

**Access to Information Laws in Asia, Germany and
Australia**

A Reader

RULE OF LAW PROGRAMME ASIA



Konrad
Adenauer
Stiftung

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Asia, Germany and Australia**

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I. Preface

Freedom of Information (FOI) does not just mean access to pure information alone. Rather, by using their right to request information, citizens have the power to actively shape an effective participatory democracy. As FOI supplies access to official decision-making in a more public and transparent form it thereby leads into open government which can be held accountable for its policies. Thus, if implemented and enforced properly, FOI constitutes an effective sword against arbitrariness and corruption.

The Rule of Law Programme of the German foundation Konrad-Adenauer-Stiftung (KAS) aims at strengthening the Rule of Law dialogue within Southeast Asia as well as between the region and Europe. Aspects connected with FOI, such as Good Governance, Transparency and Accountability, are also important pillars of an efficient constitutional state. Therefore, we publish this collection of laws, commentaries and other useful information in order to facilitate comparative studies and discussions on this timely topic.

But this Reader would not have been possible without the help of numerous experts. Thus, we are grateful to the organisation Article 19 as well as all the authors, who contributed their expertise to this worldwide relevant subject.

Finally, we want to express our hope that this Reader will be able to clarify and emphasise the importance of FOI legislation and that our readers will find it useful and interesting.

Singapore, June 2011
Clauspeter Hill, Susanne Landwehr

II. Introduction

Article 19^{*}

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek receive and impart information and ideas through any media and regardless of frontiers.

^{*} Universal Declaration of Human Rights (UDHR) of December 10, 1948.

Freedom of information – Why is it so important?

Clauspeter Hill, Jochen Wehrle, Nicole Schrödel

Development

In 1766, the world's first freedom of information law was passed in the shape of Sweden's Freedom of the Press Act. Throughout the 20th century many countries followed with adopting freedom of information legislation, the first being Finland 1951, the United States 1966, Norway and Denmark 1970, France 1978, Australia 1982 and Canada 1983. Meanwhile, most of the Western European countries as well as the world's longer-established democracies have enacted freedom of information laws. Especially since the 1990s a worldwide movement towards opening government records took place, particularly within the developing nations. Today, nearly 250 years later, more than 80 countries have already implemented some form of such legislation while many others are working towards introducing it; and their number is rapidly increasing compared to only 13 countries in 1990¹.

With this global trend of recognizing the importance of access to official information, a big step forward has been taken regarding transparency and government accountability. The freedom of information legislation basically refers to Art. 19 of the Universal Declaration of Human Rights (UDHR) which proclaims that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." According to that, freedom of speech and expression consists not only of the liberty to speak and write freely without censorship or limitation, but also includes the liberty of the public to receive the information on which decisions are based. Without such information, people are not able to exercise their rights adequately as they are hardly able to make any choices unless sufficient information is available. Thus, access to information is increasingly recognized as a legally enforceable substantial human right.

Relevance

On the one hand, right to information legislation can improve the lives of people who formerly lacked the most basic information essential for them as they can request personal information or such relating to education, health care and other public services. Government information on individuals can also affect, for example, access to benefits and goods and even treatment by the police. Therefore, the citizens require a right to information which enables them to make better social and economic choices and to rectify the information regarding their 'personal data'. The grant of such a right to access one's personal information is part of respect for basic human dignity.

On the other hand, access to information is the cornerstone for any participation of the public which entails efficiency of public administration, good governance and the

¹ See: Global Map of Data Protection, Privacy International, <https://www.privacyinternational.org/article/freedom-information-around-world-2006-report>.

realization of other socio-economic and civil-political rights. So, besides the benefits for the individual person, right to information legislation is primarily focused on combating corruption and promoting good governance. Better educated and better informed citizens are able and willing to participate in public issues that affect them. Hence, the government can be held accountable for its policies and the electorate can choose its representatives more effectively. Moreover, better informed people are more inclined to demand their rights and will therefore be more dissatisfied with non-performing governments. Consequently, access to information is expected to improve the decision-making process by public authorities in both, policy and administrative matters, by providing preventive measures fighting corruption, bureaucratic apathy and government secrecy.

Due to the fact that freedom of information does not only mean access to pure information alone, such as documents or records, it leads into open government as it supplies access to official decision-making in a more public and transparent form. As a result, officials are being forced to justify their actions and to bear responsibility for their politics. While secrecy and poor public information allow corruption to spread and feed backroom-deals to assign public spending in the interests of the few rather than the many, transparency and accountability practices are necessary to limit the risk of collusive behaviour and maladministration.

So, obviously, there is a close relation between democracy and the right to information. It has now become an established fact that openness and accessibility of information about the government's functioning are essential ingredients of an effective participatory democracy. A high level of openness therefore is an identifying characteristic of democracy. Democratic processes mainly depend on the access to official records because participation by the people and public discussion are only possible if there is a well-informed public. Therefore, it is indispensable to grant every citizen the enforceable right to question, reconsider and evaluate government acts and decisions in order to ensure that the latter are in conformity with the principles of public interest and the rule of law.

In essence, freedom of information laws are designed to promote democracy ensuring that governmental procedures are transparent and accountable by empowering the citizens to request information while imposing obligations on the authorities to respond to them. It also assists in reducing the information asymmetry by increasing public availability of official information. Of course, there is a danger of reaching the opposite effect with the law giving officials the statutory basis to refuse access to information by containing numerous exceptions. To avoid such kind of misuse, it is necessary to define the grounds for discretionary refusal narrowly and to interpret them restrictively.

Furthermore, another aspect has to be mentioned, namely the interaction between development and the right to information. It is no coincident that, in general, comparable countries perform better in economic affairs when there is a legal culture of openness and transparency. This is due to the fact that knowledge and information have become essential factors in bringing about wealth and growth by reducing

corruptive behaviour. Both, individual enterprises and the national economy suffer long-term damages due to corruption. The growing global consensus on the significance of corruption as an impediment to development is also reflected in the ratification of the United Nations Convention against Corruption (UNCAC). Thus, access to information legislation promotes efficient markets, competition for government business and fair administration, which again constitutes the foundation for commercial investment. Transparency can decrease uncertainty in the markets and is associated with better socio-economic and human development as well as with higher competitiveness and good governance. Therefore, it improves the macro-economic environment which attracts commercial investors and foreign capital. Hence, the challenge lies in convincing the international community of the fact that the right to information is a contributor to development, too.

Although, globally speaking, the right to information is far from being realized, there is today a greater conscience of its necessity and of how it can be enforced for each and every one of us.

Legislation process, implementation, enforcement

Experience has shown that the law-making process itself is as important as the legal text. Many laws granting a right of access to official information have been adopted but legislation alone does not ensure transparency. Access to information legislation is usually the result of a wide-spread movement including citizens from different professional groups whose inputs during the law-making process contribute to the enactment of legislation that will help ordinary people as well. Only with the involvement of citizens belonging to all classes of society – the rich, the middle class and the poor – can be assured that the beneficiaries reach the weaker sections of society as well.

Furthermore, the passage of an access to information act is only the first step that has to be taken. Freedom of information legislation only provides the framework for the included right to information and could be seen as a toothless tiger unless there is effective implementation, enforcement and awareness among the public. Thus, in order to develop an access to information culture, emphasis must be put on three phases, namely legislation process, implementation and enforcement of the freedom of information law.

Its enforcement and effectiveness depend primarily on the citizens' initiative and confidence in receiving the requested information. Therefore, there is a need of spreading awareness among the public regarding its right to information. Although most citizens perceive limitations on access to information, they do not always see this situation as a violation of their constitutional rights. Particularly those belonging to the poor and illiterate parts of society are often not aware of the existence of such legislation and the benefits they could gain by referring to its provisions. The basis for a citizen-friendly legislation and an effective use of the right to information is knowledge about bureaucracy and the law.

First of all, the citizen has to know what documents are held by the government and how to request them. In addition to that, when his request has been dealt with arbitrarily, he has to understand the procedures to complain about it.

Another key aspect is the courage to exercise the given right of access to information. Surprisingly, there is a lack of this attribute even in jurisdictions that have long-established freedom of information laws. Even well-educated people who are not dependent on governmental support worry that they will disrupt their relations to government officials by requesting for information.

Viewed in this light, establishing an effective right to information regime is the responsibility of both governments and civil societies. While governments must pass comprehensive laws and implement the necessary measures, civil societies have to play the leading part by making information requests and lodging appeals when requests are denied. Hence, the focus has to be put on encouraging the use of law by training and education – essential ingredients for an animation and mobilization of the public. A useful tool, provided for in many freedom of information laws, is the publication of a simple, easily accessible guide on how to lodge an information request. Nevertheless, the individual – as such an important actor – has to be prepared for being patient and persistent because it is not unusual to pursue cases for months or even for years. Nonetheless, the establishment of an appropriate institutional framework to implement these laws has to be considered as being equally important.

Today, many countries have taken the (often rather symbolical) step of passing a freedom of information law without taking the additional indispensable step of investing in public administration capacities to manage and provide information. So, there is a need to provide better mechanisms for processing information requests since access laws will be ineffective if citizens lack the ability to exercise their right of information. This task faces the challenge that freedom of information laws are not easily administered. Every country that has established a sophisticated freedom of information framework previously required a high amount of public spending on facilities needed for effective implementation as well as special procedures and staff training. Considering the vast financial resources which are necessary to implement those facilities, many countries that have recently enacted legislation are incapable of developing the adequate instruments and therefore need support to overcome these practical obstacles.

Another cornerstone regarding the implementation and enforcement of right to information laws is the design of monitoring institutions and a system of courts to review denials of access to information. In addition to that, a more informal review process should be introduced as well, for example through independent bodies like an Ombudsman, Information Commissioner or other appropriate authorities. These measures can help to prevent bureaucratic apathy by investigating complaints reported by citizens who believe they have been improperly denied access to information. The Information Commissioner, for example, can impose fines on officials not complying with the provisions of the right to information or he/she can recommend disciplinary action against the officials concerned. As the alternative problem-solving procedure of an Ombudsman is based on mediation and arbitration,

it is more citizen-friendly since it avoids bringing every case to court which in turn implies less charges and less time exposure. If the requester is still dissatisfied with the findings of the Commission, he should be enabled to apply to a court for review. Otherwise, an effective implementation is not ensured since experience has shown that a significant number of requests go into first appeal. This is due to the fact that Information Commissioners in charge often are ex-bureaucrats who tend to stick to the bureaucratic culture of secrecy and withholding information. Therefore, it is crucial that requesters have the right to appeal to an independent judicial body to review those decisions.

Contents

First of all, the right of access to information law should include a right to request and receive information, and, further, an obligation on public institutions to distribute information related to their field of work because freedom of information implies not only that public bodies should accede to requests for information, but also that they should publish and disseminate documents of significant public interest. In addition, the requester should be granted a right to appeal any decision or any infringement and violation of his right to information to an independent authority empowered to make binding and enforceable decisions. Therefore, an intermediary body such as an Information Commissioner or Specialist Ombudsman, in the first instance with a further right of appeal to a court, should be established. As the right to access information is not bound to a personal interest in the requested information, there should never be a legal obligation to provide a reason or justification.

Another related basic principle is that the burden of proof lies on the body asked for information but not on the person having requested the information. That means that the requester does not have to provide an explanation for his request, whereas the holder has to give a legitimate reason in case of denying the access to information. The provision for proactive disclosure of information even in the absence of a request is becoming an increasingly important aspect as it is ensuring widespread access for all members of society, especially those on the margin. Moreover, publishing relevant information will often be more economical than responding to multiple requests for the same type of information. This, however, involves the risk of achieving just the opposite. Referring to proactive disclosure, the governments could make available masses of subsidiary information in order to withhold the important ones by hiding them in a flood of information. Therefore, it is necessary that the provided information is well-structured to ensure easy accessibility for the average citizen.

Further, the law should include procedures designed to facilitate its use like, for example, the obligation to make every reasonable effort to assist the requester in his issue. In addition, a person willing to gain information should not be hindered to do so by hidden obstacles like high costs and/or form or manner of application. In order not to discourage the applicant, the law should also contain a time limit for responding and providing the information within a specified and reasonable period of time. That period should not exceed 30 days after receiving the request unless it has to be extended because a large number of records are requested or must be searched.

Furthermore, when a third party is involved, it has to be consulted first and has to be given a chance to submit a statement within two to four weeks.

Aiming at providing a certain degree of legal certainty, it is of high importance that exceptions of access to information are explicitly drawn and are subjected to a public interest override. The challenge to balance free access to information on the one hand and personal privacy as well as state interests on the other hand, is two sides of the same coin. This, for example, is expressly stated in sections 3-6 of the German Freedom of Information Act, in chapter 4 article 18 of the Taiwanese Freedom of Information Law, in part 2 division 2 of the Canadian Freedom of Information and Protection of Privacy Act and in chapter 2 section 8 of the Indian Right to Information Act. Thus, only when the disclosure of information poses an actual risk of serious harm to state interests, public interests or legitimate rights or interests of others, is there an overriding interest in holding back the requested information. Taking into account those state interests, it should be clearly and narrowly defined, both, what kind of information is secret and what kinds of state interests are overriding the individual's right to information. Otherwise, the request for access to information could be rejected arbitrarily for some inexplicable reason and the access to official records would be circumvented. Furthermore, to protect data privacy, the request for information has to be refused if that disclosure would be harmful to a third party's personal privacy. There is a – well-justified – sensitivity concerning national security in the post-9/11-era which brings along a growth of intergovernmental security networks. Consequently, the proportion of information held by different countries, often under strict confidentiality, grows rapidly. In combination with the fact that secrecy systems of most countries are highly complex, it is very difficult to monitor changes such as the growth of transnational security networks. This bears the challenge to avoid a quiet erosion of the citizen's right to information in the cloak of national security.

Another important point to be noticed is the fact that, nowadays, many private sector companies are involved in the performance of either public services or services in which public interests are involved like insurance companies, commercial banks or private hospitals. This increasing process of withdrawing from economic activities and outsourcing of public functions constitutes a real threat to the citizen's right to information. Consequently, more transparency is needed in the private sector as well, where private bodies are increasingly gaining influence over policy. Therefore, the right to information law should not only apply to all branches of government at all levels – including the executive, legislative and judicial bodies –, but its coverage should be extended to non-governmental actors as well. Especially those companies, who receive public benefits, carry out public functions and exploit public resources should be covered by the freedom of information law to ensure access to information held by them. This is indispensable to protect the citizen's rights effectively and to provide a transparent environment for making informed choices, as for the aggrieved individual it makes no difference if the responsibilities are given to non-governmental actors or remain in state responsibility. Consequently, the private sector should not be exempt from transparency of information. This problem of assuring transparency although responsibilities have been outsourced to non-governmental companies exists

not only in highly developed countries. In the next decades, the developing world will rush through a build-up of infrastructure as a consequence of rapid urbanization and globalization whereas much of this build-up will be implemented by private actors. The practical difficulty regarding the extended scope of right to information legislation is the lack of commonly accepted criteria determining whether private bodies should be covered or not. Therefore, certain qualifications should be defined in precise terms by law.

Conclusion

Freedom of information is indispensable to the functioning of a truly democratic system as it is creating and sustaining a culture of openness and participation. Vested in the famous words of James Madison, fourth President of the United States of America (1809-1817), of 1822: “A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives.”

Although considerable progress has already been achieved over the past decades in spreading the right of access to information, there is still a lot to be done and many challenges remain to strengthen the freedom of information framework and to reach the ultimate goal of a universally acknowledged, legally guaranteed and protected human right.

Access to information is the rule, secrecy is the exception. Now it is time to put this ideal into – legally enforceable – practice.

III. Freedom of Information

INDIA

Laws Governing Access to Information - Theory and Practice

The Right to Information – Advantage and a Challenge

*Prof. M.K. Balachandran**

Freedom of Information or Right to Information (RTI)¹ as it is being projected, understood and practised in India is an advantage as well as a challenge to the citizens. It is advantageous to the citizens because RTI has become a powerful instrument of citizen's empowerment as it enables them to critically evaluate the functioning of the government and other public authorities and to demand transparency and accountability in administration. It is challenging because its implementation requires a lot of initiative on the part of the citizens as well as consistent and co-ordinate efforts on the part of the legal fraternity and social activists to spread awareness and to combat bureaucratic apathy and judicial resistance in imparting information. They also have an obligation to ensure that vexatious demands should not be allowed to deprive genuine information seekers of their legitimate claims on limited public resources. In view of the exponential growth of requests for information since the Act came into force there is also a need to encourage the public authorities to proactively disclose as much information as possible through publication so that citizens do not have to frequently approach the concerned authorities for information.

The Background

Before 1970s non-disclosure of information was the norm and openness an exception in India. There was no special enactment imposing a duty on the government to impart information. On the other hand, the Official Secrets Act of 1923 which is still in force in the country prohibited the disclosure of any 'secret' official information without defining the word 'secret' and in a large number of cases the government used to take refuge under this Act to refuse to disclose information to the public.

The Indian Constitution does not explicitly provide for a right to information. However, while interpreting the provisions of the Constitution, the Supreme Court has held in a number of cases that the right to information is implicit in the Right to Freedom of Speech and Expression guaranteed under Art. 19(1) (a) and the Right to Life and Personal Liberty under Art. 21 of the Constitution supported by Art. 32 which provides for the right to approach the Supreme Court for the enforcement of these rights.² The court observed: "The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing."³ Every citizen has a

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¹ "A right is a powerful exercise of the freedom whereas a freedom is a meeky (gentle) attempt to exercise the right", *LP's Right to Information Laws, 2006*, Justice A.B. Srivastava.

² "The Right to Know is implicit in the Right to Freedom of Speech and Expression under Art. 19(1) (a) and from the Right to Life guaranteed under Art. 21." *State of UP v. Raj Narain*, AIR 1975 SC 865; *S.P. Gupta v. Union of India*, AIR 1982 SC 149.

³ *Ibid.*

right to know how the state is functioning in matters of sanitation and other allied matters.⁴ The court also emphasized the importance of right to information in a democratic country by stating that democracy cannot survive without free and fairly informed voters.⁵ The judiciary, thus, declared that the right to information is a fundamental right implicit under Article 19 1(a) and 21 of the Constitution. The expansive interpretation of these constitutional provisions has led to the development of the law in India.

The Right to Information Act, 2005

In the absence of any specific legislation conferring the right to information on the citizens the only resort left to them was to approach the courts every time to get the constitutionally recognized right for its enforcement. Realising this, in 1977, a conference of the Chief Ministers on “Effective and Responsive Government” unanimously recognized the need to enact a law on right to information. Accordingly, the parliament enacted a law entitled the Freedom of Information Act in 2002. However, the Act was not notified as it did not provide for any sanction for denying information or for supplying false information or for adopting delaying tactics nor did it provide for an independent mechanism for appeal when information was refused by a competent authority. With a view to rectify these shortcomings and to make the law more progressive, participatory and meaningful, a new Act viz., the Right to Information Act, 2005 was enacted to ensure greater and more effective access to information by the citizens and to promote transparency and accountability in the administration. The Act which came into effect on 12th October 2005 confers on the citizens the right to be informed about the activities of public authorities.

The Scope of the Act

The Act applies to all public authorities including the departments of central, state and local governments, and all bodies owned, controlled or substantially financed by government, non-government organization substantially financed, directly or indirectly by funds provided by the appropriate government, the executive, judiciary and the legislature.

Authorities under the Act

It provides for designating Public Information Officers (PIO) in all administrative units/offices and Assistant Public Information Officers (APIO) at sub-divisional level to provide information.

The Act envisages an independent Information Commission at the Centre and State levels to receive complaints if the PIOs do not provide correct and timely information and also hear appeals and oversee the functioning of the Act. The Commissions consist of the Chief Information Commissioner and not more than ten Information Commissioners at

⁴ *LK Koolwal v. State of Rajasthan* (AIR 1988 Raj. 2).

⁵ “...it is difficult to understand why the right of a citizen/voter – a little man – to know about the antecedents of his candidate cannot be a fundamental right under Act. 19(1)(a). Democracy cannot survive without free and fair elections, without free and fairly informed voters”. (*Union of India v. Association of Democratic Reforms*, AIR 2002 SC 2112).

the Central State levels are to be appointed by the President/Governor as case may be on the recommendation of a Committee consisting of the Prime Minister/ Chief Minister, the Leader of the Opposition and a Minister.

They can be removed from office only by the President only on the ground of proved misbehaviour or incapacity and that to only after the Supreme Court holding an inquiry and recommending for their removal. The procedure of appointment and removal of the Commissions are intended to ensure maximum independence to the highest office of the appellate authorities under the Act.

Obligations of public authorities

Any information held by or under the control of a public authority is accessible by the citizens. This includes inspection of work, documents and records of such authorities and also taking copies of such documents. Every public authority is, therefore, enjoined under the Act to maintain its records including the particulars of its organization, powers and functions duly categorized, indexed and computerized to facilitate access and also publish the same for information to the public by displaying it on the notice board and by dissemination through print and electronic media. This necessitates the authorities to be systematic in the maintenance of their records so as to ensure transparency and easy accessibility.

Procedure for obtaining Information

The procedure envisaged under the Act for obtaining information is simple and inexpensive. The information seekers are required to submit applications in writing or electronically to the PIO/APIOs specifying the particulars of the information they are seeking. The PIO/APIO is required to provide the information within a period of 30 days (48 hours where life or liberty is involved) as prescribed under Act. Failure to furnish the same within the prescribed time limit will be treated as 'deemed refusal'.

