5393, Aug. 28, 1997, amended by Act No. 13602, Dec. 22, 2015, Art. 25 (S. Kor.); *Gukka jeongbowon beop* [National Intelligence Service Act], Act No. 3313, Dec. 31, 1980, amended by Act No. 12948, Dec. 30, 2014, Arts. 6 and 12 (S. Kor.); *Gukhoe beop* [National Assembly Act], Act No. 4015, June 15, 1988, amended by Act No. 14840, July 26, 2017, Art. 118(4) (S. Kor.).

46. Official Information Disclosure Act, Art. 9.

What exemptions are involved, how the exemptions are invoked by the public institutions, and how the courts interpret the exemptions have been the frequent grounds for the growing FOI litigation.

Where information might relate to "commercial secrets" of non-government entities, the government agency may consult with the affected party. Article 11(3) of the Official Information Disclosure Act states and in the event that any public institution is aware that the requested information "pertains, in whole or in part, to a third party, the public institution shall inform the third party of the fact without delay and may, if necessary," hear that party's opinion on the information.⁴⁷

The Korean law does not discriminate against non-citizens in accessing government records. Foreigners may also file FOI requests to the government bodies and public institutions that are subject to the law. However, their requests have to comply with a relevant presidential decree.⁴⁸

There is no limitation on the format of access requests. Requests may be filed electronically as well as in writing or in person. The Enforcement Decree for the Official Information Disclosure Act provides for postal, fax, or electronic submission of requests for information disclosure.⁴⁹ The public institutions under the FOI law can charge for the actual cost of disclosing information.⁵⁰ But the charges are limited to the processing cost of inspection and reproduction of information and of mailing the information.⁵¹ No charges are permitted for other activities associated with handling information requests, such as the cost of consulting with third parties or the time spent for assessing whether the requests fall within the exemptions. "Where the purpose of using information subject to application for disclosure is deemed necessary for maintaining and promoting public welfare, the expenses referred to in paragraph (1) may be reduced or exempted."⁵²

The purpose of requesting government information is to maintain and promote public welfare if the requested information is:

1. Necessary to non-profit academic or public organizations or corporations to conduct academic and scholarly research or to monitor government agencies;
2. For a professor, teacher or student for purposes of their research after their request is certified by their supervisor;

47. *Id.* Art. 11(3).

48. *Id.* Art. 5(2).

49. *Gonggonggigwan jeongbo gonggae beob sihaeng lyeong* [Enforcement Decree of the Official Information Disclosure Act], Presidential Decree No. 27670, Dec. 13, 2016, Art. 6 (S. Kor.), *translated in* http://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=40266&type=sogan&key=15.

50. Official Information Disclosure Act, Art. 17.

51. *Id.*

52. *Id.* Art. 17(2).

3. Determined by the head of a public agency to be necessary for maintenance and promotion of public welfare.⁵³

The deadlines for handling FOI-related matters are ten days for answering the request from the date when the request was received and twenty days for refusing the request for information.⁵⁴

A government agency, when receiving a request for information that is controlled by another agency, “shall transfer without delay the request to the latter and then promptly” notify the requester in writing, explicitly referring to the public agency in charge of the request and the grounds for transferring the request.⁵⁵ The statute also provides for an extension of time limits for the consideration of access requests under “unavoidable” circumstances.⁵⁶

Meanwhile, the law disallows the requests for “voluminous” information. If the FOI requests are so voluminous as to be abusive of the right to information, the Civil Act applies,⁵⁷ and the requests can be denied. Korean courts have been justifiably keen to ensure that the alleged “abuse” of the FOI right is not misused by government offices to sidestep their FOI obligations.⁵⁸

When a public institution decides not to disclose information, it must “promptly” notify the requester in writing of its nondisclosure decision.⁵⁹ In the case of a refusal of access, the Act requires that the reasons for the decision be explained to the requester.⁶⁰ Even if the third party refuses to authorize access to information it has supplied to the government, the public body can make its own decision on whether to allow the access to the information. Third parties cannot exercise a veto over the FOI decisions by government authorities. There is no such thing as the reverse FOI application of the exemptions to denial of access requests.⁶¹ The FOI statute states:

53. Broadcasting Act, Art. 17(3).

54. Official Information Disclosure Act, Art. 11(1-2).

55. *Id.* Art. 11(4).

56. Broadcasting Act, Art. 7.

57. *Minbeob* [Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 11728, April 5, 2013, Art. 2, translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=29453&lang=ENG (Article 2 states: “(1) The exercise of rights and the performance of duties shall be in accordance with the principle of trust and good faith; (2) No abuse of rights shall be permitted.”).