It is specifically provided that the information seekers are not required to give reasons for seeking information or any other personal details except those that are required to contact them. This is to ensure that the supply of the information is not hampered by the administration by putting forward a plea that the reasons given are not reasonable.

Provisions for Appeal and Penalties

The Act has provisions for filing appeals against non receipt of information and for imposition of penalties against the PIOs concerned. The first appeal lies with the senior officer of the department and the second appeal with the Information Commission within a period of 30 days. The Information Commission is empowered to impose penalties for not accepting the application, delay in supplying information, denying information malafidely, knowingly providing false information and for destroying the information. The Commission can also recommend disciplinary action against PIOs for persistent or serious violations.

Exemption from Disclosure

However, certain categories of information have been specifically exempted from disclosure. Thus, information which will prejudicially affect the sovereignty and

integrity, security, strategic, scientific or economic interests of the state or if such disclosure might lead to the incitement of an offence or where it is prohibited by any court, or if it amounts to breach of privilege of Parliament or any legislature or if the information is received in confidence from foreign countries or if it may endanger the lives of whistle blowers or if it may impede the process of any investigation, the prohibition of disclosure is absolute. In the other three categories where the disclosure of any business secret is likely to affect others, or it relates to anything connected with fiduciary relationship or if it relates to the personal matters connected with the public functions the PIO concerned is required to weigh the relative importance of public interest in deciding the issues.

The Act is given overriding effect over all other laws in force including the Official Secrets Act, 1923 without repealing the same.

The Right to Information Act, 2005 – An Evaluation

The Right to Information Act, 2005 is a citizen-friendly legislation. Its enforcement and effectiveness depend on the citizens' initiative and persuasion in securing information. The procedure is simple and inexpensive and the benefits are enormous and satisfying. It promotes openness, transparency and accountability and acts as a deterrent against arbitrariness, abuse of power, corruption, nepotism and casteism. It strengthens participatory democracy by enabling them to exercise their political choice meaningfully. Access to government records helps the citizens to initiate legal proceedings for the enforcement of their legal rights when violated by administrative action. The responsibilities of the officials to justify their actions is one of the main safeguards against oppression and corruption.

The Act is being implemented successfully through the concerted efforts of social activists and NGOs. Its provisions have been invoked by the citizens belonging to all categories – the rich, the middle class, the poor and those below the poverty line. This is amply illustrated by the success stories during the short span of its existence where the majority of the beneficiaries belong to the weaker sections of the society.

The Act which is meant to empower the citizens with details of government decisions is now being increasingly used as a means of redressal of grievances. The RTI has also brought about systemic changes in the functioning of the government in view of the increasing pressure from the citizens by invoking its provisions.

RTI makes progress – Success Stories

The Right to Information Act is being used for getting details of delayed passports, ration cards, land allotment, denial of pensionary benefits, re-fund of excess income tax paid and other long pending grievances. There have been reports that grievances which were not attended by the authorities for years were redressed within a few days by invoking the RTI. Several organizations working in slums and resettlement colonies have made use of the Act to obtain official records to monitor the development works at the sites. A few examples of the success stories are listed below:

- Income tax refund which was pending for 5 years was reported to have paid been in a weeks time.
- Payment of compensation for land acquired which was pending for more than 18 yeas was paid by the authorities after filing an application under RTI.
- Women living in slum clusters secured admission for their children in public schools.
- The social activists could unearth huge quantities of essential commodities meant to be supplied to the weaker sections of the society through the Public Distribution System (PDS) were found to have been diverted to the black market and appropriate action could be initiated against them.
- Corruption in local government institutions like municipalities and municipal corporations in the discharge of their obligatory functions such as maintenance of roads, cleaning of drains, functioning of schools and dispensaries were exposed and the engineers involved were got arrested by the Anti-corruption Department.
- RTI was used to compel the Pollution Control Board to close down polluting units.
- Acts of official high handedness of the Forest Department against tribals were revealed through RTI. The officials had slapped cases on the tribals for trivial offences like stealing forest fruit or collecting fire woods of nominal value. Thousands of such cases were withdrawn through RTI.

It has been reported that in some cases even the mention of the word RTI got the job done.

There have been a number of instances where the Information Commissions have imposed fines on the officials who were negligent in complying with the requirements of RTI. In a few cases the Commissions have even recommended disciplinary action against the officials concerned.

Obstacles of Implementation – Challenges

- It has been reported that retired civil servants have been appointed as Information Commissioners. Since bureaucrats in the past had denied people access to information the efficacy of such officers in imparting information is doubted.
- Many public authorities have neither maintained nor published the particulars of their organizations, functions and duties as required under the Act.
- In some cases Public Information Officers have not been designated by the Ministries/Departments concerned nor have they displayed the names of such officers for the information of the public.
- It has been reported that some of the PIOs were discouraging the citizens from filing the applications and even were harassing them.
- Even though the social activists and the NGOs have taken up the cases of the weaker sections of the society, many people especially those belonging to the poor and illiterate category are not aware of the existence of the Act and the benefits they could obtain by invoking its provisions. There is, therefore, a need for spreading awareness among them.

- In a few cases, the Information Commissioners who are retired civil servants remain sympathetic with the PIOs and avoid penalizing them even when there are malafide denial of information.
- The manner in which the complaints and appeals are being disposed of by the Information Commissions and the imposition of penalty and the recommendations for disciplinary action against erring officers have not been deterrent enough to compel them to enforce the provisions of the Act in its true letter and spirit.
- In some cases, the procedure for payment of fees is made cumbersome with a view to discourage filing of applications under RTI.

Despite these shortcomings, the Act has been able to achieve its desired effect to a large extent. The government on its part has been taking efforts to streamline the procedure by setting up helpline to facilitate the filing of applications by the information seekers. The applicant is required to dial a specific number where an attendant processes the request and send the applications to the concerned officials. The government has also allocated funds to train officials to improve their handling of application under RTI. There is also a proposal to improve the infrastructure of the offices of the Information Commissioners and Public Information Officers.

It has now become an established fact that openness and accessibility of people to information about government's functioning is an essential ingredient of democracy. There is a close nexus between democracy and right to information. Effective participation by the people is possible only when they have access to official information.

“Democracy is no longer perceived as a form of Government where the participation of the people is restricted merely to periodic exercise of the right to franchise, with the citizens retiring into passivity between elections. It has now a more positive and dynamic content with people having a say in how and by what rules they would be governed. Meaningful participation of people in the major issues affecting their lives is now a vital component of the democratic governance and such participation can hardly be effective unless people have information about the way government business is transacted. Democracy means choice and sound and informed choice is possible only on the basis of knowledge.”

IV. Freedom of Information

INDONESIA

Comments on the Draft Law of the Republic of Indonesia: Freedom to Obtain Public Information

On Behalf of the World Bank

Toby Mendel

Introduction

The Indonesian authorities have been committed to adopting a right to information law for some time and it now appears that they are ready to do so shortly. This is an extremely welcome development which would bring Indonesia into the growing family of democratic countries which have adopted such laws.

These Comments relate to the Draft Law of the Republic of Indonesia: Freedom to Obtain Public Information (draft Law) currently being prepared by the Indonesian authorities. An 'original draft Law' is the subject of ongoing discussions between the Government and Commission I of the House of Representatives (DPR). These Comments are based on an unofficial English translation of the original draft Law provided to the author in December 2007, along with changes to the original draft Law agreed up to the Formulation Team meeting of 14 September 2007, as set out in the document Meeting Result: Working Committee Meeting of Commission I of the House of Representatives and the Government on the Draft Law Regarding the Freedom to Obtain Public Information: Friday, 14 September 2007, also provided to the author in unofficial English translation. Where a new provision has been agreed, the Comments reference the new provision; otherwise the Comments are based on the provisions in the original draft Law (in some cases, ongoing discussions about provisions are noted). The Comments are based on an analysis of the provisions of the draft Law in light of international standards and good comparative practice in this area by other States.

The draft Law is, overall, a very positive document which contains a number of progressive provisions relating to access to information. These include, among other things, the following:

- Strong rules for the processing of requests for information (procedural guarantees).
- Extensive rules on the proactive publication of information.
- Good rules on the processing of appeals both internally and by the Information Commissions.
- The system of sanctions for officials who obstruct access to information.

At the same time, there are a number of areas where the draft Law diverges from established international standards and practice, both in terms of its provisions and as regards omissions. Some of the more serious include:

- The proposed exclusion from the ambit of the Law of public corporations.
- An unduly broad regime of exceptions, in particular the proposal to leave in place secrecy laws, weak harm tests in some cases and a weak public interest override, and some exceptions which are unduly broadly worded.
- The proposals to weaken the independent of the various Information Commissions by including government representatives.
- The inclusion of penalties for misuse of information, as well as proposals to make it a crime to receive information that is exempt.
- The weak promotional measures provided for in the draft Law.

At certain places, the translation provided leaves some scope for interpretation and so it is possible that some of these Comments are based on a misinterpretation of the text. In some cases, where doubt exists as to the precise meaning of the text, the manner in which the text has been interpreted is indicated. No responsibility is taken for errors based on poor translation.

International Standards

The importance of access to information

The right to access information held by public bodies, often referred to as ‘freedom of information’ or the ‘right to information’, is a fundamental human right recognised in international law. It is crucial as a right in its own regard and is also central to the functioning of democracy and the implementation of other rights. The right to information has been widely recognised as a key underpinning of democratic participation, an invaluable means of controlling corruption, an important development tool and central to accountable government.

In the earlier international human rights instruments, the right to information was not specifically elaborated but it is now recognised as part of the fundamental right to freedom of expression, which includes the right to seek, receive and impart information. Article 19 of the *Universal Declaration on Human Rights* (UDHR),¹ states:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

¹ United Nations General Assembly Resolution 217A (III), 10 December 1948.

While the UDHR is not directly binding on States, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law.² Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),³ a formally binding legal treaty ratified by some 160 States, including Indonesia,⁴ guarantees the right to freedom of expression and information in terms similar to the UDHR.

These provisions are increasingly seen as imposing an obligation on States to enact right to information laws. The United Nations Special Rapporteur on Freedom of Opinion and Expression, for example, has repeatedly called on all States to adopt and implement right to information legislation. In 1997, the UN Special Rapporteur stated:

The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large ... is to be strongly checked.⁵

His comments were welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to “develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications”.⁶ In his 1998 Annual Report, the Special Rapporteur reaffirmed that the right to information includes the right to access information held by the State:

[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems....⁷

The UN Special Rapporteur was joined in his call for legal recognition of the right to information by his regional counterparts – the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and the Special Rapporteur on Freedom of Expression of the Organisation of American States – in a Joint Declaration issued in November 1999. The three reiterated their call in a 2004 Joint Declaration:

The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.⁸

² See *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). Generally, see M.S.McDougal, H.D.Lasswell, L.C.Chen, *Human Rights and World Public Order*, (1980: Yale University Press, Princeton), pp. 273-74, 325-27.

³ UN General Assembly Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976.

⁴ Indonesia acceded to the ICCPR on 23 February 2006.

⁵ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, 4 February 1997, UN Doc. E/CN.4/1997/31.

⁶ Resolution 1997/27, 11 April 1997.

⁷ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, 28 January 1998, UN Doc. E/CN.4/1998/40, para. 14.

⁸ Adopted on 6 December 2004. Available at:

<http://www.unhchr.ch/huricane/huricane.nsf/0/9A56F80984C8BD5EC1256F6B005C47F0?opendocument>.

The right to information has also been explicitly recognised in all three regional systems for the protection of human rights. The Inter-American Commission on Human Rights' *Inter-American Declaration of Principles on Freedom of Expression*, approved in October 2000, unequivocally recognise a right to access information held by the State as both an aspect of freedom of expression and a fundamental right on its own.⁹

In a decision adopted in September 2006, *Caso Claude Reyes and Others v. Chile*,¹⁰ the Inter-American Court of Human Rights held that Article 13 of the *American Convention on Human Rights*, which guarantees freedom of expression, specifically includes a right to access information held by public bodies.

The African Commission on Human and Peoples' Rights adopted a *Declaration of Principles on Freedom of Expression in Africa* in October 2002,¹¹ Principle IV of which states, in part:

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
 - everyone has the right to access information held by public bodies;
 - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
 - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
 - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
 - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
 - secrecy laws shall be amended as necessary to comply with freedom of information principles.

Within Europe, the Committee of Ministers of the Council of Europe adopted Recommendation No. R(2002)2 on Access to Official Documents in 2002,¹² Principle III of which provides generally:

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

⁹ 108th Regular Session, 19 October 2000. Available at: <http://www.iachr.org/declaration.htm>. See Principles 3 and 4.

¹⁰ 19 September 2006, Series C No. 151.

¹¹ 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, The Gambia. Available at: http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html.

¹² Recommendation No. R(2002)2 of the Committee of Ministers of the Council of Europe to member states on access to official documents, 21 February 2002.

The rest of the Recommendation goes on to elaborate in some detail the principles which should apply to this right. The Council of Europe is presently engaged in preparing a binding treaty on the right to information.

Implementation of the right to access information is also a key requirement imposed on States parties to the UN *Convention against Corruption*,¹³ ratified by Indonesia in September 2006. Article 13 of the Convention requires that States should “[ensure] that the public has effective access to information”.

National right to information laws have been adopted in record numbers over the past ten years, in countries which include China, India, Jamaica, Japan, Mexico, Pakistan, Peru, South Africa, South Korea, Thailand, Trinidad and Tobago, and the United Kingdom, as well as most of East and Central Europe. These nations join a number of other countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia and Canada, bringing the total number of States with right to information laws to over 70. A growing number of inter-governmental bodies, such as the European Union, the UNDP, the World Bank and the Asian Development Bank, have also adopted policies on the right to information. With the adoption of a strong right to information law, Indonesia would join a long list of nations which have already taken this important step towards guaranteeing this fundamental right.

The content of the right to information

A survey of international law and best practice shows that, to be effective, right to information legislation should be based on a number of general principles. Most important is the principle of maximum disclosure: any information held by a public body should in principle be openly accessible, in recognition of the fact that public bodies hold information not for themselves but on behalf of the public. The procedures by which information may be accessed should be simple and easily accessible, and should include both proactive disclosure of information and the possibility of making a request for information. Requests for information should be permitted to be refused only in narrowly defined circumstances, where necessary to protect a legitimate interest. Finally, anyone whose request for information is refused should have a means of challenging this refusal before an independent body.

In his 2000 Annual Report to the UN Human Rights Commission, the UN Special Rapporteur called on Governments to revise their domestic laws to give effect to the right to information and particularly directed States’ attention to nine areas of importance:

¹³ UN General Assembly Resolution 58/4 of 31 October 2003, in force 14 December 2005. As at the time of writing, the Convention had 104 States Parties and 140 signatories. See <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>. The text of the Convention is available at: <http://www.unodc.org/unodc/en/treaties/CAC/index.html>. The Council of Europe has also adopted both a *Civil Law Convention on Corruption*, 4 November 1999, ETS No. 174 and a *Criminal Law Convention on Corruption*, 27 January 1999, ETS No. 173, although neither provide for public access to information. Similarly, the 1996 *Inter-American Convention Against Corruption* does not provide for access to information.

[T]he Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; “information” includes all records held by a public body, regardless of the form in which it is stored;
- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
- All public bodies should be required to establish open, accessible internal systems for ensuring the public’s right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.¹⁴

This constitutes strong and persuasive guidance to States on the content of right to information legislation.

¹⁴ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.

Limits to the right to information

One of the key issues in a right to information law is defining when a public body can refuse to disclose information. Under international law, restrictions on the right to information must meet the requirements stipulated in Article 19(3) of the ICCPR:

The exercise of the rights [to freedom of expression and information] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The requirements of Article 19(3) translate into a three-part test, whereby a public body must disclose any information which it holds and is asked for, unless:

1. The information concerns a legitimate protected interest listed in law;
2. Disclosure threatens substantial harm to that interest; and
3. The harm to the protected interest is greater than the public interest in accessing the information.

The same approach is reflected in Principle IV of the 2002 Council of Europe Recommendation, which states:

IV. Possible limitations to access to official documents

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

- i. national security, defence and international relations;
- ii. public safety;
- iii. the prevention, investigation and prosecution of criminal activities;
- iv. privacy and other legitimate private interests;
- v. commercial and other economic interests, be they private or public;
- vi. the equality of parties concerning court proceedings;
- vii. nature;
- viii. inspection, control and supervision by public authorities;
- ix. the economic, monetary and exchange rate policies of the state;
- x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.

This incorporates a clear list of legitimate protected interests, and permits information to be withheld only where disclosure would harm the interest and where this harm is greater than the public interest in disclosure.

Cumulatively, the three-part test is designed to guarantee that information is only withheld when this is in the overall public interest. If applied properly, this test rules out all blanket exclusions and class exceptions, as well as any provisions whose real aim is to

protect the government from harassment, to prevent the exposure of wrongdoing, to conceal information from the public or to entrench a particular ideology.

Detailed Comments on the Draft Law

The right of access and scope (Articles 1(1)-(3), 2, 3 and 4(1)-(2))

The basic right of access is provided for in Article 4(1) of the draft Law, which states that every person is entitled to the right to information in accordance with the law. The modalities by which this may be exercised – viewing information, attending meetings, obtaining a copy of records – are set out in Article 4(2). This finds support in Article 2, which states that all public information shall be transparent and accessible to every person in a “swift, timely, low cost and straightforward manner”.

Together these are a strong statement of the right to information. At the same time, the provisions refer variously to the public’s ‘right to information’, the right to obtain ‘information’ and the right to ‘public information’, which is more limited (see below). It is assumed that the right of access is in fact limited to public information, but this should be clarified.

Article 3, entitled ‘Objective’, sets out the purpose of the law, which is to guarantee the right of every person to obtain public information in line with a number of principles. The principles, as amended by agreement of the Formulation Team, include promoting public accountability and the right to be informed of policy plans and decision-making processes along with the underlying reasons; encouraging public participation and oversight of public bodies; fostering good governance; informing (educating) the nation; and improving public information management. These are all very positive objectives for the law. At the same time, one purpose of including objectives in right to information legislation is to promote a good balance between fostering openness and yet protecting legitimate confidentiality interests. The objectives in the draft Law, while setting out clearly the underlying reasons for openness, do not give clear direction as to how to achieve a balance between these goals and protected confidentiality interests.

Examples

The preamble of the Indian right to information law¹⁵ recognises that access to information is likely to conflict with other public interests and sets out the need to “harmonise these conflicting interests while preserving the paramountcy of the democratic ideal”.

A good example of an objective that provides for balancing competing interests is found in *A Model Freedom of Information Law*, adopted by the international human rights NGO, ARTICLE 19. The Model Law provides, as one of two key purposes, the following:

The purposes of this Act are: –

to provide a right of access to information held by public bodies in accordance with the principles that such information should be available to the public, that necessary exceptions to the right of access should be limited and specific, and that decisions on the disclosure of such information should be reviewed independently of government (see section 2(a)).

Three factors are relevant to the scope of an access to information law: the types of information and/or records covered, the bodies placed under an obligation to provide information and who may make a request for information.

Article 1(1) of the draft Law defines ‘information’ as any description, statement, idea or symbol that contains ‘value, meaning and message’ in the form of ‘data, fact or explanation’ that may be ‘seen, heard and read’ and presented in different forms, in line with developments in information technology. This is no doubt intended to be a broad definition, but it is unduly complex and this complexity may result in confusion, differential interpretation by different officials and/or unduly narrow interpretation. For example, there is no need to stipulate that information be a description or statement, or that it may be seen, heard and read.

Examples

The Thai law defines information as any material that communicates anything, regardless of the form that material takes. Official information, in turn, is defined simply as information in the possession of a public body, whether relating to the operation of the State or to a private individual (section 4).

The United Kingdom law defines information simply as “information recorded in any form” which is held by the public authority at the time the request is received. It is understood that this includes any information whatsoever held by a public authority, regardless of its form, status, date received, or whether or not it was produced by the body. The law also clarifies that information is understood to be held by a public authority if it is held other than on behalf of someone else, or if someone else holds it on behalf of the authority. Thus, public authorities cannot escape their obligations simply by getting someone else to hold information on their behalf (sections 84, 1(4) and 3(2)).

More important is the definition of ‘public information’ to which, as noted above, it would appear the right of access applies. Article 1(2), as agreed by the Formulation Team, defines ‘public information’ as information ‘produced, stored, managed and/or disseminated/received’ by a public body that is ‘related to the administrator and administration of the state’ and/or other public bodies as defined in the law, as well as information related to the interests of the public.

The definition of public information is broad but it could be further enhanced. It applies to all information held by public bodies, but not to information held by private bodies on behalf of public bodies, as in the example from the United Kingdom, noted above. More important, however, is the limitation of the scope of public information to information that is related to the administration of the State or a public body, or to the public interest. This limitation is unnecessary since the right of access should apply to all information held, regardless of its purpose. Furthermore, it introduces a threshold issue to be decided by public officials prior to applying the right to information law, namely whether the information falls within the scope of administration of the State. This places an additional burden on public officials while, at the same time, it may be abused to unduly limit the scope of access.

¹⁵ Citations for the various national right to information laws referenced in these Comments are provided in p.58, 59.

Public bodies are defined in Article 1(3) as administrative bodies which form part of the executive, legislative and judicial branches of government at the national and regional levels, other bodies whose main function is associated with State administration, State-owned enterprises, State-owned legal entities, non-governmental organisations (NGOs) that receive public funds and private enterprises that operate under an agreement with public bodies to carry out public works. This definition has been the subject of discussion at meetings between Commission I and the Government and the latter has proposed a similar definition which, however, leaves out State enterprises.

This definition has a number of positive features, such as its applicability to all three branches of government and to both national and regional bodies. It may be noted that practically all right to information laws include State enterprises within their ambit. These are public bodies just as much as the other types of bodies covered, and there is presumably some public interest reason why they are operated as public companies, rather than being privatised. As a result, the main driver behind the right to information applies to them. Indeed, in many countries, bodies which are owned, controlled or financed by the State are included.

It is not uncommon to include bodies which receive funding from the State, such as NGOs, within the scope of a right to information law, although it is not very common to single out NGOs for special treatment in this regard, as is the case in the Indonesian law. Furthermore, most laws which extend to bodies receiving funding from the State either limit the obligation to provide access to information relating to those activities funded by the State or limit the obligation to bodies which receive substantial public funding.

Example

Section 12 of the South African law defines a public body as a department of State or administration in the national, provincial or municipal spheres, or any other institution exercising a power in terms of the Constitution or a provincial constitution or exercising a public power or performing a public function in terms of any legislation.

The Indian law defines a public body as any “authority or body or institution of self-government” established by or under the constitution, any law passed by either the parliament or a state legislature, or any notification made by government, and includes any body owned, controlled or substantially financed by government (section 2(h)).

Public corporations, of which there are many in Japan providing, among other things, basic services, are outside the ambit of the main right to information law. However, that law requires another law to be passed governing the disclosure obligations of public corporations. This obligation was fulfilled with the passage of the Law Concerning Access to Information Held by Independent Administrative Entities, which came into effect on 1 October 2002.

In some countries, bodies which undertake public functions are additionally included within the definition of public body, whether or not this is pursuant to a specific agreement with a public body. This has the advantage of looking to the function rather than just the form of the body and also of ensuring that access is not thwarted through privatisation.

The draft Law provides, as noted above, that every person benefits from the right to information. However, Article 1(10) defines a person as an individual, group of individuals or Indonesian legal entity. It is not clear whether the restriction to Indonesians applies only to legal entities or to individuals as well. Many right to information laws apply to everyone, regardless of nationality and this is preferable for a number of reasons. It does not exclude residents and stateless people. Moreover, those requesting access to information held by Indonesian public bodies may well be doing research or undertaking an investigation of interest to Indonesians, even if they themselves happen not to be locals. Finally, the cost of allowing foreigners to use the law has proven to be minimal in other countries.

Recommendations:

- Clarification should be provided to the effect that the right of access applies specifically to ‘public information’ so as to avoid any confusion on this point.
- Consideration should be given to adding to the objectives some statement(s) which would provide guidance to officials when assessing the exceptions to the right of access.
- Consideration should also be given to providing a simpler definition of information which makes it clear that it covers all recorded forms which communicate anything.
- The definition of ‘public information’ should not be conditioned on the purpose of the information but should, instead, cover all information held by or accessible to a public body.
- State enterprises should be included within the definition of public bodies.
- Consideration should be given to extending the definition of public bodies to all bodies which receive State funding, rather than just NGOs but, at the same time, the obligation to provide access should be limited either to information relating to activities funded by the State or to bodies which receive substantial funding from the State.
- Consideration should also be given to extending the definition of ‘public body’ to include private bodies undertaking public functions even if this is not pursuant to an agreement with a public body or to public funding.
- Everyone, not just Indonesians, should benefit from the right of access.

Procedural guarantees (Articles 4(2)-(3), 20 and 21)

Article 20 of the draft Law provides generally that the systems for obtaining information should in principle be ‘swift, timely and low cost’. Article 21 provides for requests to be made in writing or in other forms, presumably orally, in which case they must be recorded. Requests must be registered – the register shall include the name and address of the applicant, the information sought and the form in which access is desired – and given a registration number. Where a request is made electronically, the registration number shall be given immediately and where the request is made in writing, the registration number shall be sent along with the information. Pursuant to Article 4(3), applicants must provide reasons for their requests.

A response must be provided to the applicant within ten working days of receiving the request, provided that the time limit may be extended by another seven working days ‘by providing a reason in writing’. The response shall indicate whether or not the public body holds the information and whether or not it will grant the request. In case the request is granted, in whole or in part, the information shall be provided, or notification be given of the form in which access is to be provided, along with any fees and the prescribed method of payment. If the request is refused, the notice must specify this, along with the grounds for the refusal, based on Article 15 of the Law (see below under Exceptions). Where the public body does not hold the information but knows of another body which does, it shall transfer the request to that other body.

Article 4(2) lists a number of means of accessing the information, including by inspecting records, by attending meetings of public bodies or by obtaining a copy of the information. It also sets out the right of the applicant to disseminate information obtained from a public body.

These procedural provisions are for the most part positive. The requirement for applicants to provide reasons for their requests, however, is contrary to established practice. The reasons for a request are not relevant and they might be abused by officials as a ground – formal or informal – to refuse access. Most right to information laws also allow for extensions to the time limit only under certain specified circumstances, such as where there is a need to search through a large number of records or where third parties must be consulted.

Examples

Most countries do not require applicants to provide reasons for their requests. The Indian law specifically provides that no personal details may be required other than for purposes of contacting the applicant (section 6(2)). Pursuant to the Kyrgyz law, public officials may not inquire as to the use to which requested information will be put (Article 9). The 2005 Ugandan Access to Information Act rules out the belief of an official as to the reasons for a request from being taken into account (section 6).

A key concern with the procedural provisions in the Law is that they are very brief and leave a number of important matters either to future regulation, although this is in most cases not specifically provided for in the draft Law, or to the discretion of officials. No provision, for example, is made to assist applicants, although most right to information laws do place an obligation on public bodies to do this.

There are no provisions on consultation with third parties who might have supplied the information or who might be affected by its release. The provisions on forms of disclosure omit a number of other possible forms, such as in electronic form, making ones own copy or obtaining a certified copy. Significantly, there is no detail at all on the important matter of fees. A new proposed Article 60 would provide for future regulation of the matter of fees. This is a matter of some importance as unduly high fee structures can seriously undermine the right of access. As the box below makes clear, this is a matter to which other right to information laws properly devote some attention. In most countries, particularly less wealthy countries, only the cost of reproducing and sending the information to the applicant may be charged and most also provide for rules to alleviate fee burdens, such as waivers for personal and/or public interest requests, or for a set number of pages, say 100 pages.

Examples

The United States law sets out detailed rules on the fees which may be charged for requests for information, which must conform to central guidelines providing a uniform schedule of fees for all public bodies. The Law provides for three different fee systems. Requests for commercial use may be billed “reasonable standard charges for document search, duplication, and review”. Requests by educational or scientific institutions may be billed only “reasonable standard charges for document duplication” and all other requests may be charged for search and duplication. For the latter two categories, no fees may be charged for the first two hours of search or for the first 100 pages of documents, or where the cost of collecting the fee would exceed the value of the fee. Furthermore, where disclosure is in the public interest because it is, “likely to contribute significantly to public understanding of the operations or activities of the government”, information must be provided without charge or at a lower charge than would otherwise be the case. This is, in effect, a waiver for the media, as well as for NGOs who can show a public interest use (Clause (a)(4)(A)).

The Japanese law provides that fees may be charged for both processing requests and for providing information, as long as these do not exceed the actual cost. The fee structure is required to take into account the desirability of keeping fees to as “affordable an amount as possible” and the head of the administrative organ may reduce or waive the fee in cases of economic hardship or for other special reasons (Article 16).

The Indian law provides for fee waivers for those below the poverty line. It also provides that information shall be provided free of charge where a public body fails to respect the timelines set out in the law (see sections 7(5) and (6)).

Recommendations:

- The rule requiring applicants to provide reasons for their requests should be removed.
- Consideration should be given to specifying the circumstances in which the time limit for responding to a request may be extended.
- Consideration should be given to adding substantially more detail to the draft Law in the area of procedural provisions. Perhaps most important is the need to include a clear framework of rules on the fees which may be charged for access to information but consideration should also be given to developing rules on assistance to applicants, consultations with affected third parties and the forms of access which are available.

Duty to publish (Articles 7(1), (3) and (4), and 9 – 12)

Article 7 of the draft Law contains a number of general provisions on the duty to publish information proactively, even in the absence of a request (sometimes also referred to as routine or *suo moto* publication). Article 7(1) provides very generally that public bodies are required to provide and/or publish information apart from information that is exempt pursuant to the Law. Articles 7(3) and (4) provide that public bodies must prepare a written review of each policy they adopt, with a view to giving full effect to the right to information, and that such reviews shall outline the ‘political, economic, social, cultural as well as national defense and security considerations’ that underlie the policy.

The main proactive publication obligations are set out in Articles 9-12. Article 9 lists a number of categories of information that must be published on a regular basis, at least once every six months, including information on the public body, including on its performance and finances. The information shall be disseminated in a manner and form that can be accessed and understood by the public, and further rules to this end shall be determined by the information officer of the public body.

Article 12 further requires every public body, on an annual basis, to publicise its performance in implementing the Law, including a number of requests for information, the time taken to respond to each request, the number of refusals to grant requests and the reasons for these refusals.

Article 11 provides a list of information that must be available at all times, presumably for public inspection. The specific types of information include a list of all non-exempt public information held by the public body, its decisions, its policies and supporting documents, its projected work plan and an estimate of its annual expenditure, any agreements between the public body and third parties, opinions of public officials expressed at public meetings, work procedures that affect the public, a report on access to public information, and other non-exempt information. Furthermore, in a progressive provision, all information released pursuant to the request process must be included in the category of information available at all times.

Article 10 requires public bodies to publicise immediately information which is required to protect lives, again in a manner that is accessible to and understood by the public.

Examples

Pursuant to Article 12 of the Bulgarian law, public bodies must “promulgate” information contained in their official documents, other categories of information required to be published by law and information about their activities. Article 14(2) requires public bodies to disseminate information which may prevent a threat to life, health, security or property or which corrects information previously disseminated that was inaccurate. It also calls for the dissemination of information that could be of public interest, even if it is otherwise confidential, where the public interest in receiving it outweighs the risk of harm to the protected interest.

The United Kingdom law, unlike many other right to information laws, does not provide a list of information that each public body must publish. Instead, it requires every public body to develop and implement a publication scheme, setting out the classes of information which it will publish and the manner in which it will publish them. In adopting the scheme, the public body must take account of the public

interest in access to the information it holds and in the “publication of reasons for decisions made by the authority”. Importantly, the scheme must be approved by the Information Commissioner. The Commissioner may put a time limit on his or her approval or, with six months notice, withdraw the approval (section 19).

The Indian law provides a very long list of information which every public body must, within 120 days of the Law coming into force and thereafter updated annually, publish on a proactive basis. Significantly, public bodies are also required to make a ‘constant endeavour’ to provide as much information proactively as possible, so as to minimise the need for the public to have recourse to requests to obtain information. Information shall be disseminated widely and in a manner which makes it easily accessible, to the extent possible electronically, taking into account cost effectiveness, local language and the most effective means of communication in the local area of dissemination. Information covered by these rules shall be provided free, or at the cost of the medium or print cost price (section 4).

These are, taken together, progressive proactive publication rules. The inclusion of a list of non-exempt information held by the public body is particularly welcome. At the same time, the list should include all information held by the public body, unless the inclusion of the name of the document would itself reveal confidential information. The confidentiality or otherwise of information should be decided at the time of a request, in light of all of the circumstances, and not in advance.

Furthermore, proactive publication is increasingly being recognised as one of the most important aspects of a right to information law. It helps ensure at least a minimum platform of information is being disseminated to members of the public, many of whom will never actually make a request for information. And it also helps to reduce the number of requests for information, by making information available before it is requested. Given the relatively high cost of processing individual requests, and the falling costs of posting information on the Internet, this is an attractive option. Indeed, some laws are calling for as much information as possible to be made available on a proactive basis precisely to limit the need for individuals to make specific requests for information.

Recommendations:

- The list of documents held by the public body should include all documents, not just non-exempt documents, unless the name of a document would itself reveal confidential information.
- Consideration should be given to extending the proactive publication rules further, including by placing an obligation on public bodies to make as much information as possible available on a proactive basis, with a view to limiting the need to make individual requests for information.

Exceptions (Articles 6, 14-19, 21(7) and 58)

Comments on the general structure of the regime of exceptions

The primary regime of exceptions is contained in Article 15 of the draft Law, while the other articles considered under this section establish rules for the application of that regime or list categories of information that should not be kept confidential.

A key issue for any regime of exceptions in a right to information law is the relationship between the (new) right to information law and existing secrecy provisions which may be found in different laws. A new Article 15(m), approved at the meeting of 14 September 2007, establishes a new exception for information that is rendered secret by other laws or regulations. Article 58 of the Law provides generally that, at the time of enactment of the right to information law, all other laws and regulations relating to access to information remain applicable to the extent that they are not inconsistent with or have been replaced by the new law (see also Article 57, which is substantially similar). It must be assumed, however, that this does not apply to the specific rule set out in new Article 15(m), providing for the continuation of secrecy provisions.

Some existing right to information laws override secrecy laws, while many do not. There are strong principled reasons why a right to information law should override secrecy laws. Many of the latter will have been adopted years ago, before the importance of openness in a democracy was well understood and before the right to information was accepted as a fundamental human right. In most countries, existing confidentiality provisions are excessively biased in favour of secrecy and fail to promote an appropriate balance between the interests they protect and openness. To leave them in place is to fail to effect the important shift towards openness that a right to information law is supposed to herald in.

Examples

The South African law specifically provides that it applies to the exclusion of any other legislation that prohibits or restricts disclosure of information and which is materially inconsistent with its objects or one of its specific provisions (section 5). The Indian law explicitly overrides inconsistent provisions in other laws 'for the time being in force', and it specifically mentions the Official Secrets Act, 1923, as one such law (section 22). The 2002 Pakistani Freedom of Information Ordinance similarly provides that other laws shall not be grounds for refusing to withhold information (section 3).

Most of the exceptions in Article 15 do include some kind of harm test, although this varies considerably from exception to exception. Examples of the specific standard used (at least in the translation) include 'may impede', 'be detrimental to', 'may be disadvantageous to' and 'may reveal'. Article 14 specifically provides that the test for exceptions shall be 'stringent and restricted in nature' and 'based on tests of consequences that arise when information is provided', taking into account the public interest in disclosure of the information. This is further bolstered by Article 17, which provides that the 'tests of consequences' must be performed in a 'thorough and meticulous manner' prior to deciding that specific information is exempt.

The instructions in Articles 14 and 17 regarding the application of the harm test are very positive and strong and should help ensure that the test is applied properly. At the same time, it would also be useful to have more consistently strongly worded harm tests built into each specific exception. In particular, use of the term 'would or would be likely to' rather than the far more permissive term 'may' would be preferable.

The Law includes a public interest override at Article 18, in addition to the instruction, already noted, in Article 14 to take the public interest in disclosure into account when

interpreting exceptions to the right of access. The Article 18 public interest override provides that the Information Commission may disclose exempt information where there exists a ‘far greater public interest’ in disclosing the information than the interest being protected through secrecy.

Examples

Section 46 of the South African law provides simply:

Despite any other provision of this Chapter, the information officer of a public body must grant a request ... if—

- (a) the disclosure of the record would reveal evidence of—
 - (i) a substantial contravention of, or failure to comply with, the law; or
 - (ii) an imminent and serious public safety or environmental risk; and
- (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

As a result, providing evidence of an overriding breach of the law or a public safety or environmental risk effectively trumps any exception.

The public interest override in the United Kingdom law is somewhat complex. Essentially, it provides that exceptions shall apply only where, “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.” In other words, information may only be withheld where the harm to the interest protected by the exception is greater than the public interest in accessing the information (section 2(2)(b)). This is a strong and general public interest override.

The inclusion of a public interest override in the Law is welcome. At the same time, the override provided for suffers from some key weaknesses. First, it only comes into play when the matter is being considered by the Information Commission. This is problematical since, to be effective, a public interest override must be considered at all stages of a request. Furthermore, it may lead to cases where the Information Commission requires the release of information which the public body did not actually have the power to release, since it was not able to apply the public interest override, a clearly anomalous result.

Second, it comes into play only where the public interest in disclosure is ‘far greater’ than the competing secrecy interest, and even then application of the override by the Information Commission is discretionary, as signalled by the term ‘may’ in the text. It would be preferable, and more consistent with the practice of other States, if the override was mandatory whenever, on balance, the overall public interest would be served by disclosure.

Article 21(7)(e) appears to provide for partial disclosure of a document where only part of it is covered by an exception (often referred to as severability). This is a common and useful provision in right to information laws which ensures that where only part of a document is secret, that shall not prevent the rest of the document from being disclosed.

Article 19 addresses the issue of historical disclosure, providing that the exceptions set out in Articles 15(a)-(f), all of those in the original draft Law apart from the one dealing with personal information, are not permanent and that the government will provide further regulations on the duration of exceptions. While it is helpful to provide that most

exceptions shall not be permanent, most right to information laws provide for set time limits on at least certain exceptions. This promotes certainty as to the duration of exceptions and a clear timeframe for historical release.

Examples

The Azerbaijani law provides for the historical release of information protected on public grounds after five years (Article 40). The Ugandan law provides for release of documents protected under the internal deliberations exception after ten years and documents protected on grounds of defence and international relations after 20 years (sections 33 and 32).

In a number of other countries – including India, Jamaica, Thailand and the United Kingdom – most exceptions come to an end after 20-30 years.

Recommendations:

- Consideration should be given to removing the new Article 15(m), which preserves secrecy rules in other laws. Instead, the Law should make it clear that, at least to the extent of any inconsistency, it overrides secrecy rules.
- Consideration should be given to providing for a more standard harm test for different exceptions, based on the idea that disclosure of the information ‘would or would be likely to’, rather than simply ‘may’, cause the harm.
- The public interest override should apply at all stages of consideration of a request for information, including internally to the public body, and disclosure should be mandatory whenever this would, on balance, serve the overall public interest.
- Consideration should be given to providing for a ‘hard’ time limit for historical disclosure, for example of 20 years.

Comments on specific exceptions

The specific exceptions are provided for in Article 15 of the draft Law. Article 16, however, sets out a number of categories of information that may not be deemed to be exempt, in an attempt to limit the scope of the exceptions. Article 16(1) excludes from the scope of the exceptions, for example, that the rulings of judicial bodies, reports on the reclaiming of corruption money, and a range of information held by law enforcement bodies such as their regulations and policies, orders to cease an investigation or prosecution, annual expenditure plans and annual financial reports.

It should be noted that Article 6 also provides for non-disclosure of exempt information. It provides for five specific exceptions, most of which are elaborated in more detail in Article 15. However, it should be noted that some of the Article 6 exceptions are very broad in nature. Article 6(2)(a), for example, refers to information ‘that is detrimental to the state’, while Article 6(2)(d) refers to information ‘related to confidentiality of position’. It is not clear what this latter means. Finally, Article 6(2)(e) refers to information that has not been handed over or documented. Again, the meaning of this is not clear. It presumably covers situations where the information in question is not held by the public body, but this is already addressed through the definition of public information.

It would appear from other provisions that Article 15 is the key exceptions provision. If this is the case, there is no need for exceptions to be repeated in Article 6 and, indeed, this

could cause confusion and differential application of the law by different public bodies. It would be preferable simply to remove Article 6 and to keep all of the exceptions in one place.

For comparative purposes, reference in this section of the Comments to national practice will be to the South African and the Indian laws.

Article 15(a): Law Enforcement

Article 15(a) exempts information which, if disclosed, ‘may impede the process of law enforcement’, giving as specific examples impeding criminal investigations, revealing the identity of informants, whistleblowers, witnesses or victims, disclosing intelligence on crimes and plans for prevention and handling of trans-national crimes, endangering the safety of law enforcement officers and/or their families, or endangering the security of law enforcement equipment.

Examples

Section 39 of the South African law contains a lengthy description of the various interests protected in relation to law enforcement. These include protection of methods of preventing or investigating crime, the actual prevention or investigation of crime, prosecuting accused persons and, specifically, such related matters as the intimidation of witnesses, revealing confidential sources of information and so on, although these would all appear to be covered under investigation and/or prosecution of crime.

The Indian law provides for a simple exception for information the disclosure of which “would impede the process of investigation or apprehension or prosecution of offenders” (section 8(1)(h)).

Protecting law enforcement is recognised as a legitimate reason not to disclose information in all right to information laws. In addition to the various interests protected in the draft Law, consideration should be given to extending protection to cover the prosecution of crime, another very important social interest which is closely related to the others.

Article 15(b): Commercial Secrecy

Article 15(b) provides for an exception where disclosure of the information would disrupt the public interest in protecting intellectual property rights, trade secrets or fair business competition. This is a legitimate exception.

Examples

The South African law protects trade secrets and information the disclosure of which would be “likely to cause harm to the commercial or financial interests” of the third party who supplied it or to put that party at a disadvantage in negotiations. A specific exception to the exception, however, means that it does not cover the results of product or environmental testing, where these disclose a serious risk of harm (section 36).

The Indian law includes two different exceptions relating to commercial secrecy, both of which are subject to a specific public interest override, which allows the exception “unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information”. The first covers “information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party” while the second covers “information available to a person in his fiduciary relationship” (sections 8(1)(d) and (e) and 11(1)).