58. For a discussion of the judicial rulings on the abuse of the FOI law in Korea, see *infra* note 87 and accompanying text; for a discussion of the legislative effort to deal with the abusive use of the Official Information Disclosure Act by prison inmates, see *infra* note 133 and accompanying text.

59. Official Information Disclosure Act, Art. 13(1).

60. *Id.* Art. 13(4).

61. See *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) (Although not identical to American law on third parties’ innovation of various FOIA exemptions, Korean law is similar to the Supreme Court’s reasoning.).

Notwithstanding the request made by the third party not to disclose the information ..., if any public institution decides to disclose such information, such public institution shall promptly notify in writing the third party of its decision to disclose the information, explicitly indicating the reason for deciding to disclose the information as well as the date of information disclosure, and the third party may raise an objection in writing to the relevant public institution or file for an administrative appeal or an administrative hearing.⁶²

The denial of access requests may be appealed administratively. The requester may ask the government agency to reconsider its initial denial of his or her FOI request. The internal appeal may be filed within thirty days after the requester is notified of the agency's decision to reject his or her request in whole or in part.⁶³ The internal appeal must be decided within seven days. If an agency cannot respond to the internal appeal due to unavoidable circumstances, the agency has an extended deadline of seven days.⁶⁴

If an agency's reply to the appeal is not acceptable, the requester may use an administrative appeal under the Administrative Appeals Act.⁶⁵ The administrative appeal may be filed without following the internal appeals under the Official Information Disclosure Act.⁶⁶

Individuals whose information requests have been denied may seek redress by filing for an administrative hearing under the Administrative Litigation Act.⁶⁷ More Koreans and public interest groups resort to the Administrative Litigation Act to challenge the denials of their access requests. More often than not, Korean courts rule against the agency's action against the disclosure of the requested information.

JUDICIAL INTERPRETATIONS OF THE RIGHT TO INFORMATION

Since the Constitutional Court created access to government-held information as an implied right to freedom of expression in the late 1980s, the right to know has resulted in a substantial body of case law. Freedom of information has emerged as a popular area for lawsuits since the enactment of the Official Information Disclosure Act in 1996.⁶⁸

62. Official Information Disclosure Act, Art. 21(2).

63. *Id.* Art. 18(1).

64. *Id.* Art. 18(3).

65. *Id.* Art. 19(1).

66. *Id.* Art. 19(2).

67. *Id.* Art. 20.

68. *Id.*

A. The Korean Constitutional Court Reads FOI into Freedom of Expression

The “Forests Survey Inspection Request” case of the Constitutional Court was the first FOI case in Korea.⁶⁹ The case came eight years before the National Assembly passed the Official Information Disclosure Act.

In this landmark FOI case, the Constitutional Court extended Article 21 of the Constitution on freedom of expression to access to government records.⁷⁰ The Court held:

Freedom of speech and press guaranteed by Article 21 of the Constitution envisages free expression and communication of ideas and opinions that require free formation of ideas as a precondition. Free formation of ideas is in turn made possible by guaranteeing access to sufficient information. Right to access, collection and processing of information, namely the right to know, is therefore covered by the freedom of expression. The core of right to know is people’s right to know with respect to the information held by the government, that is, general right to request disclosure of information from the government (claim-right).⁷¹

Hence, if the complainant requested disclosure of information with legitimate interest in it, and the government failed to respond without any review, the Constitutional Court found that his freedom of speech and freedom of expression under Article 21 was abridged.⁷²

The Court stated, however, that the right to know is not absolute and it can be reasonably restricted by balancing the interest secured by the restriction and the infringement on the right to know: “Generally, the right to know must be broadly protected to a person making the request with interest as long as it poses no threat to public interest.⁷³ Disclosure, at least to a person with direct interest, is mandatory.”⁷⁴

In another important FOI case, the Constitutional Court affirmed that a sufficient guarantee of access to information makes freedom of speech and the press a reality.⁷⁵ Interestingly, the Court drew upon the U.N. Declaration of Human Rights as well as the Constitution of Korea for its conclusion that the right to know is naturally included in the freedom of expression.⁷⁶

Further, the Court linked access to information to liberty and the right to petition. The right to liberty, the Court said, includes the freedom “not to be

69. Const. Ct., 88 Hun-Ma 22, Sept. 4, 1989 (1 KCCR 176) (S. Kor.).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Const. Ct., 90 Hun-Ma133, May 13, 1991 (1 KCCR 176) (S. Kor.).