Article 15(c): National Security

Article 15(c) exempts information the disclosure of which would ‘be detrimental’ to national defence and security strategy. It lists as specific examples of this, among other things, information on intelligence, State defence and security tactics in relation to both internal and foreign threats, strategic plans for the execution of a war, the number and composition of the military, the condition of military bases and data estimating the military strength of other countries. It is not clear from the text whether this is considered to be an exclusive or merely indicative list (the translation uses the term ‘i.e.’ to describe the list provided).

Examples

Section 41 of the South African law provides that a public body may refuse to disclose information where this “could reasonably be expected to cause prejudice to” national security or defence. It goes on to define this as including information relating to military tactics, to the characteristics or vulnerabilities of weapons or military personnel, or to intelligence operations. Although superficially appealing, the items of this list are far too broad and actually include many matters that are commonly the subject debate in a democracy. For example, public debate about weapons vulnerability can be crucial to building the public support needed to allocate the expenditure required to redress those vulnerabilities.

The Indian law provides for an exception where disclosure of the information “would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State” (section 8(1)(a)). It does not include a list of specific examples of this.

Every right to information law includes an exception in favour of national security. At the same time, national security constitutes a very broad exception in many right to information laws, and their provisions have often been criticised for that reason. It is undoubtedly difficult to achieve an appropriate balance between the need to protect security and the imperative of openness. The problem comes when trying to define national security. Many laws do not even attempt this, leaving it either up to the responsible minister and/or the courts.

The list of specific examples of what constitutes national security in the Indonesian draft Law, as in the South African law, is presumably an attempt to ensure that the exception is not interpreted too broadly. At the same time, the result is undoubtedly problematical. For example, in most countries military strength in terms of number of personnel is a matter of open public record while the condition of military bases may well be a matter of public debate.

Article 15(d): Natural Wealth

Article 15(d) in the original draft Law provides for an exception where disclosure of the information would reveal the natural wealth of Indonesia. This is the subject of some debate and an alternative formulation would protect ‘vital national objects’ which require confidentiality, for example based on the needs of the public, development, transportation, governance and State revenues.

These are not exceptions which are found in other right to information laws. Many such laws do protect the ability of the government to manage the economy or public economic interests but Article 15(e) already appears to cover this need. Internal security is also already protected by the draft Law. Many right to information laws do, however, provide

protection against disclosures which may harm the life or safety of an individual, although it is harm to see how information held by public bodies, outside of the law enforcement context, would lead to this result.

Examples

The South African law protects information the disclosure of which could reasonably be expected to endanger the life or physical safety of an individual, or the security of various listed interests, such as buildings or systems (section 38). Pursuant to the Indian law, information is exempt if its disclosure “would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes” (section 8(1)(g)).

Outside of the far more specific exceptions noted above, however, there is absolutely no reason why the natural wealth of the country should be kept secret; indeed, there are probably good environmental reasons why it should not be. The alternative is too general to be legitimate as a grounds for secrecy; the potential for abuse of protecting the ‘needs of the public’, to give just one example, is obvious.

Article 15(e): National Economic Interests and Foreign Relations

Article 15(e) in the original draft Law prevents disclosures which ‘may be disadvantageous’ to public economic interests or foreign relations. This is a matter of discussion but no alternative formulation has yet been agreed.

These are legitimate interests which are protected in other right to information laws.

Examples

The South African law carves out an exception for information the disclosure of which could reasonably be expected to harm international relations, unless the information is more than 20 years old, along with information supplied in confidence by another State or international organisation. It also exempts information where disclosure would be likely to materially jeopardise the economic interests or financial welfare of the country or the ability of the government to manage the economy effectively (section 41).

The Indian law also protects information supplied in confidence by a foreign government, although this does not apply to international organisations (section 8(1)(f)). As noted above, the Indian law also includes a general exception in favour of the economic interests of the State (section 8(1)(a)).

Article 15(f): Last Will and Testament

Article 15(f) contains an exception that appears to be in favour of official private information in the form of a last will and testament, although it is not clear from the wording whether it refers to private information *and* a last will and testament or simply private information as part of a last will and testament. Assuming the former is the case, this is not an exception that is found in other right to information laws. While a last will and testament will often be private in nature, this might not always be the case and it would be preferable simply to have one exception in favour of personal information (in this case, the general exception found at Article 15(g)).

Article 15(g): Personal Information

Article 15(g) provides for an exception to protect ‘personal secrets’. A list of these is provided which includes medical history, financial information and evaluation results indicating capacity and ability. This list is assumed to be indicative, since it clearly does

not cover all personal secrets, although this is not clear, as with other lists in Article 15. Article 16(2) includes a list of categories of information that should not be treated as secret under the privacy exception, such as where the individual consents to disclosure, where the information is disclosed for research purposes or where the information relates to an official's public activities.

Examples

Section 34 of The South African law rules out the “*unreasonable* disclosure of personal information about a third party”, thus ensuring that only where the disclosure would cause harm should secrecy prevail. Further protection against undue secrecy is provided by a set of exceptions to exceptions which require disclosure notwithstanding the above where the individual has consented, the individual provided the information on the understanding that it might be disclosed, the information is already publicly available and, importantly, the individual is or was an official of a public body and the information relates to the position or functions of that individual.

The Indian law establishes an exception for personal information which has no relationship to any public activity or interest, or the disclosure of which would lead to an unwarranted invasion of privacy. However, this does not apply where the information officer or the appellate authority is satisfied that the larger public interest warrants disclosure, or the information could not be denied to parliament (section 8(1)(j)).

Every right to information law protects personal information in one way or another. In the more progressive laws, this protection is limited to information which would constitute an unreasonable disclosure, rather than applying to all personal information. Although the exceptions to the exception in Article 15(g) help narrow the scope of the exception, it would still be useful to restrict it to harmful disclosures.

Article 15(h): Internal Deliberations

A new exception has been proposed by government, which is still under discussion, to protect memoranda or other internal correspondence between or among public bodies that are by their nature not supposed to be accessible to those not involved in the relationship.

An exception generally along these lines is found in most right to information laws and this reflects the need to allow government to develop policy in an effective manner, based on the free and frank provision of advice from civil servants. The latter need to feel secure enough to be able to provide their views on policy matters freely. At the same time, these exceptions can easily be abused by civil servants used to operating in secrecy and who are concerned that any degree of openness will interfere with their work. Indeed, the experience in other countries has been that this is one of the most problematical exceptions from an openness perspective.

Balancing these interests is not easy and, regardless of the approach taken in the legislation, it is difficult to safeguard fully against abuse. In some countries, care has been taken to elaborate as clearly and precisely on the specific interests to be protected so as to limit unduly broad interpretation. Two interests that are commonly protected are the success of a policy, where this would be defeated by premature disclosure of the policy, and the free and frank provision of advice within public bodies. Protection is also provided in some laws for the successful development of policy and/or for the effectiveness of a testing or auditing procedure. In many laws, background factual or statistical information is excluded from the scope of this exception.

The proposed new exception, while generally relating to a legitimate interest, fails to specify sufficiently clearly what that interest is. As a result, it is open to serious abuse by officials who may wish to use it to avoid their disclosure obligations.

Examples

The South African law provides for an exception where disclosure of the information could reasonably be expected to inhibit the candid communication of advice or conduct of a consultation or discussion. It also more generally covers disclosures which would be likely to undermine the formulation of policy or decision-making, as well as to frustrate the success of a policy by premature disclosure. Finally, it protects testing and evaluative material (section 44).

Significantly, the Indian law does not include a general exception protecting internal deliberations. It does, however, exempt information the disclosure of which would constitute a breach of the privilege of parliament or a state legislature (section 8(1)(c)), as well as cabinet papers, including records of the deliberations of the Council of Ministers. Cabinet papers, however, shall be made public after the decision has been taken “and the matter is complete, or over” (section 8(1)(i)).

Omissions

It is of the greatest importance that the exceptions in an access to information law are comprehensive, in the sense that they cover all legitimate confidentiality interests. Otherwise, public officials may be required by law to disclose information that really should remain confidential.

Most access to information laws contain an exception in favour of information which is privileged from production in legal proceedings, unless the person entitled to that privilege has waived it. In other words, if courts would not order the information to be disclosed in a legal proceeding, it should not be required to be disclosed pursuant to an access to information request. In practice, this largely relates to information covered by solicitor-client privilege.

Examples

The South African law provides for an exception for information which is privileged from production in legal proceedings, unless that privilege has been waived (section 42). The Indian law similarly exempts information the publication of which has expressly been banned by a court or the disclosure of which would constitute contempt of court (section 8(1)(b)).

Recommendations:

- Consideration should be given to removing Article 6, which duplicates the exceptions provided for in Article 15, in its entirety. If it is not removed, its provisions should be substantially narrowed to bring them into line with the principles underpinning the right to information and the more detailed exceptions provided for in Article 15.
- Consideration should be given to extending protection under law enforcement to cover the prosecution of crime.
- Consideration should be given to removing the list of specific types of information which should be considered secret on national security grounds.
- Article 15(d), protecting the national wealth of Indonesia, should be removed from the draft Law.

- The exception in Article 15(f) in favour of a last will and testament should be removed as this would, where appropriate, be covered by the general personal information exception.
- Consideration should be given to adding some form of harm test to the exception in favour of personal information, for example by requiring the disclosure to be ‘unreasonable’.
- The proposed exception in favour of internal deliberations should be substantially reworked so that it specifies clearly the particular interests sought to be protected.
- Consideration should be given to adding an exception to protect legally privileged information.

Appeals (Articles 4(4) and 22-46)

Article 4(4) provides generally that everyone has the right to appeal to the courts when faced with an obstruction of or failure to fulfil his or her right to information. A new provision agreed by the Formulation Team, which would become new Article 47, provides that where one of the parties rejects the decision of the court of appeal, he or she may, within 14 working days, appeal to the Supreme Court for a final decision. While this is appropriate, and found in many access to information laws, experience has demonstrated that access to an administrative level of appeal is also extremely important in facilitating access in practice. The courts are simply too expensive and time-consuming for the vast majority of requesters to bother with.

Independence of oversight body

The draft Law devotes considerable attention to the establishment and powers of the Central and Regional Information Commissions. Pursuant to Article 22, as amended by agreement, the Commissions are independent institutions that implement the Law and its regulations, determine technical guidelines governing public information and resolve disputes through mediation and/or adjudication. Pursuant to Article 23, the Central Information Commission shall be based in the capital and the Regional Information Commissions shall be based in the capital cities of the provinces.

Article 24, as amended by agreement, provides that the Central Information Commission shall consist of seven members, two representing government and five representing the public, while the Regional Information Commissions shall consist of five members, again with two representing government and just three representing the public. In both cases, more than two candidates shall be proposed by the government and both government and public representatives shall be selected by either the House of Representatives (DPR) or the Regional House of Representatives ‘through a fit and proper’ test. According to Article 29, members of the Central Information Commission shall be proposed by the public to the House of Representatives which shall select them on the basis of a ‘fit and proper test’ and they shall then be formally confirmed by the President. A similar process is proposed under Article 30 for Regional Information Commissions, involving, respectively, the Regional House of Representatives and the Governor. Pursuant to

Article 28(2) and (3), a list of potential members shall be announced to the public, who may then submit a grounded objection against any candidate.

It would appear that the precise modalities for proposing representatives still need to be clarified. An alternative proposal at the regional level, yet to be agreed, would have the government representatives proposed by the official responsible for communications and information.

Pursuant to Article 24, the Commissions shall be led by a chairperson, accompanied by a secretary, both selected by the members from among themselves either by agreement or, failing that, by vote.

Article 28(1) sets various conditions on who may be appointed as a member, permitting only individuals who are citizens, possess integrity and virtue, have not been convicted of a crime punishable by five years' imprisonment, unless it was for political reasons, possess knowledge about human rights and public policy, and experience with public interest activities in the community, demonstrate a willingness to relinquish any positions in administration or politics, and are willing to work full time.

Members are appointed for five years and may be reappointed once (Article 31). Dismissal prior to the end of tenure shall be pursuant to a decision of all other members, which is informed to the President or Governor, respectively. The grounds for termination of membership shall be death, end of tenure, resignation, proof of commission of a criminal offence punishable by five years' imprisonment, being in poor mental or physical health that inhibits performance of duties for at least one year, or having committed a dishonourable act or for other reasons as determined by all of the other members (Article 32).

Article 54 provides that the Central Information Commission shall be established within one year of the law coming into force while Article 55 allocates two years for the establishment of Regional Information Commissions.

Article 27 provides generally that Information Commissions are accountable to the public, although it is not clear what this really means. Article 33 grants a right to members of the public to make a complaint to the relevant Commission to the effect that a Commission member is failing to execute their duties and the Commission is required to investigate the complaint and report back within 30 days. Where the complaint is substantiated, the member shall be dismissed. This seems inconsistent with the rules for termination of membership under Article 32, which require all members to agree and which require a failure of performance of duties for a full year. Article 27 also requires Commissions to present an annual report on their activities to either the House of Representatives or the Regional House of Representatives, which report shall be open to the public.

The general duties of the Information Commissions are set out in Articles 25(1) and (3) as being to process complaints and assist applicants to submit such complaints. The

Central Information Commission is further tasked with establishing guidelines on the submission of complaints, in consultation with Regional Information Commissions and the public (Article 25(2)).

It is well established that bodies which exercise the sorts of functions entrusted to the various Information Commissions – and, in particular where they deal with individual complaints – should be independent in the sense that they are protected against the possibility of political or commercial interference. The primary reason for this is that access to information can be politically embarrassing or worse and, as a result, only independent bodies can be expected to perform these sorts of functions without bias. Put differently, a key role of Information Commissions is to oversee the application of the access to information rules by public bodies and this cannot be achieved where they are not independent of those bodies.

Some effort has been made in the rules to promote the independence of the Commissions, including through involving the public in the process both at the level of nominations and again in terms of commenting on shortlisted candidates. At the same time, there are still some significant problems in this regard. The presence of two government representatives on both the Central and Regional Information Commissions is particularly problematical and runs directly counter to the need to promote the independence of these bodies from government.

Examples

Under the Mexican law, appeals from any refusal to provide information go first to the Federal Institute of Access to Information, established under the Act, and from there to the courts. The Institute is an independent body. The five commissioners are nominated by the executive branch, but nominations may be vetoed by a majority vote of either the Senate or the Permanent Commission. Individuals may not be appointed as commissioners unless they are citizens, have not been convicted of a crime of fraud, are at least 35 years old, do not have strong political connections and have “performed outstandingly in the professional activities”. Commissioners hold office for seven years, but may be removed for serious or repeated violations of the Constitution or the Act, where their actions or failure to act undermine the work of the Institute or if they have been convicted of a crime subject to imprisonment (Articles 33-35).

Under the Indian law, Central Information Commissioners are appointed by the President upon nomination by a committee consisting of the Prime Minister, the leader of the opposition and a Cabinet Minister nominated by the Prime Minister. Members shall be “persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.” They are also explicitly prohibited from having strong political connections. Commissioners hold office for five years and may not be reappointed. Salaries are pegged to those of election officials. Commissioners may be removed from office only by order of the President, and for proved misbehaviour or incapacity, as decided by the Supreme Court, or for various offences or conflicts of interest. Similar rules relate to the State Information Commissioners (sections 12-14 and 15-17 for State Information Commissioners).

The conditions on who may be appointed as a member are welcome but again they fail fully to guarantee independence. In particular, rather than simply providing that individuals must be prepared to relinquish their political positions, the law should rule out individuals with strong political connections from being appointed as members.

Recommendations:

- The government should not be able to appoint representatives to serve as members of the various Information Commissions.
- Individuals with strong political connections should be barred from being appointed as members of the various Information Commissions.

Processing of complaints

Pursuant to Article 34, anyone may make submit an ‘objection’ for any of the following reasons: their request for information was rejected; information was not published on a proactive basis as provided for in Article 9; they did not receive any response to their request for information; the response to their request was not in the form requested; their request for information remains unfulfilled; they were charged an excessive fee for access to information; or the timelines for responding to requests as set out in the law were not respected. These are broad grounds for complaint, although it is not clear why complaints for a failure to publish information proactively have been restricted to Article 9, instead of including Articles 10-12, which also deal with proactive publication.

Pursuant to Articles 35 and 36, an objection shall be addressed to the superior of the information official within 30 working days and the superior must respond within seven working days. Where the superior rejects the objection, his or her response must be in writing and include reasons.

Where the applicant is not satisfied with the response of the superior, he or she may submit a complaint to the relevant Central or Regional Information Commission within 14 working days. In this case, the Central or Regional Information Commission shall initiate mediation or adjudication efforts within a further 14 working days (Articles 37-38).

In undertaking these functions, the Commissions have the authority to compel witnesses, to request required records and to administer oaths. The Central Information Commission shall deal with disputes involving central public bodies and disputes in regions in which no Regional Information Commission has been established, and the Regional Information Commissions shall deal with disputes involving regional public bodies, and district/municipal bodies (Article 26).

Article 40 provides for mediation where both parties agree to this, but not for complaints that a request was wrongly rejected. During the mediation process, members of the Commission shall act as mediators and an agreement of the parties pursuant to mediation shall be set out in a resolution of the Commission, which shall be binding (Articles 39-41).

An adjudication hearing may only be commenced when mediation has been declared unsuccessful in writing by one of the parties, or when one or more of the parties withdraws from the mediation. The hearing shall be held by between three and five Commission members and be open to the public, except where documents claimed to be covered by an exception are being examined, in which case members are bound to

safeguard that confidentiality. The head of the public body has a right to present oral or written testimony and the complainant may be represented by a proxy. In an adjudication hearing, the onus is on the public body to justify its actions (Articles 42-45).

Article 46 addresses complaints pursuant to the adjudication process involving a refusal of a request differently from other complaints. According to Article 46(1), in the former case, the Commission has the power either to declare the ruling of the superior null and void and to order the disclosure of the information or to uphold the ruling of the superior. Pursuant to Article 46(4), a ruling in a case involving a refusal of a request is final and binding, although Article 39(2) confusingly provides that adjudication resolutions are binding *except* in such cases. According to Article 46(2), in other cases the Commission may order the information officer to fulfil his or her obligations under the law, order the public body to provide the information within the set timeframe or uphold the decision of the superior and reject the complaint. The Commission may also make orders over and beyond what the complainant requested, where appropriate. In all cases, the resolution of the Commission shall be declared publicly and copies shall be sent to the applicant and the superior official at the public body.

Examples

The Federal Institute of Access to Information was established by the Mexican Federal Transparency and Access to Public Government Information Law of 2002 (see below for more details on how it is appointed). Appeals lie in the first instance to the Institute and from there to the courts. The appeal must be lodged within 15 days of the notice of refusal of access, and the complaint may be based on a refusal to provide information or an opportunity to correct personal information, or the timeliness, cost or form of access. A commissioner must investigate the claim and report to the whole body within 30 working days, and a decision must be made within another 20 days, although these time limits may be doubled for justifiable cause. The Institute may accept or reject the claim, or modify it, and their ruling shall include time limits for compliance. The requester, but not the agency or entity, may appeal from the Institute's decision to the federal courts Articles 50-56).

Similarly, the Central and State Information Commissioners are provided for by the Indian law. As in Mexico, requesters may lodge complaints with the Commission relating to a failure to provide access to information or to keep to the time limits, or in respect of fees charged. The Commission has the same powers as a civil court when investigating such matters, including to examine any record held by a public body. The Commission may order the disclosure of any information and also order that compensation be paid to a requester. The Commission may also impose penalties on public officials who have wilfully obstructed access to information. Unlike in most countries, the Indian law specifically precludes the jurisdiction of the courts in information complaints. Prior to appealing to the Commission, individuals must lodge an internal appeal to a higher official in the same public body (sections 18-20).

The procedural rules for complaints are very comprehensive and progressive. One issue which should be clarified is how complaints against rejections of requests are to be dealt with. It is not clear why these should not also be subject to mediation. Furthermore, as noted, the draft Law actually contains conflicting provisions on the power of the Commission in such cases.

Recommendations:

- Consideration should be given to extending the grounds for complaint to breach of the proactive publication obligations in Articles 10-12 (instead of restricting them to breach of Article 9).

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- The power of the Commission in cases of complaints against a rejection of a request should be clarified and consideration should be given to making the mediation procedure applicable in such cases.

Sanctions and protections (Articles 48-53)

The draft Law contains a number of provisions providing for penalties for public bodies and/or officials who breach various of its provisions. Pursuant to Article 48, any public body which fails to publish information on a proactive basis or to furnish it in accordance with a request, in breach of Article 7(1), shall be subject to imprisonment for between three months and two years and/or a fine of between Rp one and five million (approximately USD105-530). The government has proposed to replace all provisions stipulating imprisonment for public bodies with simple fines, on the basis that you cannot criminalise the actions of a public body. For Article 48, the government proposal is a maximum fine of Rp ten million (approximately USD1060). Article 49 provides for a fine of up to Rp five million for breach of the proactive publication rules in Article 9 (the government proposal is again for a maximum fine of up to Rp ten million). Articles 50 and 51 provide for imprisonment of between nine months and three years and/or a fine of up to Rp ten million for, respectively, a failure to publish information immediately in breach of Article 10(1) or to make information available for inspection pursuant to Article 11(1) (the government proposal in each case is simply for a fine of up to Rp ten million).

These provisions are welcome and should help ensure that public bodies take their obligations seriously. Once again, however, it may be questioned why breach of the proactive publication obligations in Article 12 does not also attract sanction. Furthermore, it may be noted that the fines for public bodies are extremely low, far lower, for example, than the fines for various offences by individual officials (see below) and probably too low to discourage many public bodies.

Examples

Section 20 of the Indian law grants the Information Commission the power to impose sanctions of Rs. 250 per day, up to a maximum of Rs. 25,000, on information officers who, without cause, have obstructed in any way the disclosure of information under the law. For cases of persistent obstruction, the Commission may recommend the individual for disciplinary action.

Section 90 of the South African law establishes a criminal offence, punishable by up to two years imprisonment, for anyone who damages, conceals or falsifies a record.

The draft Law also includes two articles providing for sanctions for officials. Article 52 provides that any person who intentionally and unlawfully destroys, damages or loses any public information, or renders such information unusable, shall be punished by between one and five years' imprisonment and a fine of up to Rp 500 million (approximately USD53,000). The government has proposed a slightly different formulation of the punishable wrongs as well as a reduction in the maximum penalty to three years' imprisonment and a fine of Rp 75 million. This is a positive provision, although it might be extended to cover any situation where an official acts intentionally to obstruct access to information.

Article 53 provides for imprisonment of between two and five years and/or a fine of up to Rp 100 million for anyone who intentionally produces inaccurate or misleading public information. This appears to be based on a mistaken notion of the role of right to information legislation. While it is of course undesirable that officials should produce inaccurate information, at the same time this is inevitable and should not attract such a heavy potential sanction outside of cases where the act is a deliberate attempt to obstruct access to information. The government is proposing a complete reworking of this provision to cover situations where public bodies fail to maintain their records in good order, in breach of Article 7(2). While this is perhaps more appropriate, it is probably also not the most effective way to try to promote better record management by public bodies.

Article 47 goes beyond any of these provisions and seeks to impose sanctions of between three months and two years' imprisonment and/or fines of between Rp one and five million on individuals who 'fail to safeguard' or commit an 'infringement on the utilization of information' as provided for in Article 5. Article 5, for its part, places an obligation on information users to safeguard information and to 'refrain from committing digressions in using information', as well as to include the source of the information whether used for personal purposes or for publication. Pending amendments to this article would make it an offence intentionally to impede transparency of public information or to misuse public information in a manner that may result in tangible losses to others.

Although the pending amendments are a significant improvement on the original, the idea of placing obligations on information users, or restrictions on the use to which public information may be put, is based on a fundamental misconception of the role of a right to information law, which is to promote access to information held by public bodies. Restrictions of this sort are completely unnecessary since national laws already provide for comprehensive penalties for the misuse of information in laws of general application, such as defamation laws, privacy laws, laws on national security and the like. Moreover, they pose a significant threat to the objectives of a right to information law as they may exert a significant chilling effect on the willingness of members of the public to make information requests in the first place, out of fear of possible future sanction.

A new proposed article, to come after existing Article 52, would make it an offence, punishable by imprisonment of up to five years and/or a fine of up to Rp 75 million, to access, intentionally, information rendered exempt by Article 15. Once again, this is based on a misconception of the purpose of a right to information law, as well as the means by which such laws function. Pursuant to this proposal, it would be a crime to receive information provided by an official in breach of Article 15, even though all one had done was to request the information. Once again, other existing legal provisions are sufficient to guard against any harm that this provision might avoid and, weighed against that is the serious chilling effect it might exert on the willingness of individuals to make requests for information.

Instead of providing for sanctions for individuals that misuse information or receive information in breach of Article 15, the right to information law should provide

protection to officials who, in good faith and pursuant to the law, disclose information even if in fact they should not have done so. This protection is important to give officials a sense of confidence to apply the law properly and to reverse the long-standing culture of secrecy in the public sector. Absent such protection, experience in other countries has been that officials have been reluctant to apply the law seriously, preferring to continue with long-standing secretive practices, which are unlikely to expose them to any risks.

Examples

The Indian law provides comprehensive protection for acts done pursuant to the law, stipulating that no legal proceeding shall lie against any person for any act done or intended to be done under the Law (section 21).

Section 89 of the South African access to information law provides:

No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act.

The United Kingdom law provides more limited protection for individuals against defamation proceedings for the disclosure of information pursuant to the law, unless the disclosure was actuated by malice (section 79).

Consideration should also be given to providing protection for whistleblowers, individuals who, in good faith, disclose information on wrongdoing. ‘Wrongdoing’, for these purposes, should include the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, abuse of power or serious misconduct, including any breach of the right to information law or other procedures relating to participation, as well as a serious threat to public health, safety or the environment, whether linked to individual wrongdoing or not.

Examples

The Ugandan law provides protection against legal, administrative or employment-related sanctions for whistleblowers – those who release information on wrongdoing or a serious threat to health, safety or the environment – as long as they acted in good faith and in the reasonable belief that the information was true and disclosed evidence of wrongdoing (section 44).

In South Africa, a separate piece of legislation, the Protected Disclosures Act 2000, provides protection for whistleblowers. Protected disclosures are, among other things, those that tend to expose criminal behaviour, a breach of the law, a miscarriage of justice, a danger to health, safety or the environment, or discrimination.

Recommendations:

- Consideration should be given to extending the sanctions to cover a breach of the proactive publication obligations in Article 12.
- Consideration should be given to increasing substantially the level of fines that may be levied on public bodies.
- Consideration should be given to extending the wrongs for which officials may be punished to any intentional action which obstructs access to information.
- Article 53 should be removed from the draft Law.
- Article 47 should be removed from the draft Law.

- The new proposed provision making it an offence to access information in breach of Article 15 should not be incorporated into the law.
- Protection should be provided for good faith disclosures pursuant to the law and consideration should also be given to providing protection for whistleblowers.

Promotional measures (Articles 7(2), 8 and 13)

The draft Law includes few promotional measures. Article 7(2), noted above, places a general obligation on public bodies to keep their documents in good order so as to ensure the ‘swift, timely, low cost and straightforward’ provision of information. This is supported by Article 13(2), which requires public bodies to produce and implement an ‘information provider system’ that ensures availability of information and services that are, once again, ‘swift, timely, low cost and straightforward’. Article 8 supports this indirectly, providing that the keeping of ‘company documents’ shall adhere to existing laws and regulations.

A number of right to information laws provide for the establishment of minimum standards for record management. This is important not only to facilitate access – since you cannot give access to documents you cannot find – but also to facilitate effective modern governance, which depends on sound information management. Indeed, promoting better record management is a very general benefit which a good right to information law can help promote.

The system envisaged in the draft Law, while helpful, is not sufficiently clear to really promote better record management. In many countries, the law places responsibility on a central authority – for example the oversight body for the right to information or the responsible minister – to set and enforce record management standards for all public bodies.

Examples

Pursuant to section 46 of the United Kingdom law, the Lord Chancellor (the Minister of Justice) must issue a code of practice providing guidance to public authorities regarding the keeping, management and destruction of their records. This code shall also deal with the transfer of records to the Public Record Office (the archives), including the destruction of those records which are not to be transferred. The code is not formally binding but the Information Commission has a mandate to promote compliance with it.

Pursuant to the Mexican law, the Federal Institute for Access to Public Information, the promotional body under that law, is required to cooperate with the General Archive of the Nation to develop “criteria for cataloguing, categorizing and preserving administrative documents, as well as organizing the archives” (Article 32).

Article 13(1) provides for the appointment by public bodies of information officers. Such officers can serve not only as a clear point for individuals to file information requests but also as a general point of responsibility within a public body for promoting compliance with the law and better information disclosure practices. The draft Law does not clearly stipulate these more general obligations for information officers.

Most right to information laws, particularly those adopted more recently, include a number of other promotional measures. Indeed, it is now recognised that the greatest challenge to the right to information is fulsome implementation of the law and that sufficient attention should be devoted to this from the beginning, including in the text of the law.

In a number of countries – including Thailand, Mexico, the United Kingdom, South Africa and Azerbaijan – the oversight body has a general responsibility to promote implementation of the law which may include monitoring implementation, providing training, interpreting the law, developing forms and other implementation tools, giving advice to applicants and/or public bodies, and making recommendations for reform. This ensures a locus of responsibility for this important function and can prove invaluable for longer-term implementation efforts.

In many countries, the oversight body is required to produce a guide for the public on how to use the law. In some cases, each public body is required to produce such a guide. Training obligations are also spelt out in the laws of some countries, usually in the form of providing for the oversight body to play a role in this. One way to monitor implementation of the right to information law and also to promote transparency generally is to require public bodies to report annually on their performance in implementing the law. A central authority, such as an information commissioner, may also be required to report annually to the legislature on overall performance in implementing the law, identifying problems and making recommendations, and generally providing elected officials with a regular opportunity to advert to and discuss this important issue. None of these obligations are provided for in the draft Law.

Examples

Pursuant to the South African law, every public body must, within six months of the Law coming into force, compile, in at least three official languages, a manual with information about its information disclosure processes. The manual should include information about the structure of the body, how to make information requests, services available to the public, any consultative or participatory processes and a description of all remedies available to the public, and it must be updated annually. The Human Rights Commission is also tasked with publishing a guide, in all eleven official languages, on how to use the Law. This guide should include the names and contact details of every information officer of every public body, the procedures for requesting information and assistance available through the Commission, and it must be updated every two years as necessary (sections 10 and 14).

Under the Mexican Federal Transparency and Access to Public Government Information Law of 2002, the Federal Institute for Access to Public Information is required to provide an annual report to Congress containing at least the following information: the number of requests for access to information presented to each public body and the responses provided; the time public bodies took to respond to requests for information; the number and outcome of matters attended to by the Institute; the status of appeals brought before internal oversight bodies; and any difficulties encountered in carrying out the law (Article 39). Each public body is required to provide the requisite information to the Institute to enable it to produce this report (Article 29).

Recommendations:

- Consideration should be given to strengthening the record management system under the law by providing for a central body to establish and implement clear standards in this area.

- Consideration should be given to stipulating more clearly the responsibilities of information officers and, in particular, placing some central responsibility on them for general implementation of the right to information law.
- Consideration should be given to enhancing the promotional measures under the law. The Information Commissions could be given a general responsibility to promote implementation, including through supporting training, producing a guide for the public on using the law and publishing an annual report on measures taken to implement the law.

Other issues (Articles 1, 56, 59)

The draft Law contains a number of definitions in Article 1 other than those noted above, including of ‘Information Commission’, ‘appeal’, ‘mediation’, ‘adjudication’, ‘public official’, ‘information and documentation official’ (referred to in these Comments simply as an information officer) and ‘user’. While important for purposes of interpreting the law, these are otherwise uncontroversial.

Article 56 in the original draft Law gives public bodies up to two years to make the necessary adjustments to implement the law. This works in tandem with Article 59, which provides that the law shall take effect from the date of its enactment. This is under discussion and the Government has proposed that the law shall not come into effect for three years after its adoption (proposals for a delay of two and five years have also been proposed). Together, these provisions would appear to give public bodies a total of between two and seven years to prepare for implementation of the law.

Some right to information laws do give public bodies a period of time to prepare for implementation while others do not. Experience has clearly demonstrated that longer periods are simply a means to delay implementation of the right to information and that, in practice, most public bodies leave it until the last few months to prepare for implementation of the law. Furthermore, preparations should not actually take very long and there will inevitably be a learning period at the beginning regardless of advance preparation.

Recommendation:

- The period allocated to public bodies to prepare for implementation of the law should be short, preferably not longer than one year but certainly not longer than two years.

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V. Freedom of Information

JAPAN

Information Disclosure In Japan

Paper presented at the biennial conference of the
Japanese Studies Association of Australia (JSAA)

Jeff Kingston

“Information is the currency of democracy.”
Ralph Nader, 1989 Japan lecture tour

“Popular Government without popular information, or the means of acquiring it, is but a
Prologue to a Farce or a Tragedy; or perhaps both”
James Madison, 1822

“There is no single change that would do more to weaken the [Japanese] bureaucracy
and protect consumers than a national freedom of information law.”
Miyake Hiroshi, Attorney

Introduction

If information is indeed the currency of democracy, Japanese citizens have been grievously shortchanged. However, recent developments suggest they are on the road to getting more of their money's worth. Since the 1970s there has been a sustained effort by a handful of citizens' groups to promote greater information disclosure at the local and national levels of government. This effort to broaden access to official information has been animated by public outrage over a number of bureaucratic and political scandals and inspired by the evident costs of opacity. Public officials free from scrutiny and accountability have too often betrayed the public trust and conspired against the public interest, leaving behind an onerous tab for ordinary taxpayers and citizens. As the profligate ways of Japan's governing elite have been unveiled in a cascade of scandals, heightened public awareness of the benefits of transparency has gradually eroded their cocoon of privilege and privacy. As a result, there has been an erosion of their immunity from accountability, albeit a gradual and limited one.

This is not to argue that transparency has become the norm; it is certain that there will be sustained resistance to the principle of open government. However, the rising tide of public expectations, greater awareness about the benefits of transparency, the growing sophistication of pressure groups and the proliferation of NPOs are all exerting pressure for greater accountability and public participation in government policymaking.¹ The fundamental crisis in the legitimacy of government is both sustaining demands for greater citizen participation and trimming the wings of the mandarins.

The US Freedom of Information Act, enacted in 1966 and amended in 1974 in the aftermath of the Watergate scandal (over the veto of President Gerald Ford), has been a model for advocates in Japan. Disclosure laws are designed to set the ground rules for relations between private citizens and public servants, obligating the latter to release public documents

¹ This positive perception was recently confirmed in an interview (June 22, 2005) with Miki Yukiko, Executive Director, Information Clearing House.

on demand subject to the rules and procedures stipulated in the legislation. Many democracies around the world have such legislation in place; Great Britain only in 2005.

In Japan, citizens' groups began to request information about pesticide use, food additives and drug side effects in the 1960s; they aimed to prevent public health tragedies by pressuring bureaucrats to disclose information and act with greater concern for public safety. While advocates suspected the government of negligence in these areas, they had no way of lifting the veil of secrecy that shrouded government deliberations and policymaking. In the end, their efforts proved in vain.

In the 1970s, growing support for a freedom of information policy was fueled by the Lockheed bribery scandal involving Prime Minister Tanaka Kakuei. It was information made public in the U.S. that proved decisive in breaking open the case and highlighting the merits of greater transparency to Japanese citizens. In 1976 growing interest in the ethics of disclosure led to a public demand for a freedom of information law by the Japan Consumers Federation. This was followed in 1979 by a proposal from the Japan Civil Liberties Union (Jiyu Jinken Kyokai) that set out guidelines for a national disclosure law and, in 1981, by a Declaration of Rights to Information Disclosure by the newly formed Citizens Movement, an umbrella group for organizations involved with consumer rights and civil liberties.

Throughout the 1980s there was a lively debate about the need for transparency (joho kokai- literally "information disclosure") and the principle of shiru kenri (the right to know). Transparency and disclosure were actively promoted as a way of improving democracy and government while facilitating public participation in creating the nation's social and political agenda. Poor access to information was depicted as a significant national defect with great potential for harm to the people and an obstacle to the assertion of their constitutional rights.

In 1985, families of victims involved in Japan's largest air crash were driven to use the US Freedom of Information Act to acquire information related to their litigation. The media focused on the irony that information about events in Japan was more readily available overseas, generating a feeling that Japan was out of step with international standards. Citizens groups such as the Japan Civil Liberties Union capitalized on this sense of embarrassment by lobbying to have information disclosure placed on the national agenda.

However, in the absence of legal sanction, the spirit of disclosure languished amidst official inertia and resistance. In Japan, government is to a large extent at the mercy of the bureaucracy. Many LDP members are themselves former civil servants, and politicians are heavily dependent on bureaucrats for information and drafting legislation. In addition, many politicians play a brokering role between business and the bureaucracy and would prefer to shield such activities from public scrutiny. This helps explain why LDP politicians have been such reluctant supporters of information disclosure. Thus, while the theater of reform inched along at the national level, the substance of reform was left to citizen advocates at the local level.

Modest Origins, Growing Expectations

While politicians postured on the national stage, a handful of activists and grassroots citizens groups were working effectively to advocate transparency as a basic principle of democracy. Although demands for disclosure started modestly, a wildfire of expectations rapidly engulfed Japan, overcoming the best efforts of bureaucratic firefighters to bring it under control. At the beginning of the 1980s, few could have anticipated the developments that in the 1990s popularized the concept of public access to

government files and made it a yardstick by which Japanese governments are judged. In a short span of two decades, what was once anathema to the ruling elite has now become a common and judicially sanctioned practice that officials are trained to implement.

After the first hesitant steps in the 1970s, the pace of activism quickened. The Japan Federation of Housewives Associations (Shufuren) took the government to task for its lack of transparency, while the Consumers' Union of Japan (Nihon Shohisha Renmei) and the Japan Civil Liberties Union lobbied for an information disclosure law on the U.S. model. In 1981 the latter group published a model ordinance that has been used extensively by local government bodies in crafting their own laws. In tandem with local citizens' groups, lawyers' associations and opposition party politicians, and drawing on favorable media coverage, advocates campaigned for information disclosure ordinances at the local and prefectural levels.

In response to this grassroots campaign, localities acceded to demands for greater citizen input, probably never imagining that it would become such a "nuisance". In 1982 the first town and prefectural information disclosure ordinances were enacted, initiating a trend that swept through Japan involving 36 prefectures and 136 towns and cities by the end of the decade. By 1996 all 47 prefectures had passed information disclosure legislation and by the end of the century more than 500 towns, including all major population centers, had adopted similar ordinances—a bewilderingly rapid transformation only made possible by the efforts of citizen groups. Conservative politicians joined their progressive colleagues and climbed on board the transparency train, recognizing the electoral advantages in an era of growing public skepticism about politicians and bureaucrats. Their support was crucial in transforming it into a mainstream issue and encouraging local and prefectural governments to adopt such ground-breaking legislation. They may have underestimated the implications of their actions and probably did not expect that the new rules would have such a strong impact in the years to come.

However, the adoption of new legislation did not mean that all the barriers to transparency were removed overnight. Patricia Maclachlan (2000: 17) notes that the disparate ordinances share a core of principles based on "the promotion of citizen participation in local government; the enhancement of citizen trust in and understanding of local administration; the promotion of the impartial implementation of government policy; and the realization of governmental openness." However, the achievement of such grand ideals has been a great challenge. At the outset, citizens who asserted their rights under these ordinances found that the spirit of transparency had not permeated among the officials responsible for implementing them. Many of the statutes are couched in vague language that allows bureaucrats considerable latitude in deciding what documents should be open to public perusal. The opportunities for stonewalling, manipulation and obfuscation are rife and draw considerable public ire.

Where citizens wish to challenge the authorities, there are various routes for appeal. In cases where requests for information are denied (*hikokai*), people can appeal to a local government review committee established to deal with disclosure cases. Generally, the local executive appoints these committees subject to legislative approval. While these review boards make recommendations, they cannot force disclosure. Citizens also have resort to legal action and can appeal to the courts for a legally binding ruling forcing disclosure. There have been a number of such lawsuits in the 1990s, heavily covered in the media, leading to revelations of lavish entertainment and faked travel expense claims. In exposing the profligate spending of local officials, citizen groups have reinforced public skepticism towards bureaucrats and provided impetus for a national information disclosure law. The sensationalizing of these cases by the media has also ensured maximum publicity for their efforts and public sympathy for their goals.

Local Efforts, National Consequences

The local information disclosure ordinances and their role in instituting greater levels of accountability have been examined by Lawrence Repeta (1999, 19) who regards them as creating a “revolution in the nature of the relationship between citizen and government.” He focuses on the role of lawyers affiliated with the Zenkoku Shimin Ombudsmen (National Citizen Ombudsmen group) who have run several well-organized disclosure campaigns and devised a system of rating prefectures in terms of their openness. Repeta tells a fascinating story of how the legal system has been used by activists to promote open government and democracy. It is an object lesson in the unforeseen consequences of legal change and the degree to which seemingly inadequate reforms can be made to alter traditional forms of governance and the relationship between officialdom and the public. The bureaucrats, once referred to as *okami* (gods) with a mixture of fear and reverence, have been transformed into objects of recrimination, scorn and ridicule. The revolution referred to by Repeta is nothing less than the broad (and novel) expectation that officials are accountable for their actions to the people.

As a result of the new laws and heightened public awareness of transparency issues, official prodigality has come under increasing scrutiny. During the 1990s the Japanese lexicon was enriched by three new terms—*kan-kan settai*, *enkai gyosei* and *karashutcho*—describing some of the seamy realities of public life. *Kan-kan settai* (official-to-official entertainment) refers to the widespread practice of local government officials entertaining national government bureaucrats to curry favor and hopefully tap into central government funding. *Enkai gyosei* (partying bureaucrats) is the derisive appellation for officials who enjoy high living on the public purse. *Karashutcho* (empty business trip) refers to the claiming of travel expenses for non-existent business trips. Since 1994, media exposés of such practices have molded perceptions of public officials, highlighting the need for greater oversight and generating widespread public enthusiasm for still greater levels of information disclosure.

From the mid-1990s the Citizen Ombudsmen, a national network of activist lawyers, simultaneously filed similar information requests to all prefectural governments. In comparing the responses and then rating the openness of the various governments, the Ombudsmen generated considerable media interest and sent two clear messages to government officials: insufficient transparency would produce a lower rating that would reflect badly on both the prefecture and its public officials; and lavish wining and dining and falsifying expense claims would no longer be tolerated.