76. *Id.*

impeded by the government in obtaining access to, collecting, and using information.”⁷⁷ The right of petition allows citizens to request that the government eliminate restrictions on access to information. If release of the requested records “would not conflict with the fundamental rights of those concerned or violate the national security, maintenance of law and order, and public welfare interest,” the Court held, disclosure of the records would be a “faithful” execution of the government’s duty to guarantee the basic constitutional rights of its citizens.⁷⁸

B. The Supreme Court and Lower Courts Applying the FOI Law

According to a 2009 study of the Korean Supreme Court rulings during the first 10 years of the Official Information Disclosure Act, nearly 80 percent of the 89 cases in 1998-2007 arose from the rejection of FOI requests by public institutions on the basis of various statutory exemptions.⁷⁹ In balancing the right to know with its conflicting interests, the study found, the Supreme Court tended to prioritize informational disclosure over informational non-disclosure.⁸⁰ Some of the pro-access court decisions are illustrative.

In an FOI case of 2004, the Supreme Court set forth a balancing test in ruling on when access requests are denied by the government.⁸¹ *Chung Dong-yon v. Chief Public Prosecutor, Seoul District Prosecutor’s Office*, stemmed from an FOI request by Chung, who participated in the Kwangjoo Democratization Movement of 1980, to Seoul District Prosecutor’s Office.⁸² Chung asked the records of his and others’ unsuccessful damage lawsuit against the prosecutors who refused to prosecute former Presidents Chun Doo Hwan and Roh Tae Woo in connection with their illegal military revolt of 1979 and the bloody Kwangjoo movement of 1980.⁸³

The Prosecutor’s Office rejected Chung’s request on the ground that he had no legitimate interest in accessing the information because the lawsuit he initiated against the prosecutors had already been completed. Chung

77. *Id.*

78. *Id.*

79. Jung-Kun Bae, *Limitations of the Realization of the Right to Know Through the Official Information Disclosure Act: The Supreme Court Rulings on the Act’s Non-Disclosure Clauses Analyzed*, 53 KOR. JOURNALISM & COMM. STUD. (Korean) 368-90. (2009).

80. *Id.*

81. *Chung Dong-yon v. Chief Public Prosecutor, Seoul District Prosecutor’s Office*, S. Ct., 2003 Du 1370, Sept. 23, 2004 (S. Kor.).

82. *Id.*

83. See Jerome Alan Cohen & Edward J. Baker, *U.S. Foreign Policy and Human Rights in South Korea*, in HUMAN RIGHTS IN KOREA: HISTORICAL AND POLICY PERSPECTIVES 188-96 (William Shaw ed., 1991).

disagreed, contending that the rejection of his FOI request violated the Official Information Disclosure Act.

In upholding a lower court's ruling in favor of Chung, the Supreme Court drew the line on when information requests can be denied. The requests are rejected, the Court stated, when they collide with the State and societal interests in national security, maintaining law and order, and ensuring public welfare or when they violate the basic rights of criminal suspects and witnesses to safeguard their reputation, private secrets, life and physical safety and tranquility.⁸⁴ Also, the Court said that if the FOI requester aims to harass government officials or agencies, the FOI requests may be denied.⁸⁵

Indeed, the Supreme Court held in 2014 that the Official Information Disclosure Act does not cover the abusive, not bona-fide requests for official information.⁸⁶ The Court stated: "The right to information is justifiably not permitted, when, in actuality, the requester has no intent to obtain and use the public information involved and only has an intent to acquire various socially unacceptable illegitimate benefits through the informational disclosure system, or when the requester is determined to badger the government officials in charge. This is a clear case of abusing the right."⁸⁷

When rejecting the information requests, the government must establish which exemption clause(s) of the FOI law to apply after specifically checking and examining the requested investigatory records. The Court ruled that government agencies should not use overly broad reasons for denying the access altogether.⁸⁸

The Supreme Court held in 2006 that access to government documents under the Official Information Disclosure Act should be treated differently than that under the Military Secrets Act.⁸⁹ The FOI case on access to military secrets arose from a request for disclosure of the secret reports of the Board of Audit and Inspection (BAI) on the ROK Ministry of Defense's research and development project for the Korean multi-purpose helicopters.⁹⁰ BAI denied the access to its reports, claiming that the reports were military secrets and, if disclosed, would be feared to injure the vital national interests.

In interpreting the Official Information Disclosure Act that allows withholding the information that other laws have designated as secret or confidential, the Court held that the FOI law and the Military Secret

84. S. Ct., 2003 Du 1370, Sept. 23, 2004 (S. Kor.).

85. *Id.*

86. *Id.*

87. S. Ct., 2014 Du 9349, Dec. 24, 2014 (S. Kor.). *See also* S. Ct., 2013 Du 25603, Jan. 29, 2015 (S. Kor.); Seoul High Ct., 2015 Nu 35965, July 10, 2015 (S. Kor.).