The size of local government entertainment budgets has been another key issue. The cost of entertaining central government officials, usually undertaken by prefectural government representatives dispatched to Tokyo solely for this purpose, amounted until recently to tens of millions of dollars and was hardly the nation’s best-kept secret. However, the media had ignored this practice until citizens exercised their new rights to access government information and uncovered the extent of the spending and how it was systematically covered up. The public was shocked to learn that the 47 prefectural offices spent some \$250 million a year on entertaining central government bureaucrats, a revelation that provoked considerable anger given the prolonged economic slump and declining tolerance of extravagant spending of taxpayer money. Once the story broke, the media played a key role in keeping such practices at the center of public attention for many months. During the latter half of 1995 alone, fifteen editorials appeared in national newspapers condemning excessive entertainment by civil servants.

These investigations showed that filing false or inflated expense claims had become routine and that preparing an obscuring paper trail was part of the clerical norm. It became clear that false documentation, padding expenses and the sequestering of fraudulently claimed funds in unofficial accounts was standard practice throughout the nation, a clever shell game that had gone unquestioned until citizens blew the whistle. Even government auditors were caught padding expenses. One of the

more eye-opening exposés involved counting the number of trips (37) ostensibly taken by Fukuoka officials on the bullet train at a total cost of Yen 3.7 million—at a time when the tracks were so badly damaged by the 1995 Kobe earthquake that the train in question was out of service!

The media coverage and public outrage over this squandering of public funds reveals how in a very short span of time the local disclosure ordinances have transformed the relations between the people and government. These revelations also changed the conduct and habits of government. Moreover, prosecutors also began taking a dim view of such practices, arguing that entertainment at such lavish levels can constitute a bribe. Suddenly, prefecture after prefecture began to clamp down on such entertainment. More than 20,000 officials around the country were reprimanded for filing false expense claims. What had been “business as usual” was now forbidden and subject to punishment—demonstrating the effectiveness of the legal system in promoting and applying standards of conduct in the public service, and the costs to those who do not comply.

Without the support of politicians, disclosure ordinances would either not have been passed or languished as little more than legislative ornaments. What is interesting is that these politicians range from outspoken defenders of freedom of information to opportunists, and include conservatives, liberals, mavericks and mainstreamers. Because they are accountable to their constituents rather than to the government, they have pushed transparency more forcefully and effectively than the courts. The emergence of such politicians across the political spectrum reflects popular support for disclosure and a desire for information on how taxes are being spent or squandered.

Prefectures now run annual training seminars aimed at weaning officials responsible for documents from established anti-disclosure attitudes. Officials are trained in how to handle requests and, in some prefectures, information specialists are employed to ensure proper interpretation of disclosure guidelines. In many cases, but certainly not all, local legislatures have revised ordinances in tune with user complaints and in line with court rulings, effectively expanding the scope of transparency and limiting exemptions and discretionary denials. Limits on who may request documents have been liberalized and reforms instituted to facilitate information requests.² And disgruntled citizens know they have recourse to the courts, something that may come as a surprise to many observers who have assumed, with considerable justification, that the court system is biased in favor of the government.

Despite the vagaries of the judiciary, the pro-disclosure posture of the courts has far exceeded expectations and has influenced bureaucratic practices and attitudes. A reversal ratio of 65.2% as of March 1999, in which the courts overturned information disclosure denials by local and prefectural governments in two-thirds of cases heard, is surprisingly high. As Repeta (1999,19) asserts, “The courts’ adoption of such an aggressive role in correcting administrative behavior is without precedent in Japan’s modern legal history.” Why? According to Miki Yukiko it is because the burden of proof rests on the government in defending non-disclosure. In addition there is no practice of *in camera* sessions so that the government typically does not make the documents in question available for the judges to evaluate. Without access to the documents, it is difficult for the judges to rule in favor of disclosure denials and difficult for government lawyers to make their case about the harm that would result from disclosure.

More recently, Jonathan Marshall (2002) has confirmed the pro-disclosure inclinations of the courts, finding that in more than 50% of cases plaintiffs were successful in gaining greater disclosure than local

authorities had decided to grant.³ It is worth bearing in mind that expanded disclosure does not mean full disclosure and may very well be trivial in its effects. Nevertheless, this is still an astounding figure given the courts' usual reluctance to second-guess administrative decisions; plaintiffs typically win in less than 10% of all administrative lawsuits. Given ongoing fast paced judicial reforms, aimed at creating a more activist judiciary, the implications of this trend are vast.

Fifteen years of information disclosure at the local and prefectural levels between 1982 and 1997 generated strong popular demand for a national information disclosure system. The pro-disclosure stance of the media, echoed to some degree in the courts, created an extraordinarily favorable environment for its implementation. Successful application of information disclosure has altered citizen-state relations and generated higher expectations inimical to the closed file approach to information access that has been the bureaucratic norm. This revolutionary development cannot easily be squelched: too many positive precedents favoring greater transparency have been established while bureaucratic efforts at defending institutional turf have lost credibility and raised the public ire. As a result of *kanson mimpi* (literally “revere the official, despise the people”, shorthand for bureaucratic arrogance), public officials in Japan have lost their privileged status and freedom from scrutiny for good. Self-inflicted wounds have irreparably undermined the facade of power and cocoon of privilege that in the past have permitted excesses, facilitated systematic defrauding of the public purse and stymied public oversight. The bureaucrats have lost their unbridled autonomy and more than ever are subject to popular sovereignty, a trend that is gaining momentum.

National Information Disclosure

Legislation was approved in 1999, but promulgation was delayed until 2001 to allow public officials time to prepare for this dramatic innovation at the same time they faced other administrative reforms including a reduction in the number of national ministries. The task of establishing a unified filing system was another major reason for the delayed implementation. In addition, critics have pointed to the time-consuming process of weeding out “inconvenient” documents. At the end of 2004 an information request concerning government ministries use of waste disposal services indicates that in the period between 1999-2001 there was a suspiciously huge increase.⁴

The favorable political environment of the mid-1990s facilitated passage of a law that was unexpectedly progressive given its conservative sponsors. With reform in the air and the creation of an administrative reform council, support for freedom of information gained momentum. Politicians and the media raised public expectations that improved governance would be the major benefit of increased transparency in government proceedings and policy deliberations. The logic of reform rested on open government and those opposing it were easily depicted as defenders of vested interests and part of the problem; transparency was the solution. The public's right to know and ability to access pertinent information also fit with the spirit of deregulation. With Thatcherian enthusiasm, the Hashimoto administration advocated a reduced role for government and saw deregulation as a means to revive the economy and improve efficiency. The mantra of deregulation and restructuring—the oversold solution to what ails contemporary Japan—proved popular at this time and had consequences for information disclosure. In a changed environment where the government's refereeing role would decline, consumer

³ According to the Information Clearing House, in 20% of these cases the court ordered full disclosure.

⁴ Part of this increase can be attributed to administrative reforms that now permit ministries to dispose of documents that they previously were barred from destroying. In connection with this a new national archive law in 1999 has promoted a centralized, permanent system of documentation involving transfer of documents from the respective ministries to the national archive staffed by information specialists. Interview 6/20/05 Miki Yukiko.

citizens were encouraged to become more involved and knowledgeable. Thus, the government was trapped by its own logic—it could not advocate deregulation and at the same time restrict the flow of information citizens would need to participate more effectively in society and better protect their own interests.

The final legislation reflects a compromise. Bureaucratic hostility and political wrangling led to the insertion of provisions that weakened the law as a tool of transparency. Exemptions to disclosure were expanded and the scope of non-disclosure was kept vague, while special public corporations (*tokushu hojin*) were not subjected to the law until 2002.⁵ Despite these deficiencies, the new legislation provides the legal basis for expanding public oversight of, and participation in, the affairs of government. It includes some significant improvements over local disclosure ordinances. For example, the national government is bound to respond to requests from any person and there is no residency requirement as is common in the local ordinances. In another major step forward, the national law applies to any document in the possession of an administrative agency and available to officials in the performance of their duties; local regulations typically applied only to documents reflecting some formal action by a government official.⁶

Thus, at the advent of the 21st century, an era of transparency was dawning for the Japanese. Finally, after decades of campaigning, advocates have earned a means to slowly and incrementally bring about an end to unaccountable government and official impunity. However, despite grassroots support for open government and the new legislation, successful implementation will require well-organized and independent citizen groups that are able to sustain pressure, focus on critical issues and effectively marshal the information they gather. The legislation will have little impact unless there is a significant community of requestors able to demand specific kinds of information and put it to effective use in the policymaking process. In this sense, the 1998 NPO legislation is partially encouraging in that independent policy organizations can now obtain independent legal status. However, this legislation is also problematic and reflects the government's inclination to monopolize the policymaking process and to keep non-government organizations dependent and subject to bureaucratic oversight. However, Repeta (1999, 42) draws a more optimistic conclusion: "The NPO law may be a harbinger to the appearance of better organized and informed citizen groups articulating alternative visions of the public interest and more effectively participating in policy debates of the future."

Electoral Implications

The mayor of Yokohama, Nakada Hiroshi, was elected in 2002 promising to make government more open to public scrutiny. Upon assuming office, Nakada encountered the expected bureaucratic resistance to open disclosure. City officials complained that publishing lists of people attending public functions would infringe on their privacy—an example of how selective concerns about privacy are often invoked to inhibit transparency. The mayor responded with the clear message that public money should not be spent on anything that cannot pass public scrutiny. Details of his own social expenses are accessible on the city's homepage and he has set other disclosure precedents by divulging the balance of municipal debt and the market price of real estate owned by the city.

Supporting transparency has become good politics. Around the country, advocates have generated a groundswell of popular concern about dysfunctional government practices and put information disclosure on the nation's political agenda. These concerns are having a pay-off at the ballot box: in several prefectures, candidates in gubernatorial elections backed by mainstream political parties have been defeated, often by political neophytes with no organization and limited campaign funds. In recent

⁵ In 2002 a FOI law was passed that covers three public corporations.

⁶ In addition, local ordinances have been revised to incorporate provisions of the national law that broaden the scope of documents subject to disclosure. Interview 6/22/05 Miki Yukiko, Informational Clearing House.

years voters have elected governors eschewing party affiliation in the prefectures of Akita, Chiba, Miyagi, Nagano, Tokushima and Tochigi. These newcomers have run against the establishment, embracing open government as a keystone of their campaigns. They have effectively tapped public anger against a rigged system that is widely viewed as a major obstacle to Japan's recovery from a prolonged economic slump.

One of the most visible of the new-style governors is Tanaka Yasuo, a famous novelist and commentator who won an unexpected electoral victory in 2000 against the handpicked successor of the outgoing governor of Nagano. Tanaka ran on a simple platform of more open government and "no more dams". He also benefited from public outrage over dubious spending on the Nagano Olympics (1998) and the destruction of related documents that could have been used to indict officials. His stance on dams also won him kudos from environmental activists. Not content with simply thumbing his nose at the political establishment's backroom dealing, upon taking office Tanaka installed himself in a literally transparent office in the lobby of the prefectural government building and publicized an open door policy for citizens to drop in. This novel openness to his constituents, combined with frequent town hall-style meetings and his stance against environmentally destructive, wasteful spending has ensured him high approval ratings.⁷

Until the economic implosion of the 1990s, voters tolerated the peccadilloes of their politicians as long as they delivered the goods. In Japanese politics, pork-barrel projects are the basis of the *doken kokka* (the construction state). As detailed by Gavan McCormack (1996) and Alex Kerr (2001), the vast amounts of money channeled into Japan's largest industry literally cement the political ties between central government politicians and their local support base. They also provide ample opportunity for siphoning off campaign funds and give politicians at all levels the wherewithal to maintain and expand their influence. The system of bid rigging (*dango*) revealed in a series of scandals in the 1990s exposed the systematic plundering of the public purse by unscrupulous businessmen and their political sponsors. Information disclosure laws were essential to gathering evidence on bid rigging on sewer systems in particular. Armed with this experience, activists are expanding their investigations into other misappropriations of taxpayer monies, estimated at 15-30% of the value of typical public works contracts.

The early years of the 21st century thus provide a basis for limited optimism about the trend favoring open government and a significant diminution of the immunity from scrutiny and accountability that enables corruption to flourish. Just as exposés of lavish entertainment spending and falsification of expense claims drew public ire, the squandering of the far larger sums involved in the *doken kokka* has shaped public perceptions of Japan's elected and non-elected government officials. They have emerged as co-conspirators in a massive fraud at a time when people were feeling the economic pinch and growing anxious about possible loss of jobs and security.

⁷ According to Miki Yukiko (6/22/05) who serves on the Nagano Prefectural FOI Review Board, disclosure has become a political weapon. For example, Tanaka has many enemies in the local media and among local politicians and their supporters. They appear to be making requests designed to embarrass him not only by making damning information public, but also by provoking non-disclosure as a method of tarnishing his government's image for transparency. For example, it was once thought that documents related to Nagano's Olympic bid were all destroyed to cover up malfeasance. Tanaka successfully campaigned against such corrupt practices. Now it appears that copies of some of the documents have been discovered and that the government is refusing to disclose them. It argues that disclosure would adversely affect ongoing criminal investigations and possible prosecution.

Japan's *Glasnost*

Developments at the local level have nurtured new attitudes, raised public expectations and generated new norms in the practices of government and in the relations between citizens and government officials. In the nearly two decades between the enactment of the first local information disclosure statute (1982) and the implementation of the national information disclosure law (2001), the political landscape has changed dramatically in favor of open government, as revelations of abuses have generated a momentum in support of transparency. Central government officials have been presented with a *fait accompli*, an insurrection that began at the fringe and has relentlessly bored into the political mainstream. The battles won in the legislatures, courts, local assemblies and media have created a more favorable context for fuller information disclosure. Transparency advocates have won the hearts and minds of the people, generating a climate of *glasnost* aimed against the bureaucrats and their grudging concession of power. Their ability to control the information that has enabled them to monopolize and direct policymaking is slowly, incrementally eroding. It is becoming ever more difficult to shield policymaking from public view. The verities and assumptions of governance are fading and the relations between civil servants and the public are being transformed by Japan's quiet revolution.

Naturally it is too soon to proclaim victory and exult in unconditional surrender. So much change has happened so rapidly that the implications are still being digested and defenders of the status quo remain well entrenched. Furthermore, the institutions in place to support transparency remain very weak. Clearly the system has some serious teething problems.

From Freedom of Information to Freedom of Surveillance

Despite the very real signs of change vestiges of the old ways are evident, perhaps most alarmingly in the Defense Agency. In May 2002, barely a year after the Freedom of Information law took effect, the Defense Agency was caught transforming it into an excuse to compile dossiers on 142 requestors. The *Asahi* warned: "There is something ominously anachronistic about the fact that the Defense Agency abused the very system of information disclosure intended to encourage 'administrative openness'." ⁸ Lawrence Repeta, currently a professor at Omiya Law School, added: "A freedom of information law is intended to promote citizen knowledge of government, not government surveillance of citizens."⁹ All government agencies are subject to the disclosure law and must provide requested documents unless they can demonstrate that any of six exemptions applies. ¹⁰ Both Japanese and foreign nationals may request documents and need not state a reason for the request or provide personal details. In violation of a 1988 privacy law and clearly trampling over the spirit and intent of the Freedom of Information law, Defense Agency officials compiled lists of requestors, conducted investigations on their backgrounds and classified them so as to identify likely "troublemakers". Staff at the Agency then tried to cover up these extra-curricular activities once reporters had gotten wind of them.

A reporter was tipped off about the illicit background investigations and the storage of requestors' dossiers on the Agency's computer system where they would be widely accessible to staff. The media pounced on the story, raising questions about why the Agency would mount unauthorized investigations against Japanese nationals trying to find out what the armed forces are up to. The resulting brouhaha killed debate on proposed legislation on information protection that had drawn

⁸ *Asahi*, 5/29/02.

⁹ *International Herald Tribune* 6/17/02

¹⁰ There are six areas of exemptions from disclosure covering: 1) individual citizen's records; 2) business information of private firms; 3) national security; 4) judicial procedures involving police investigations and prosecution of criminal cases; 5) harm to government decision making, and; 6) harm to government administrative procedures. In denying disclosure the government is obliged to explain the reason for doing so and this is subject to appeal.

sharp criticism from advocates of transparency. The new legislation would have effectively become the media muzzling law in that reporters who uncovered evidence of corruption among public officials would not have been allowed to name the people involved without receiving their permission first. The government tried to portray the proposed law as an attempt to protect the privacy of individuals from an often predatory press, citing cases of an insensitive media intruding on the grief of bereaved relatives and otherwise offending public sensibilities. There is no shortage of such cases. In their coverage of a Wakayama curry-poisoning incident (“the crime of the century”) and a sarin gas attack in Nagano in the 1990s, the press acted as both prosecutor and judge, convicting the accused with sensational, obsessive coverage akin to that accorded to the O.J. Simpson case in the US. In response, media organizations have adopted tougher rules of conduct and self-imposed restraints aimed at placating critics and warding off legislation they regard as placing unconstitutional and unwarranted restrictions on their activities. Media advocates argue that it is their very success in keeping the public informed, and digging out information damaging to politicians and government officials, that has motivated the government’s push for new controls, using evident media abuses of private individuals to draw a curtain around the activities of public officials.

The Defense Agency scandal has effectively worked against these attempts to muzzle the media. Even before the story broke, the new legislation faced substantial revisions; but in the wake of the scandal further attempts to place restrictions on the press face an uphill battle in the court of public opinion.¹¹ⁱⁱ Yet again, government officials were caught breaking the rules thanks to media oversight. In this climate, those seeking to curb the media are suspected of having something to hide.

While the proposed bills on information protection and human rights started out as vehicles to protect people from government abuses, they were deftly transformed into measures to regulate the media and clamp down on whistleblowers and negative coverage about politicians and bureaucrats. Such seems to be the logic behind the Defense Agency’s own efforts to reinterpret freedom of information as an excuse for prying.

Why would the Agency gather such information? Presumably requestors were viewed as potential enemies and exercising their legal rights was the basis for suspecting them. Gregory Clark suspects that the SDF “have been creating and distributing dossiers on the ideological beliefs of those who exercise their right to inquire into SDF affairs ... [because] Japan’s security agencies have long provided similar dossiers to firms keen to deny employment to pro-communists and other leftwing elements.”¹²ⁱⁱⁱ Ironically, a statute designed to facilitate public oversight has been interpreted as a license to investigate anyone exercising this right. This is a significant threat to information disclosure and sends a chilling message to other citizens inclined to exercise their legal rights: Big Brother really is watching.

¹¹ Although new privacy legislation enacted in 2003 omits the controversial intrusions on media freedom, elements of the bill are still seen as too ambiguous and could be broadly interpreted in ways that have nothing to do with protecting citizens from snooping into their personal information. Under the law proposed in 2002, a reporter interviewing a politician involved in a bribery scandal would have been forced to get permission to use such information. Under the new bill, such permission is no longer required and punitive sanctions have been dropped. The government is also enacted a related bill designed to protect personal data held by central government offices. This bill introduces penalties for government employees who pass on personal information to third parties without just cause. Private firms are also subject to penalties for unauthorized use of personal data. Concerns about adequate safeguards remain, as do suspicions about the government’s use of data collected under the JUKI Net system. The media has given a lukewarm reception to the new legislation, welcoming the revisions affecting journalism while expressing concerns about vague provisions that could permit government intrusion on civil liberties.

¹² *Japan Times* 6/15/02.

After being caught violating the 1988 privacy statute and subverting the information disclosure law, the Agency managed to inflict additional wounds on itself. First, it denied compiling lists and posting them on its internal computer network; it then admitted it had done so, but denied any wrongdoing. The bungled handling of a report generated by an in-house investigation into the case made matters worse. Initially the Agency released a four-page, sanitized summary of a longer report, but leaks about the longer version and reference to an aborted cover-up forced its subsequent release. This episode demonstrated a flair for disastrous public relations and reinforced perceptions that the Agency had something to hide. Moreover, the involvement of party bosses in deciding which version of the report to release implicated PM Koizumi's ruling coalition and further tarnished his claims to be a committed reformer. The desperate attempts by party bosses to evade responsibility for suppressing the longer, damning version of the report only added to the debacle.

Although political embarrassment over the affair has been acute, it has made it even more difficult to obstruct transparency. On a larger and more embarrassing scale, central government officials have learned the hard way the lesson already learned by their local government counterparts: thwarting public sentiments on open government is a recipe for disaster. The collateral damage to the government has also been substantial as opposition parties took the opportunity to shelve debate on crucial legislation aimed at transforming Japan's military posture and ability to act in emergency situations. The attempt to neutralize the freedom of information law has only served to highlight the dysfunctional character of the government and reinforce the perceived need for the law. The disingenuous and clumsy handling of the affair made a mockery of the public trust and underlined the need for civilian oversight.

The damage that the Defense Agency has inflicted on itself is incalculable. After WWII, the armed forces were disbanded and then resurrected under a constitutional subterfuge at the insistence of the US. The constitutional legitimacy of the SDF has been questioned from the outset and the Defense Agency has taken pains to cultivate an image distanced from the military abuses of the past and memories of political suppression under military controlled governments in the 1930s and 1940s. This affair has undone those efforts and revived invidious comparisons. The SDF operates under a bitter legacy that places it under special scrutiny and is expected to meet the highest standards of conduct. Even its advocates would be hard pressed to defend this blatant attempt to derail the spirit of transparency in a way that can only arouse suspicion about its motives and routine practices.

Prominent among the Agency's critics is Umabayashi Hiromichi, president of the NPO Peace Depot. In his view, "the Defense Agency failed to honor even the most basic of human rights, which is that no administrative entity may discriminate against citizens for their thoughts or beliefs. The Agency's failure goes to show there are administrative authorities who think nothing of arbitrarily deciding what constitutes human rights ... It is now clear that these individuals understood squat about the spirit of the law ... Was this Defense Agency scandal just an aberration? I don't think so. On the contrary, it simply embodied what is totally 'normal' among central government bureaucrats who believe their job is to keep the citizenry in line." ^{13iv} Umabayashi expresses pessimism about the prospects for freedom of information in the absence of a fundamental "cultural revolution" among bureaucrats.

The public furor over the affair, however, reveals an encouraging vibrancy and resilience in Japanese society. Not too many years ago a scandal like this may not have seen the light of day. Now, the media is shining a harsher light on the government, ferreting out stories that keep the public informed about what the government is up to. The scandal has produced a consensus that personal "background checks" are inimical to the spirit and practice of information disclosure. In addition, the public has been alerted to the need for increased vigilance and oversight of the government. In this sense, the Defense

¹³ *Asahi* 6/7/03

Agency has unwittingly buttressed support for transparency and undermined government resistance to information disclosure and the media's watchdog role.

Teething Problems

Users of FOI in Japan cite a number of problems with how the law is being implemented and advocate some revisions to facilitate access. One of the major problems involves the appeal process for cases in which the requestor's request for documents is either partially or fully denied. In such cases the requestor may file an appeal with the review board established for each ministry within 60 days of being informed about the ministry's disclosure decision. After the appeal is filed, there is an internal review of the disclosure decision and if this does not lead to a change in the decision the ministry is obliged to refer the case to the review board. Typically, members of the review boards are staffed by lawyers, academics or those who participate in relevant NPOs. They review the documents under question and render a decision. According to Miki Yukiko, Executive Director of Information Clearing House, review boards have overturned information denials in approximately 40% of cases brought to them. However, the problem in the system is the lack of a time limit for the ministry to file the appeal. Thus, there are significant opportunities for foot-dragging and stonewalling. Furthermore, there is no time limit on the review board to render its decision nor is there a time limit for the ministry to comply with a review board decision in favor of fuller disclosure. FOI is thus undermined by a time consuming process enmeshed in red tape. The second major problem is the cost of fees associated with processing a request. There are no fee waivers as in the US for requests by the media or for public interest purposes. Many of the disclosures are made digitally and high fees are charged, about Yen 220 per 0.5 megabyte. Given the volume entailed in some information requests, including photos and data, fees can quickly mount to Y500,000. The digital files are scanned from the originals which according to users also makes them more difficult to use. Even if documents are photocopied, a similar request at Yen 20 per page could cost Yen 300,000. Fees of this magnitude are beyond the resources of most NPOs and private citizens. The third area of concern involves the exemptions and loopholes that ministries use to avoid disclosure and how these are invoked inconsistently. Similar requests to different ministries can yield very different outcomes, generating uncertainty among requestors about how to best access information.

When the national information disclosure was passed in 1999 there was provision for revision of the bill in 2005 but the government has decided not to initiate any revisions. Hearings were held under the Justice Ministry in 2004-2005 to gather information about how information disclosure was working, what problems there have been and what revisions would be welcome among users. However, the government has decided, without explanation, not to revise the legislation. Clearly, the government understands that open government presents formidable challenges and is not easy to implement. There is also a sense that implementation has been improving and the government may be taking a wait-and-see approach before proposing revisions. It is expected that the opposition Democratic Party of Japan will table revisions in 2005, including a fee waiver provision, but prospects for the DPJ bill are not encouraging.

Conclusion

Information disclosure is changing the way governments and officials conduct their business. Citizens are propelling Japan's quiet revolution by exercising their new power to monitor government officials and hold them accountable. This surprisingly successful experience has fundamentally changed citizens' assumptions about the nature of political power and raised their expectations, forcing bureaucrats and politicians to scramble to keep pace. Bureaucratic foot-dragging and stonewalling have served only to galvanize public support for more transparency, cheered on by a generally supportive

media. In order to win votes and address the concerns of their constituents, politicians have jumped on board the disclosure bandwagon, lending power and legitimacy to the popular quest for enhanced oversight of government activities. One unanticipated development in this story is the support for disclosure shown by some of the courts and their emergence as administrative overseers in a manner that has eroded the bureaucracy's power, autonomy and practice of self-oversight. In this sense the 1990s was a lost decade for the bureaucracy, as the emergence of a more vibrant civil society has been achieved at the expense of its cherished prerogatives. This quiet revolution is proceeding case by case, incrementally and cumulatively as citizens learn how to use their newfound powers and wield them more effectively. This process is gradually leading to more informed and responsible citizen participation in the affairs of government and society.

There have been some recent encouraging developments towards improving access to government information. The privacy protection law enacted in April 2005 allows individuals to request information that the government holds about them. For example, refugees may now request the government to release all data related to their requests for asylum. The new bar exam now tests aspiring lawyers about administrative law, including FOI procedures. In addition, nearly one quarter of the new law schools opened in 2004 have or are in the process of establishing legal aid clinics designed to provide free legal advice to those who need it. Some law students will also do internships at NPOs, giving them access to legal advice they otherwise could not afford. The Omiya Law School has established a specialized legal aid clinic for FOI requests, effectively helping individuals and organizations understand how to prepare and process requests. Thus many young lawyers will have greater knowledge of and experience in FOI and public service. It is also encouraging that many government agencies and departments are taking the initiative to publish much more about government activities, policies, deliberations and documents on official web sites that are easily accessible. Thus, all individuals have far greater access without having to go to the trouble of filing a request. This is an example of the government increasingly adopting the habits of transparency even if it does not entail full disclosure. Better access to such information is important because it helps requestors better prepare their information requests and in some cases may lessen the costs of requests by allowing requestors to better define and limit their requests. However, even though governments increasingly have taken this initiative and are expanding access, it appears that few people are actually accessing the government sites. To some extent this may reflect low public awareness of what is freely available and scant media coverage.

It remains to be seen if the courts will remain supportive of transparency. In general, district courts have been most supportive of disclosure while the appeal courts have usually sided with the government. Currently there are 30-40 cases pending involving the national disclosure legislation implemented since 2001. These cases will provide some basis to assess whether the courts will provide the same degree of support on the national stage that has helped FOI to be as successful as it has been at the local and prefectural levels.

The success of information disclosure in Japan depends on a number of interrelated factors. Clearly, there have to be individuals and organizations willing to submit requests and deal with the time- and energy-consuming obstacles to accessing government information. It is also crucial that there are organizations enjoying a degree of autonomy insulating them from government pressures that know how to effectively use requested information to exercise oversight and participate in policymaking. Voters also need to elect politicians who will support disclosure. Intervention by politicians has proved decisive in many cases, for better and worse, highlighting the importance of electing political leaders who will establish and interpret rules favorable to transparency. Since the Diet will in coming years play a key role in determining the extent and evolution of information disclosure, representatives' stance on the issue will be a decisive factor. In addition, proposed judicial reforms that would reduce the influence of the government in the training of judges, and shift promotion decisions out of the Supreme Court, offer the opportunity to build a more independent judiciary. Thus, the future of

information disclosure will be determined by media support, the strength and autonomy of NPOs, elected officials and implementation of judicial reform. The trend towards improved information disclosure is vulnerable and can be derailed precisely because the institutional support for transparency remains weak while the vested interests opposed to open government remain powerful.

The kinks in the system are being worked out and bureaucrats are grudgingly getting used to sharing information. The courts have sent mixed but surprisingly encouraging signals about their support for transparency, while party competition for votes is creating a favorable environment for more citizen oversight and greater transparency. Meanwhile, NPOs, citizens, the media and business all have far more access to public information than ever before and are constantly “pushing the envelope”. Officials now feel obliged—if only to cover their backs—to involve a wider range of people and interests in their deliberations and thus government is becoming more inclusive and subject to increasing scrutiny. The process of setting agendas and making policies must now pass more intrusive public inspection and, as a result, outcomes are being influenced by a broader range of opinions and interests than in the past.

A weary and wary public has come to know the value of oversight in curbing waste and corruption. This has whetted their appetite for better and more extensive access. One of a cluster of reforms aimed at promoting transparency and citizen participation in government affairs, freedom of information is being implemented in a social and political context far more favorable than could have been imagined in the late 1980s. Just as the Watergate scandal gave impetus to political reform in the US post-1974, the fading legitimacy of government in the scandal-plagued 1990s and beyond is boosting support for information disclosure in Japan. Justifiably suspicious of politicians and bureaucrats, citizens are coming to understand the benefits of setting the political agenda, establishing priorities and shaping a society based on popular sovereignty. The evident benefits of open government and democracy, and the high costs of the alternative, suggest that time is ripening the situation for even greater transparency and a more robust civil society. This process, however, will proceed slowly precisely because those who have so much to lose are still in a strong position to hamper these developments.

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VI. Freedom of Information

NEPAL



MEMORANDUM

on the

Right to Information Act of the State of Nepal

January 2008

ARTICLE 19

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SUMMARY OF RECOMMENDATIONS

On scope:

- The Act should be amended to make it quite clear that it covers all three branches of government, as well as private bodies providing public services.
- All records should fall within the scope of the definition of 'information' regardless of whether they relate to 'functions, proceedings or decisions of public importance'.
- Every person, regardless of nationality, residence or other status, should enjoy the right to information.

On exceptions:

- A strong harm test – for example of placing a protected interest in 'serious jeopardy' – should apply to all exceptions.
- A public interest override, guaranteeing that information will be released where this is in the overall public interest, should be added to the Act.
- Consideration should be given to imposing an overall time limit beyond which exceptions no longer apply.
- The Act should not provide for a system for classifying information. Decisions on whether to disclose information should be made on a case-by-case basis rather than on classification status.

On requesting procedures:

- More details should be added to the request procedure to ensure that it does not pose a barrier to requests or provide opportunities for obstructing access. Among other things, these should include provision for requests to be made orally, assistance to applicants to narrow their requests, a requirement for applicants to provide contact details with their requests, permission to refuse requests in certain clearly defined and limited circumstances (for example, where they are substantially similar to a recent request from the same person), provision for extended timelines for responding in exceptional circumstances, and transfer of requests where another public body holds the information.
- The fee structure should make it clear that applicants may only be charged the costs of duplicating and delivering the requested information. Furthermore, a central fee schedule should be published in advance, and consideration should be given in this schedule to providing a certain amount of information for free and to charging lower rates to public interest requesters.

On measures to promote openness:

- Public bodies should be required to publish a description of any opportunities for public participation in their decision-making processes on a proactive basis.
- Consideration should be given to allocating a wider promotional role to the National Information Commission, including by publishing a code of practice on record management, a guide or code on minimum standards for proactive publication and a guide for the public on how to use the RTI Act, by providing training on implementation of the Act to civil servants and by conducting public awareness campaigns.

On complaints and appeals:

- Heads of public bodies should be required to respond to complaints within a set timeframe and applicants should be able to complain about any material failure to process their requests for information in accordance with the Act. Applicants should be given longer – perhaps 21 days – to submit a complaint.
- In proceedings before the National Information Commission, both parties should have the right to make representations and the burden of proof should rest on the public body.
- The appointments process for the Commission should be revised. Consideration should be given either to making Parliament responsible for selecting the members or to including more civil society representatives on the appointments committee. The appointments process itself should be conducted in an open and participatory manner and members of the public should be given an opportunity to nominate candidates.
- Funding for the Commission should be shielded against political interference, instead of being provided directly by government.

On protection of good-faith disclosures:

- Whistleblowers should only be protected where their disclosures were made in good faith, in the belief that the information is substantially true. At the same time, whistleblower protection should apply broadly to all disclosures of information which reveal the existence of a serious threat to the public interest, such as a grave threat to public health, safety or the environment, and not just to the exposure of corruption and other irregularities.

1. INTRODUCTION

This Memorandum contains an analysis by ARTICLE 19, the Federation of Nepali Journalists and Freedom Forum of Nepal's Right to Information Act, 2064 (2007) (RTI Act), adopted in 2007 by the parliament of Nepal.

ARTICLE 19 is an international, non-governmental organisation based in London with a specific mandate to promote the rights of freedom of expression and to information. Through the provision of legal expertise and training, ARTICLE 19 has been involved in the adoption and implementation of right to information legislation in many countries around the world. We have also been actively involved in the development of the Nepali RTI Act in various ways, including through providing analyses of it in January 2004¹ and December 2006.²

The Federation of Nepali Journalists (FNJ) is the representative umbrella association of the media community in Nepal. Its 6000 members operate across the length and breadth of the country and belong to every sphere of the modern media - print, electronic and cyber. FNJ pioneered advocacy for Right to Information Act in Nepal since mid-nineties. It had also created and submitted a draft RTI bill to the government. FNJ organized series of talk programs and held discussions with parliamentarians and other press-related people and entities to create pressure on the government for the enactment and implementation of the Act.

Freedom Forum is not-for-profit, non-governmental organisation working for the cause of democracy and protection and promotion of human rights, press freedom and freedom of expression. The organisation was founded in February, 2005. Right to information is one of the basic themes of freedom forum since its establishment. It organized a 'National Campaign for Right to Information' along with the network called 'Citizens' Campaign for Right to Information'. Under the campaign national and regional workshops, consultative meetings with parliamentarians and grassroots advocacy were organized. Similarly, the Forum have had provided constructive inputs to the task force while formulating the Right to Information Act.

The three organisations warmly welcome the efforts of the Nepali authorities and civil society to adopt a right to information law. We are pleased to note that many of the problems identified in a previous analysis by ARTICLE 19³ have been addressed in the final text of the Act. The right to information is a fundamental human right, crucial to the functioning of democracy and key to the implementation of other rights. It has been recognised as an integral part of the right to freedom of expression, which includes the right to "seek, receive and impart information". Article 19 of the *Universal Declaration of Human Rights* (UDHR) states:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

¹ Available at: <http://www.article19.org/pdfs/analysis/nepal-information-act-jan-2004.pdf>.

² Available at: <http://www.article19.org/pdfs/analysis/nepal-foi-analysis.pdf>.

³ In December 2006. See note 2.

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If information is denied to the public and journalists on a widespread basis, the exercise of free expression is severely limited. The enactment of the RTI Act is an important step in Nepal's democratisation process.

Our overall assessment of the Act is very positive. It establishes a presumptive right to information, subject to exceptions, it contains a broad definition of the public bodies covered and mandates the establishment of a National Information Commission. At the same time, the Act suffers from some weaknesses which we believe could be relatively easily remedied. The most serious is the regime of exceptions, which does not include a public interest override and which appears to promote the withholding of information simply on the basis that it has been classified. This Memorandum sets out our main outstanding concerns with the Act, as well as recommendations for its reform.

Our analysis of the Act is based on international law and best practice in the field of the right to information, as summarised in two ARTICLE 19 publications: *The Public's Right to Know: Principles on Freedom of Information Legislation* (ARTICLE 19 Principles)⁴ and *A Model Freedom of Information Law* (ARTICLE 19 Model Law).⁵ Both publications represent broad international consensus on best practice for right to information legislation. An overview of international standards on the right to information can be found in Section 3 of this Memorandum, after the substantive analysis of the RTI Act and our drafting recommendations, contained in Section 2.

⁴ (London: June 1999). Available at <http://www.article19.org/pdfs/standards/foi-the-right-to-know-russian.pdf>.

⁵ (London: July 2001). Available at <http://www.article19.org/pdfs/standards/foi-model-law-russian-.pdf>.

2. ANALYSIS OF THE RIGHT TO INFORMATION ACT

2.1. Scope

A good starting point for a discussion of the RTI Act is its scope. One of the key international principles applicable to right to information legislation is the “principle of maximum disclosure”, which holds that all information held by all public bodies should presumptively be accessible to any person, and that this presumption may be overcome only in very limited circumstances. This implies that the scope of the access legislation should be broad. The ‘scope’ of a right to information law has three dimensions: (i) which bodies have an obligation to respond to requests for information; (ii) what type of material is included in the concept ‘information’; and (iii) who has the right to access information.

2.1.1. Bodies obliged to provide access to information

Overview

The RTI Act applies to ‘public agencies’, a term which is defined in Article 2(a). The definition covers constitutional and statutory bodies, agencies established by law to render services to the public and agencies operating under a government grant or owned or controlled by the government. It also covers political parties and organisations, and non-governmental organisations (NGOs) which operate with funds obtained directly or indirectly from the Nepali government, a foreign government or an international organisation. Pursuant to Article 2(a)(9), the government can bring further bodies under the ambit of the Act through a notification in the official gazette.

Analysis

Article 2(a) apparently seeks to ensure that all public bodies, whatever their nature, are covered by the RTI Act. This is important, since public bodies should be accountable to the public for how they perform their responsibilities.

An initial concern we have with Article 2(a) is that it is not expressly clear that the RTI Act applies to the legislative and judicial branches of government as well as to the executive. We understand the taskforce which drafted the RTI Act intended this to be the case, and envisaged that the legislature and judiciary would be included under Articles 2(a)(1) and (2), which cover “agencies under the Constitution” and “agencies established by an Act”. However, since the word ‘agency’ is not defined, we recommend explicitly confirming that all three branches of government are covered by the RTI Act, for example by adding the words “...whether executive, legislative or judicial” to Articles 2(a)(1) and (2).

Further attention should also be given to the extent to which the RTI Act applies to private legal and natural persons. Since the right to information is based on the idea that the State is established by the people to serve them, the organs of the State should be subject to a duty of accountability to the public. This reasoning does not apply to private persons, unless they have assumed part of the responsibilities of the State. Concretely, contemporary right to information laws generally apply to private bodies primarily in the following cases:

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1. *The body is owned or controlled by the State*, for example a State corporation established under civil law.
2. *The body carries out a statutory function*, for example a bar association or medical board established under civil law, but vested with the responsibility to ensure professional discipline by a law or regulation.
3. *The body performs a public function*, for example a private utility company providing water or electricity, or a company implementing a government contract to build roads or schools.
4. *The body is substantially financed by the State*, for example a privately-owned museum or archive which depends on public subsidies, or a charity implementing projects with government funds.

We believe that pursuant to Article 2(a), the RTI Act applies in situations 1, 2 and 4 described above. This is positive. We are concerned, however, that the Act will not always apply in situation 3, for example when a private company performs a public function but is neither under the control of the government nor receives income from it. Examples of this could include private schools or universities; it is important that the public can verify that the standard of education and curricula at these institutions meet the applicable legal requirements. We accordingly recommend amending Article 2(a)(4) to read: “private persons providing public services” (removing the “established by law” requirement).

The fact that political parties fall within the scope of the RTI Act is somewhat unusual, as is the fact that NGOs are covered even when not funded by the Nepali State. Although NGOs and political parties work for the public good or seek to influence public policy, they do not ordinarily perform explicitly public responsibilities (although their members may do so) and for this reason are usually not covered by RTI legislation, except in the four situations described above. At the same time, since their purpose is to advance the public interest, political parties and NGOs may have little reason to object to a duty to provide information to the public.

2.1.2. *The definition of ‘information’*

Overview

The definition of ‘information’ is found in Article 2(b):

[A]ny written document, material or information related to the functions, proceedings thereof or decision of public importance made or to be made by the public agencies.

Article 2(d) goes on to define what is meant by the term “written document”. This term includes any kind of scripted document and any audiovisual materials collected and updated through “any medium” and that can be printed or retrieved.

Analysis

Consistently with the principle of maximum disclosure, progressive right to information laws define information broadly as including any recorded information held by a public body, regardless of its form, source, date of creation, or official status, and whether or not it was created by the body that holds it.

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While the definition of information in the RTI Act is reasonably broad, we are concerned that the ‘public importance’ requirement is an unnecessary limitation of the right to information. This wording suggests that access to a document held by a public body can be refused on the mere grounds that it is not of public importance, and therefore does not fall within the definition of ‘information’. It is clear that this wording could be abused, and it also creates an extra task for Information Officers, who must assess every time whether or not a request relates to a matter of public importance, rather than simply disclosing the requested information unless an exception to the general rule of disclosure applies.

We are also concerned that a document is only considered to be subject to the Act if it relates to the ‘functions, proceedings or decisions’ of the public body. These are vague terms, which, like the ‘public importance’ requirement, could be abused. Moreover, public bodies may hold documents which relate to the functions of other bodies, rather than their own functions. Such documents should nevertheless be subject to disclosure, or else it would be easy to prevent disclosure of a document simply by sending it to another body.

Modern right to information laws generally apply to any record held by a public body, whatever its contents or purpose. It is true that a public body may hold documents which do not relate to a public function, such as a notebook or videocassette in the lost and found department of a hospital. However, access to such documents can in appropriate cases be refused under ordinary exceptions, such as the privacy exception.

The ARTICLE 19 Model Law provides the following broad definition of ‘records’:

Records

7. (1) For purposes of this Act, a record includes any recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the body that holds it and whether or not it is classified.

We recommend broadening the definition of ‘information’ and ‘written document’. At a minimum, the requirements that a document be of public importance and related to the functions, proceedings or decisions of the body should be removed.

2.1.3. Persons with the right to access information

Overview

Article 3 of the Act provides that the right to information belongs to “every Nepali citizen” and, accordingly, every Nepali citizen shall have the access to information held in public agencies. This rule appears to be derived from Article 27 of the Interim Constitution of Nepal, which states:

Every citizen has the right to seek and receive information of a personal nature or relating to matters of public importance, provided that no one shall be required to provide information which has been declared secret by law.