88. S. Ct., 2003 Du 1370, Sept. 23, 2004 (S. Kor.).

89. *Id.*

90. S. Ct., 2006 Du 9351, Nov. 10, 2006 (S. Kor.).

Protection Act are entirely different from each other.⁹¹ Unless special rules override the difference between the two laws, the FOI request cannot be handled in such a restrictive way as the request for disclosure of military secrets is under the military secrets law.⁹²

In 2007, the Supreme Court clarified the contents and scope of the requested information under the FOI law. In the *Korea National Housing Corp.* case, the request at issue was for information about the cost of certain purchasing housing lots and “all the related materials,” about the original price of developing the lots and “all the related materials” about the sale price of the lots and “all the related materials” about all the contracts with a construction company and its direct construction cost and “all the related materials” about the calculation of the actual building cost such as the construction expenditure, design and supervision cost, incidental cost, and the margin of the project’s profits, and “all the related materials.”⁹³

The request was denied because it did not contain the relevant information that would identify the contents of the requested information and the method of disclosing the information. The request was found to be too vague and overbroad because it was only for “all the related materials” and specified no particulars. Accordingly, there was no way to disclose the information at issue.⁹⁴ The Supreme Court delineated how to apply the FOI law to overly vague information requests:

When a government agency rejects the information request because the request is too sweeping or vague for an ordinary person to ascertain its contents and scope, a court should specify the contents and scope of the request by ordering submission of the requested information for its in-camera inspection. If the request’s specificity remains still elusive, the court should separate the unspecified portion of the information from the rest. When the denial of the request for the now specified information was illegal, the court should split the unspecified portion of the information and dismiss the challenge to the denial of access to the information.⁹⁵

The privacy of government officials collided with access to information in a 2004 case of the Supreme Court.⁹⁶ The Citizens’ Coalition for Participatory Autonomy in North Chungchong Province wanted to inspect the receipts of the expenditure for meetings sponsored by the Governor of North Chungchong Province and the receipts of the expenditure of the governor for those who assisted in publicizing the provincial administration and for the

91. *Id.*

92. *Id.*

93. S. Ct., 2007 Du 2555, June 1, 2007 (S. Kor.).

94. *Id.*

95. *Id.*

96. S. Ct., 2003 Du 8302, Sept. 20, 2004 (S. Kor.).

needy neighbors and the disaster victims. The Governor's office refused the FOI request, arguing that the information was exempt from disclosure because it would identify individuals in violation of their privacy.

The Supreme Court balanced the public's right to know against a person's right of privacy. The Official Information Disclosure Act exempts from disclosure the personally identifiable information (PII) such as name, resident registration number, and others, of a particular individual. The Court held, however, that the law does not cover information that was created or obtained by a public institution and whose disclosure is necessary for the public interest and for protection of a person's right.⁹⁷

"In determining whether certain information should be released in the public interest," the Supreme Court stated, "courts should make an individual judgment based on the specific facts by balancing the benefit of protecting an individual's privacy through non-disclosure with the public interest in guaranteeing the people's right to know through the disclosure and in ensuring the people's participation in, and the transparency of, the governing process."⁹⁸

Under this balancing standard, the Court found that the information about the attendees of the Governor's events, including the public officials who participated in the events as their official conduct, was the kind of information to be released for the public interest. The Court continued, however, that the public officials' resident registration numbers and the information about the public officials who attended the events as private individuals should not be disclosed in protection of the public officials' privacy.⁹⁹

Does a local government have a right to request information from a central government agency? The Seoul Administrative Court answered no.¹⁰⁰In January 2005, the Ward of Songpa in Seoul asked the Seoul Election Commission for a report that the Ward had violated the Public Officials Election Act when hosting an event in honor of elderly people. The Ward wanted to know what had led the Election Commission to suspect the Ward of a violation of the election law.

The Election Commission rejected the request, maintaining that the disclosure of the requested information was prohibited by the election law on protection of those who confidentially reported on election-related crimes, and thus the information would be exempt from disclosure under the FOI law.

97. *Id.*

98. *Id.*

99. *Id.*

100. Seoul Administrative Court, 2005 Kuhap 10484, Oct. 12, 2005 (S. Kor.).

In its appeal to the Seoul Administrative Court, the Ward of Songpa argued that if the information in question was exempted under the information disclosure law, the Election Commission should separate the exempted from non-exempt information and release the non-exempt information. The Ward continued that the Commission's vague, complete denial of the request for the information was a violation of the FOI law.¹⁰¹

The Seoul Administrative Court held that when examining whether the local government institution possesses the essential elements of the right to know as a citizen's basic right, the court should consider various factors. First, the right to know is derived from freedom of expression as part of an individual's "psychological freedom," that is, a human dignity and the right to pursue happiness. Second, the right to access information is the right for citizens to access and request disclosure of the information in the possession of the national and local government institutions, which enables citizens to participate in the governing process. Third, even when the local government is denied the right to access information, the denial does not interfere with the constitutionally guaranteed autonomy of its administration. And finally, the local government as a public authority with official power can protect the citizen's right to know.¹⁰²

These factors work against the local government in asserting access to information as its basic right because the Official Information Disclosure Act does not recognize the local government as the "people" entitled to access to government records. Rather, it makes the local government an entity with an obligation to disclose information to the people, not the requester of the information.¹⁰³

An FOI request to the Korean Broadcasting System (KBS), the public television network in Korea, raised a freedom of the press issue.¹⁰⁴ A supporter of Dr. Hwang Woo-Suk, a disgraced biomedical scientist who fabricated stem cell research in Seoul, requested a temporary tape for an edition of the KBS TV's "Tracking 60 Minutes."¹⁰⁵ The tape was initially prepared for an investigative news program on Hwang's widely publicized research fabrication. The tape was edited by a KBS TV producer without authorization, but it was not used for any KBS broadcasting.

101. *Id.*

102. *Id.*

103. *Id.*

104. Seoul High Court, 2007 Nu 24731, July 2, 2008 (S. Kor.).

105. For the archival website of the New York Times on Dr. Hwang Woo-suk, see "Hwang Woo Suk: News about Hwang Woo Suk, including commentary and archival articles published in The New York Times," at <http://nyti.ms/2eBbw0K> (last visited Dec. 2, 2017).

The KBS did not respond to the FOI request for the tape for 20 days, which amounted to the KBS's denial of the request.¹⁰⁶ One of the key issues in the case was whether the release of the requested tape violate the KBS's freedom of the press under the Constitution and the Broadcasting Act? The Seoul High Court ruled that it would not. The FOI request at issue was for disclosure of the information from KBS, not for broadcasting of the information, the court said. "So, we cannot consider it a direct restriction to or interference with the KBS's freedom of the press and the KBS's programming freedom and independence. Besides, the public institution (such as the KBS) must disclose the requested information unless it is exempted by the information disclosure law."¹⁰⁷ The court further noted that if the KBS's free press argument does not fall within any of the exempted categories under the Official Information Disclosure Act, freedom of the press cannot constitute a ground for rejection of the information request.¹⁰⁸

On appeal, the Supreme Court disagreed. The Supreme Court held that the "unlimited mandatory disclosure" of the information about the planning, organization, and production of a broadcasting program would discourage broadcasting activities.¹⁰⁹ This would hurt the broadcasting company's management and business interests and further affect the broadcaster's "freedom and independence of broadcasting."¹¹⁰ The Court stated that the KBS's refusal of the information in question fell within the trade secret exemption under the Official Information Disclosure Act and protected its own "legitimate interest."¹¹¹

In *Lee Kon-young v. Head of Dongjak Ward, Seoul Metropolitan City*,¹¹² the Supreme Court held that the Dongjak Ward had rightly denied Lee's request for information about a redevelopment project. The Court reasoned that the records requested bore on an individual's privacy and property and thus its release would violate the person's privacy and freedom,

106. *Official Information Disclosure Act*, Art. 11(5), states: "In the event that any public institution does not decide on whether or not to disclose information within 20 days from the date on which a request is made for disclosing such information, such public institution shall be deemed to have decided not to disclose the information."

107. *Id.*

108. *Id.*

109. S. Ct., 2008 Du 13101, Dec. 23, 2010 (S. Kor.). For a thoughtful analysis of the case, see Inho Lee, *The Conflict Between the Public Broadcaster's Freedom of Broadcasting and the Official Information Disclosure Act: Focusing on the Informational Request to KBS on "Tracking 60 Minutes,"* in 12 PUB. L.J. (Korean) 277-314 (2011).

110. *Id.*

111. *Id.*

112. *Lee Kon-young v. Head of Dongjak Ward, Seoul Metropolitan City*, S. Ct., 96 Nu 2439, May 23, 1997 (S. Kor.).

while the processing of the *voluminous* (9,029 pages) records would considerably affect the administrative function of the government agency.¹¹³

In a pro-access case of 1999, the Supreme Court reversed a denial by a government agency of a request for investigatory records.¹¹⁴ The request was from a complainant in an appeal of his criminal case to inspect and copy the records relating to the prosecutor's investigation of him. The prosecutor denied the request while offering no concrete reasons.

In ruling against the Prosecutor's Office, the Supreme Court stated that even when the exercise of the right to access investigatory records exceeds its accepted boundaries, a government agency cannot reject the request for overly broad reasons. The Court further said that the denial should be based on the proof that the government agency has specifically checked the records and determined which records would conflict with what interests and rights.¹¹⁵

Lawyers for a Democratic Society requested the copies of the released U.S. government documents about the political situation in South Korea in 1979 and 1980. The Ministry of Foreign Affairs denied the information request, arguing that the contents of the U.S. documents have been already reported by Korean news media. Thus, the plaintiffs could use them to form their own opinions, and their right to know was not violated. It also maintained that when the U.S. government provided the documents to the Ministry of Foreign Affairs, the U.S. government expressed its wish that Korean citizens would ask the U.S. government for access under the U.S. law.¹¹⁶

In September 1999, the Supreme Court in *Lawyers for a Democratic Society v. Ministry of Foreign Affairs* disagreed with the Ministry of Foreign Affairs.¹¹⁷ In affirming its balancing test in FOI, the Court held: "There are certain limits on the citizens' right to access to information based on the people's right to know. But the benefits from the limitations should be weighed against those from their restrictions."¹¹⁸ The Court concluded that there was no evidence that the damage to the State interest would arise from the release of the U.S. government records, and that the lawyer group's request for the records had overstepped the citizens' right of access to information through the right to know.¹¹⁹

113. *Id.*

114. S. Ct., 98 Du 3476, Sept. 21, 1999 (S. Kor.).

115. *Id.*

116. S. Ct., 97 Nu 5114, Sept. 21, 1999 (S. Kor.).

117. *Id.*

118. *Id.*

119. *Id.*

DISCUSSION AND ANALYSIS

The ongoing Korean experience with access to information as a right to know epitomizes the global trend of the FOI movement that has swept the world since the late 1980s. As in other countries that have adopted access laws, it is one of the most significant developments in the steadily expanding freedom of expression for Koreans. It is hardly an overstatement that the Constitutional Court's recognition in 1989 of freedom of information as a constitutional right was revolutionary and the National Assembly's enactment in 1996 of the Official Information Disclosure Act was a threshold event in Korea's institutional step forward to a full democracy. Korea is much closer than ever to embracing the policy of openness embodied in the FOIA of the United States—disclosure is the rule and secrecy is the exception.¹²⁰

According to the latest Korean government FOI report, a total of 1,464 FOI cases were filed with the Korean administrative courts in 1998-2015.¹²¹ As of Nov. 2, 2016, 298 “information disclosure” cases are listed in LawnB, South Korea's Westlaw and LexisNexis combined.¹²² The Supreme Court of Korea has ruled on fifty-four cases; the intermediate high courts on sixty-five; and the district courts on 179.¹²³ Although the lower court FOI cases are less impactful, the Supreme Court decisions are especially significant.

When it comes to unsuccessful access requests, appeals to government agencies are far more frequent than formal administrative appeals or administrative litigation. In 2015, for example, slightly more than 18,000 FOI denials were challenged administratively and judicially. Of the FOI challenges, 19.7 percent were through petition to the agencies involved. Only 9.4 percent and 0.88 percent of the challenges were through administrative appeals and administrative litigation, respectively.¹²⁴ One reason for the infrequency of judicial challenges to the request denials is that the litigation is so time-consuming that those who win against the government agencies find its practical value limited. This is because the timeliness of information requested is lost in the litigation process, and the FOI litigation deserves judicial priorities. More importantly, the FOI administrative appeals are structurally friendly to FOI petitioners. Since public institutions cannot

120. *Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Baltimore*, 508 F.2d 945, 949 (4th Cir. 1974).

121. MINISTRY OF THE INTERIOR, *Annual Report on Public Disclosure in 2015* (Korean), at <https://www.open.go.kr/pa/info/openData/annualReport.do> (last visited Oct. 12, 2017).

122. The authors conducted a caselaw search using “information disclosure” in Korean on Nov. 2, 2016, through the major legal database LawnB in Korea at http://www.lawnb.com/lawinfo/info_total_search.asp.

123. Ministry of the Interior, *supra* note 121.

124. *Id.*

challenge the pro-disclosure results of the appeals, the state institutions are required to release the documents in questions.

Several contentious issues remain for the Official Information Disclosure Act. For example, “any information” collected or created by State intelligence agencies is not subject to the disclosure law.¹²⁵ So, certain information in the possession of the National Intelligence Service (NIS) is presumptively excluded from public access, which directly contradicts the objective of the FOI statute. Furthermore, there is no independent judicial determination of whether the NIS information relates to national security interests. The “state secrets privilege” abuse by government agencies in Korea is more probable than apparent if the U.S. experience is a disturbing real-life guidance.¹²⁶

The Act also requires public institutions to prepare and maintain a list of agency records so that the public can easily understand the list, and to publish the list through the information disclosure system.¹²⁷ It does, however, broadly exempt “any information” that may not be disclosed by the Act or any other laws from this listing requirement.

Meanwhile, no punishment is imposed upon those who deliberately refuse to disclose information in violation of the FOI statute by ignoring the requests or obstructing the requests. Nor does the law provide for any punitive actions against those who deliberately release misleading information or, for no plausible reason, transfer the information requests to other government agencies.

Fortunately, Korean judges have been refreshingly libertarian in interpreting the access law. They have been willing to uphold the spirit of the law when ruling on challenges to the access denials by government authorities. The pro-disclosure rulings have been the rule, not the exception, and Korean courts have read the exemptions to the FOI law in a limiting way.

125. See Official Information Disclosure Act, Art. 4(3) (“This Act shall not apply to any information that is collected or produced by agencies in charge of information pertaining to the national security and security services for the purpose of analyzing information pertaining to the national security: Provided that the same shall not apply to the production, provision and disclosure of the information provided for under Article 8(1) [on making and keeping the list of government information].”).

126. In the United States, the government has invoked the “state secrets” privilege, which protects classified government information from disclosure in judicial proceedings. In recognizing the state secrets privilege, the Supreme Court held in *United States v. Reynolds*, 345 U.S. 1 (1953), that if disclosure of the classified documents is proved to pose “a reasonable danger” to national security, the government can withhold the documents from the judges. For an informative background on the state secrets privilege in U.S. law, see Electronic Frontier Foundation, *State Secrets Privilege*, at <https://www EFF.org/nsa-spying/state-secrets-privilege> (last visited Dec. 2, 2017). For an in-depth case analysis of the state secrets privilege in the United States, see Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 99-132 (2007).

127. Official Information Disclosure Act, Art. 8(1).

The Constitution Court has found the right to information to be more than a constitutional right. Amazingly, the Court views it as a human right under the Universal Declaration of Human Rights.

Amid the explosive FOI litigation in Korea in recent years, few of those access lawsuits have pitted the news media against the government agencies. It is not clear why media professionals and news media in Korea rarely resort to administrative appeals or litigation even when they are denied access to government documents under the FOI law. One can easily argue that Korean news media might have found the FOI law less helpful than expected. More often they might consider law in action to be more efficient in obtaining what they need for their news reporting.

Regardless, the FOI law is more widely used by individuals for private ends than by media or public interest groups. A study of freedom of the press in Korea showed that seventy-four percent of the FOI lawsuits in Korea up to the year 2001 arose when individuals challenged the denial of their information requests. The remaining fifteen lawsuits were initiated by public interest groups when they asked for judicial review of agencies' rejection of their informational access.¹²⁸ The author of the study concluded:

The high percentage of individuals making FOI requests that information of private interest is more likely to be requested in South Korea than that of public interest. These private individuals tend to focus on agency records with little regard for the public good, creating a situation where the major public policy implications of FOI have largely been overshadowed by the actions of private individuals.¹²⁹

128. See Kyu Ho Youm, *Freedom of Expression and the Law: Rights and Responsibilities in South Korea*, 38 STAN. J. INT'L L. 147, 148 (2002)

129. *Id.* In connection with private individuals and public interest groups' monopolization of FOI lawsuits in South Korea, it is useful to take a comparative look at the application of the FOIA in the United States. A leading treatise on U.S. administrative law noted: "Originally, it was thought that newspaper reporters and public interest groups would be the primary requesters. In fact, the vast majority of FOI requesters are private businesses or their lawyers, generally seeking information on their competitors. In 1981, one estimate was that only five percent of FOIA requests came from journalists, scholars, and authors combined. The rest came from businessmen or their representatives"; See WILLIAM F. FUNK ET AL., *ADMINISTRATIVE PROCEDURE AND PRACTICE* 627 (2nd ed. 2001). See also MARC A. FRANKLIN ET AL., *MASS MEDIA LAW: CASES AND MATERIALS* 616 (7th ed. 2005) (noting that "[t]he majority of these [FOIA] requests did not come from journalists or scholars, but rather from 'commercial use' requesters.... [O]nly one out of every twenty FOIA requests were [sic] made by a journalist, scholar or author. In contrast, four out of five requests were made by business executives or their lawyers" (quoting the General Accounting Office)). For an in-depth analysis of the "contemporary usage patterns" of FOIA in the United States, see Michael Doyle, *The Freedom of Information Act in Theory and Practice* (2001) (unpublished M.A. thesis, Johns Hopkins University) (on file with author).

The fee for FOI requests is relatively lower in Korea than other countries.¹³⁰ The low FOI fee seems to induce some people to abuse the FOI system by filing frivolous requests for information.¹³¹ For example, prisoners frequently file FOI requests ostensibly to make complaints, with the real intention of harassing prison officers or for other questionable purposes. In 2008, for example, eighteen prisoners submitted 1,684 FOI requests concerning prison facilities and officers.¹³² In response, the National Assembly revised the Administration and Treatment of Correctional Institution Inmates Act in 2010.¹³³ Now a prisoner may be required to pay in advance if the prisoner has “unjustifiably” withdrawn informal requests more than once during the current confinement or has failed to pay the FOI costs more than once during the confinement.¹³⁴ If there is no advance payment by the prisoner, the informational request may not be processed.¹³⁵ The Korean legislative approach to prisoners’ FOI abuse is conceptually similar to one of the legal actions that Sandra Norman-Eady, the Connecticut Director of Legislative Research, has suggested government agencies should take in handling groundless FOI requests: “charge the maximum allowable fees for copies.”¹³⁶

SUMMARY AND CONCLUSION

The theoretical and conceptual framework of access to information as a right to know in South Korea is broad. As an individual value, it is intrinsic to a person’s self-realization. At the same time, it is socially functional because it is related to a participatory democracy.

The Official Information Disclosure Act of Korea is more encompassing than the Freedom of Information Act of the United States. The Korean law applies to the three branches of the government while the FOIA is only

130. Seung-Tae Kim, *The Comparative Analysis on the Information Disclosure Act* (Korean), 10 HONGIK L. REV. 353, 383 (2009).

131. The FOI filing cost is generally 30 cents (300 Won) per copy of a record and free for a 1MB electronic file, <http://www.open.go.kr/pa/info/openInst/chargeInfo.do> (last visited Nov. 2, 2017).

132. Criminal Policy Research Institute, *Annual Report: Analysis on Prisoner’s FOIA Request* (Korean) 63 (2009), http://www.prism.go.kr/homepage/researchCommon/retrieveResearchDetailPopup.do?research_id=1270000-200900003.

133. *Administration and Treatment of Correctional Institution Inmates Act* (Act No. 8728/2007) (S. Kor.).

134. *Id.*, Art. 117-2.

135. *Id.*

136. Sandra Normal-Eady, *Frivolous Requests for Records Under the Freedom of Information Act* (Apr. 1, 2004), <https://www.cga.ct.gov/2004/rpt/2004-R-0369.htm> (last visited Dec. 2, 2017).

limited to the executive branch. There are more similarities than differences between the Korean open records law and the FOIA in their exemptions.

There is no doubt that freedom of information is developing in Korea. It makes the Korean government growingly transparent and responsive to the public. The open records law is readily accepted by Korean courts as one of the foundational mechanisms for ensuring that their government will not regress to a rule *by law*. They consider that the law is firmly anchored to freedom of expression as a constitutional right. They even view it as a human right under the Universal Declaration of Human Rights.

Korean courts are increasingly willing to construe their information disclosure law within the context of their nation's liberal democratic principles. They are wary of the inhibiting impact of the disclosure exemptions on the citizens' use of the law. Hence, if the denials of the FOI requests are challenged in court, Korean judges now scrutinize the denials more searchingly. And they err, if they can, on the side of giving the benefit of the doubt to those who want to access government documents. Nonetheless, when national security information is at issue, courts seem to defer to the government's decision to withhold the information. The balancing test guides the Korean courts in applying FOI exemptions, but an increasing number of pro-access decisions lead the government agencies to desist from denying disclosure requests outright or cursorily.

When the right to information collides with freedom of the press for the broadcasting media, Korean courts give priorities to press freedom over informational access. This FOI interpretation should be viewed as the judicial sensitivity to the negative and positive concept of freedom of the press in Korea as a right. Regardless, the Official Information Disclosure Act and its judicial interpretations in Korea should serve as a useful frame of reference for those old and new FOI countries.