Analysis

The fact that only Nepali citizens enjoy a right of access is a disappointing limitation on the scope of the RTI Act. Most right to information laws give *everyone* the right to request information, in line with Article 19 of the UDHR and Article 19 of the ICCPR,

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which both confer the right to seek and receive information on everyone, without discrimination on any grounds, including on the basis of nationality.⁶ For example, Macedonia's recent *Law on Free Access to Information of Public Character*, which entered into force in September of 2006, states in Article 1:

Any national or foreign legal and natural entity shall be entitled to access information filed with government agencies.

Limiting the scope of the RTI Act to citizens has the effect of depriving some long-standing Nepali residents of the right of access, for example because they are refugees or stateless. This is particularly relevant in the Nepali context, where significant numbers of individuals fall within these categories.

There are few risks or costs associated with extending the right in this way, as evidenced by the experience of the many other countries which do this. In practice, only few non-citizens can be expected to make requests for information, so little burden will be imposed on public authorities. Moreover, permitting requests from non-citizens may provide indirect financial benefits, by making Nepal an easier place to do business for foreigners and hence a more attractive destination for investment.

We also note that the use of the word "citizen" in the Interim Constitution is not deciding. It is open to the legislature of Nepal to adopt a wider safeguard of the right to information than the minimum required by the Constitution.

Recommendations:

- Article 2 should be amended to make it clear that all three branches of government are covered, for example by adding the words "...whether executive, legislative or judicial" to Articles 2(a)(1) and (2).
- Article 2 should be amended to ensure that private persons providing public services are covered by the RTI Act, regardless of whether they are established by law. This can be achieved by removing the words "established by law" from Article 2(a)(4).
- The definition of 'information' in Article 2(b) should be broadened. In particular, records should fall within the definition regardless of whether they relate to 'functions, proceedings or decisions of public importance'.
- Every person, regardless of nationality, residence or other status should enjoy the right to information. Article 3, as well as all other provisions limiting the right to "Nepali citizens", should be amended to this effect.

⁶ Arguably, the rule of the ICCPR, to which Nepal is a party, should prevail over the RTI Act. Section 9.1 of Nepal Treaty Act, 1990 reads: "If any provision of the treaty of which His Majesty's Government or the Kingdom of Nepal is party, after such treaty is ratified, acceded or approved, is inconsistent with any law in force, such law to the extent of such inconsistency, shall be void and the provision of the treaty shall come into force as law of Nepal."

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2.2. Exceptions

Overview

The exceptions are found in Article 3(3). Five categories of interests are listed whose protection could justify a refusal to disclose information, such as national security and privacy. A public body may only invoke these exceptions if there is an “appropriate and adequate reason”.

Article 3(4) contains a severability clause, which applies when a request is made for a record which contains some information that can be released and other information to which an exception applies. Any information in the record which is not subject to the exception shall, to the extent it can be severed from the rest of the information, be disclosed.

Article 27 introduces a classification procedure. A committee consisting of senior civil servants is charged with classifying information as confidential for up to thirty years. Any person who disagrees with a decision to classify a document may apply to the committee for revision.

Analysis

The exceptions regime in the RTI Act is one of its weakest points and it fails to strike a careful balance between the right of the public to know and the need to protect other important individual and social interests.

According to international standards (discussed further in Section 3 below), the right to information should be denied only if three conditions are met:

- 1) The information affects a legitimate interest protected by law.
- 2) Release of the information would cause actual harm to that interest.
- 3) This harm would be greater than the harm caused to the public interest by non-disclosure.

The second condition is often referred to as the ‘harm test’ and the third one as the ‘public interest override’. The operation of this three-part test can be illustrated through a simple example. During an election campaign, the media may wish to have access to the educational or criminal records of the leading candidates. This request affects a legitimate interest protected by law, namely the privacy of the candidates. Release of the information may in fact cause harm to that privacy, if its contents turn out to be embarrassing. However, the public interest override should be applied: the public’s right to know is more important in this instance than the candidates’ right to privacy. As the Indian Supreme Court remarked in a similar case, a voter may wish to “think over before making his choice of electing law-breakers as law-makers”.⁷

The RTI Act contains a list of legitimate interests and, to some extent, a harm test. The public interest override is however entirely absent. We are also concerned that the classification regime will lead to the unjustifiable withholding of information.

2.2.1. Legitimate interests

The legitimate interests listed in Articles 3(3)(a)-(e) of the Act are comparable to those found in other national laws, such as national security, public order, the investigation and

⁷ *Union of India (UOI) v. Association for Democratic Reforms and Anr. with People’s Union for Civil Liberties (PUCL) and Anr. v. Union of India (UOI) and Anr.* (2002) 5 Supreme Court Cases 294 (Supreme Court of India), para. 46.

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prosecution of crime, economic and trade interests, privacy, and security of life and body. We are wary of a certain degree of overlap between some of the legitimate interests. In particular, Article 3(3)(a) of the Act refers to “public peace”, while paragraph (d) refers to the need to safeguard the “harmonious relationship subsisted among various casts or communities”. It is hard to see what information held by a public body would, if made public, cause serious conflict among different groups and in any case such information would, in legitimate cases, also be covered by Article 3(3)(a). We are concerned about the possibility that paragraph (d) could be used in an illegitimate manner, for example to withhold information which discloses discriminatory practices or which highlights socio-economic divisions. Other countries, including many with serious ethnic and caste tensions, such as India, have not included an exception along these lines in their right to information laws.

2.2.2. The harm test

Most of the exceptions in Article 3(3) are subject to a harm test; for example, paragraph (a) states that information can be withheld if it “seriously jeopardises” national security. We are concerned, however, that the strictness of the harm test varies from exception to exception and is rather lenient in some cases. Article 3(3)(b) provides that information which “directly affects” the investigation, inquiry and prosecution of crimes shall not be released, which appears to be a considerably lower standard than ‘serious jeopardy’.

2.2.3. The public interest override

We are particularly concerned at the absence of a ‘public interest override’ in the RTI Act. Such an override is essential to ensure that exceptions are not allowed to trump the overall public interest and to ensure that minor concerns are not abused to refuse access to information. As it currently stands, the RTI Act would allow information to be withheld even if doing so is against the public interest.

It is also good practice to introduce an overall time limit beyond which exceptions expire. In the ARTICLE 19 Model Law, for example, exceptions to protect public interests, as opposed to private ones, expire after 30 years. This kind of practice, followed in many democracies, ensures that old archives become fully accessible to researchers once the information they contain can no longer cause serious harm to any current interest.

2.2.4. The classification scheme

Finally, as noted above, the Act introduces a classification process for information in Article 27. Essentially, the Act establishes a committee tasked with determining, on a proactive basis, whether one of the exceptions found in Article 3(3) applies to documents. The committee can declare a document classified for a maximum of thirty years. An additional period of confidentiality may be added by the committee where this is deemed necessary having regard to the nature of the information.

While most, if not all, democratic governments organise the information they hold into different categories of classification on the basis of its sensitivity, the scheme proposed in Article 27 is inappropriate. Classification should be an administrative practice, designed to ensure proper internal management of information. For example, if a document is classified as sensitive it may only be handled by more senior civil servants. However, classification status should be irrelevant to the question whether a document is subject to disclosure under a right to information law. When a request for access to a document is received, this request should always be judged on the basis of the exceptions regime

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contained in the right to information law, which should reflect the three-part test discussed above. This is of importance, since the public interest in the disclosure of a file may vary over time. For example, the tax records of an ordinary person may legitimately be withheld, but if that person subsequently becomes a senior public official, the public interest in disclosure may prevail. Classification for 30 years would, under the RTI Act, prevent disclosure of these records, regardless of the subsequent public interest.

We accordingly recommend removing Article 27 from the Act. A separate law or civil service rule may regulate classification levels, to ensure appropriate management of files within public bodies. This should not, however, affect the question of disclosure under the RTI Act.

Recommendations:

- The Act's regime of exceptions should be based on a three part test. Information should never be withheld, unless:
 - The information affects a legitimate interest protected by law;
 - Release of the information would cause actual harm to that interest;
 - This harm would be greater than the harm caused to the public interest by non-disclosure.
- Article 3(3)(d), which allows information to be withheld if its release would jeopardise the relationship between casts and communities, should be deleted. Genuine cases of a threat to public order can be dealt with under Article 3(3)(a).
- The harm test in Article 3(3)(b), which provides that information which "directly affects" the investigation, inquiry and prosecution of crimes shall not be released, should be made more strict, for example by requiring 'serious jeopardy'.
- All the exceptions contained in Article 3(3) should be made subject to a public interest override, guaranteeing that information will be released if doing so is in the overall public interest.
- Consideration should be given to setting an overall time limit beyond which exceptions no longer apply.
- The classification scheme of Article 27 should be removed from the RTI Act. Decisions on whether to disclose information should be based on a case-by-case balancing of interests rather than the classification status of the concerned documents.

2.3. Processing requests for information

Overview

Articles 6-8 of the RTI Act deal with the procedures for requesting access to information.

Pursuant to Article 6, each public body must appoint an Information Officer who will be responsible for dealing with information requests. A Nepali citizen who wishes to obtain information must submit an application to the relevant Information Officer, "mentioning the reason" (Article 7(1)). The Information Officer is obliged to provide the information immediately or, if that is not reasonably possible, within fifteen days, providing notice to

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the applicant of the reasons for any delay (Article 7(3)). The Act also provides that where requested information relates to the security or life of any person, the Information Officer shall provide it within 24 hours of the request (Article 7(4)).

Article 7 also states that the Information Officer shall endeavour, as far as reasonably practicable, to provide information in the format requested by the applicant. If the information could be destroyed or damaged if provided in the specified format, the information will be communicated in another appropriate way, stating the reasons (Article 7(6)). In cases where the requested information is not held, the applicant shall be notified immediately (Article 7(8)).

At the time of requesting, the applicant is required to pay a fee, which must be based on the actual cost of providing the information (Article 8(2)). The applicant has the right to appeal against an unreasonable charge (Article 8(3)).

Finally, mention should also be made of Article 31, which states that a person who obtains information from a public body is prohibited from using it for a reason other than it was acquired for. Article 32(4) allows the imposition of a fine of up to NRS 25,000 (about US \$400) in cases of ‘misuse’ of information.

Analysis

2.3.1. The need to state a reason

While the procedure for requesting access to information is generally well-designed, we are very concerned about the requirement in Article 7(1) for an applicant to ‘mention the reason’ for his or her request. This provision appears to contradict the basic idea of a right to information law, namely that information belongs to the public, rather than the government, and should be accessible to it unless the public body has a good reason to withhold the information. Indeed, many domestic RTI laws explicitly state that the applicant is not required to justify the request.⁸ We recommend incorporating such a provision into the Nepalese RTI Act.

Connected with this, we strongly believe that Articles 31 and 32(4), which prohibit use of the information for other purposes than it was requested for, should be deleted.

2.3.2. Manner of submitting a request

The RTI Act does not specify any procedural requirements which a request must meet, except that the request should be submitted to the relevant Information Officer. This is a good thing, insofar as it means that requesters will not be subject to any unnecessary bureaucracy. It may however be helpful to clarify some basic questions, in particular whether the request can be made orally or must be made in writing, and what should be done if the request is unclear or disproportionately burdensome.

⁸ See, for example, Right to Information Act of India, Article 6(2); Federal Transparency and Access to Public Government Information Law of Mexico, Article 40; Freedom of the Press Act of Sweden, Chapter 2, Article 14(3); Promotion of Access to Information Act of South Africa, Article 11(3)(a); Act on the Openness of Administration of the Netherlands, Art. 3(3). See further Recommendation R(2002) of the Committee of Ministers of the Council of Europe, Principle V.

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Written requests offer some obvious advantages over oral ones, such as being easier to store, replicate and forward to other departments, but a requirement to submit a written request makes the procedure difficult to use for those who are unable to write. It can also be an unnecessary formality if the request is a simple one which can be answered straight away. For these reasons, most modern right to information laws either allow requests to be filed orally, or state that if the requester is unable to submit a written request, the official who receives the request will reduce it to writing, providing a copy to the requester. Requests submitted through electronic communication means such as fax or e-mail are normally considered to have been made in writing.

A common problem which is not addressed by the RTI Act are requests which are unclear or which unreasonably interfere with the operations of the public body processing them. In such cases, the first step is to contact the requester as soon as possible and make an effort to discover what exactly he or she wants to know, narrowing the request accordingly. If this does not help, the request may legitimately be refused. Requests may also be refused immediately if the request is substantially identical to another recent request from the same person, or if it is clear the only purpose of the request is to waste the public body's time. The draft European Convention on Access to Official Documents, a draft treaty on the right to information, contains the following clause:

Article 5 - Processing of requests for access to official documents

1. The public authority shall help the applicant, as far as reasonably possible, to identify the requested official document.
[...]
5. A request for access to an official document may be refused:
 - (i) if, despite the assistance from the public authority, the request remains too vague to allow the official document to be identified; or
 - (ii) if the request is manifestly unreasonable.⁹

Finally, for practical reasons, it may be useful to specify that the applicant should provide contact details when filing the request. This requirement should however not go further than is necessary to provide the information. Some countries explicitly guarantee the right to submit anonymous requests; in Sweden, the country with the oldest right to information regime, this right is even constitutionally guaranteed.¹⁰

2.3.3. Time limits and the transfer of requests

The duty to provide access to information as soon as possible, and in any case within 15 days, is a reasonable rule and in line with the practice of other democracies. In the case of unusually complicated requests, many countries do additionally allow the time-limit to be extended for one additional period of 15 days. In such cases, the public body is required to notify the requester of the delay in writing, stating the reasons for it. We believe the RTI Act would benefit from the introduction of a similar rule, principally because the 15-day deadline could be unrealistic tight in some cases. Overall respect for the Act is likely to suffer if civil servants feel it imposes impossible obligations on them.

⁹ Report of the sixteenth meeting of the Council of Europe Group of Specialists on Access to Official Documents, Strasbourg, 9 – 12 October 2007, DH-S-AC(2007)010, Appendix III.

¹⁰ Freedom of the Press Act of Sweden (one of the basic laws which together make up the Swedish Constitution), Chapter 2, Article 14(3).

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If a request for information is submitted to a body which does not hold that information, the Act simply states that the Information Officer shall provide notification to the applicant. This is an appropriate response in cases where the requested information simply does not exist. However, if the information does exist but is held elsewhere, we believe the Information Officer should promptly refer either the request or the applicant to the body which will be able to provide the information in question, notifying the requester. In such cases, the time limit would begin to run from the moment the request is received by the second public body.

2.3.4. Fees

We welcome the principle that the costs of right to information shall be based on the “actual cost of providing information” (Article 8(3)). It is not clear, however, which costs may be factored into the calculation. Good practice suggests that only the costs of duplicating and sending the information to the requester should be charged, and not the costs of searching for the information or deciding whether to release it. For example, the draft European Convention on Access to Official Documents, mentioned above, provides:

Article 7 - Charges for access to official documents

1. Inspection of official documents on the premises of a public authority shall be free of charge. This does not prevent parties from laying down charges for services in this respect provided by archives and museums.
2. A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs of reproduction and delivery of the document. Tariffs of charges shall be published.

This provision also suggests that central tariffs for access should be published beforehand. Stipulating this in the RTI Act would help prevent the charging of arbitrary fees and ensure that requesters are able to foresee what sort of charges they will face. It also avoids a patchwork of different fees being charged across the public sector.

A number of governments have realised that charging for requests itself generates costs and that it is not worthwhile to collect fees for small requests. Sometimes the first 50 pages or so are therefore provided for free. Furthermore, it is a good practice to charge no or lower fees in public interest cases, such as where the request is from an NGO, an MP, a university or the media and is intended to highlight an issue of public concern.

Recommendations:

- The Act should indicate whether requests for information must be made in writing or may also be made orally. In the former case, the public servant receiving the request should assist illiterate or disabled applicants to reduce their request to writing.
- If a request is too unclear or too burdensome to process, the public authority should be under an obligation to provide assistance to help clarify or narrow the request.
- Public authorities should be permitted to refuse requests which are substantially similar to a recent request from the same person, which are clearly intended to waste the public authority’s time, or which remain unclear or unduly burdensome despite assistance having been offered to the applicant.
- Consideration should be given to requiring applicants to provide a contact address or number.

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- Consideration should be given to allowing the time-limit for responding to a complicated request to be extended for one additional 15 day period. The applicant should be notified of the delay and the reasons for it in writing.
- When a public body receives a request for information held by another public body, it should be under an obligation to refer either the request or the applicant to the body which does hold the information by a set deadline.
- Article 8 should state clearly that only the costs of duplication and delivering the requested information can be charged to the applicant. A central fee structure should be published in advance.
- Consideration should be given to providing a certain amount of information, for example the first 50 pages, for free, and to charging lower rates to public interest requesters, such as the media, NGOs, MPs and universities.

2.4. Measures to promote openness

Overview

Article 4 places an obligation on every public body to “respect and protect” citizens’ right to information. In the first place, public bodies are required to “classify and update information and make them public, publish and broadcast” (Article 4(2)(a)). Article 5(3) sets out a list of categories of information which must be made available on a proactive basis, such as the structure and nature of the body, the duties, responsibilities and powers of the body, decision-making processes, a description of functions performed and so on. The information may be disseminated in any national language and through different media (Article 4(3)), and should be updated every three months (Article 5(4)).

In addition to publishing information proactively, public bodies have a general duty to ensure that access to information is “simple and easy”, to conduct their functions openly and to provide appropriate training and orientation to staff (Article 4(2)(b)-(d)).

Analysis

Most contemporary right to information laws impose a proactive obligation on public bodies to make certain key categories of information public even in the absence of a request, a practice sometimes referred to as routine disclosure. Routine disclosure is a key element of a right to information regime, as many people will find it difficult or uncomfortable to file a request for information with a public body. In order to involve these people in the activities of their government, and to enable them to benefit from the information public bodies hold, as much information as possible should be published proactively. Proactive publication also means that individuals do not have to resort to the request process to get information, which can actually reduce the burden on public bodies, particularly given how simple it is to make information available over the Internet.

The provisions in the RTI Act regarding routine disclosure are suitably wide and include most of the key sorts of information that public bodies are required to disclose routinely under other right to information laws. One category of information which we believe would improve the list in Article 5(3) is a description of the mechanisms or procedures which members of the public can use to participate in the public body’s decision-making

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procedures. An important purpose of a right to information regime is to involve people more in their own government, thereby strengthening democracy, but in order to do so, people must understand the opportunities that exist for public consultation.

Experience in many countries shows that the poor organisation of public bodies' records is one of the biggest obstacles to an effective right to information regime, as well as to the functioning of public bodies in general. Improving record management practices should therefore be an important goal of any right to information law. A central official body – perhaps the National Information Commission – should be given the responsibility of collecting information on good practices from different public bodies and, on the basis of this, issuing a code of practice on record management which explains how to organise, update, dispose and transfer records.

Article 19 of the RTI Act sets out a helpful list of promotional activities to be undertaken by the Commission. The Commission could also undertake a number of other promotional roles. Even if records are well organised, the duty to publish information may be a burden to comply with for smaller public bodies. The National Information Commission could reduce this burden by offering assistance to public bodies, through the publication of a guide on minimum standards and best practices regarding the duty to publish, as well as by responding to *ad hoc* questions from public bodies.

The National Information Commission could also contribute to making access to information “simple and easy” for people by publishing a guide to the RTI Act. Such a guide, which is provided for in the right to information laws of many countries, should set out in a clear and understandable way how an individual can file a request for information, how the request is supposed to be processed and responded to, and how to appeal against any failure to observe these rules.

The Commission could organise training activities for Information Officers and heads of public agencies on how to implement the Act, and conduct public awareness campaigns through a variety of means (radio, newspapers, television, Internet and so on). The Act's effectiveness will be greatly reduced if the wider public remains ignorant of its existence.

Recommendations:

- Every public body should be required to publish a description of the mechanisms or procedures available to members of the public to participate in decision-making procedures.
- Consideration should be given to requiring the National Information Commission (or some other official body) to publish the following:
 - A code of practice on record management, based on the best practices of different public bodies.
 - A guide on minimum standards and best practices regarding the duty of public authorities to publish information proactively.
 - A guide on how to use the RTI Act for ordinary people.
- The Commission should be required to provide training on the implementation of the RTI Act to civil servants and to conduct public awareness campaigns about the Act.

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2.5. Appeals

Overview

Articles 9 and 10 deal with appeals against refusals to provide access to information, as well as other failures to comply with the RTI Act. Initially, applicants have seven days from the moment the information is denied, in whole or in part, to complain to the head of the public body concerned. The head may decide to release the information or confirm the earlier decision, within an unspecified timeframe (Article 9).

If the requester disagrees with the head, he or she may file an appeal with the National Information Commission within 35 days. The Commission may then summon the concerned head or Information Officer and take their statement, as well as hearing witnesses, reviewing evidence and inspecting any document held by a public body. The Commission shall reach a decision within sixty days (Article 10). This decision can be appealed to the Appellate Court within 35 days (Article 34).

Articles 32 and 33 provide for compensation and other remedies where the Commission finds that the head of a public body or an Information Officer improperly processed a request. The Commission may write to the concerned body seeking ‘departmental punishment’ or decide to impose a fine on the person concerned of up to NRs 25,000 (about US\$400). Delays in providing information shall be punished with a fine of NRs 200 per day, while failure to implement the Commission’s decision may result in a further fine of NRs 10,000. Furthermore, an individual who has sustained losses as a result of improper processing of a request may appeal to the Commission for compensation within three months. Following investigation, the Commission may award a “reasonable amount” of compensation to the applicant.

Articles 11-18 deal with the establishment and composition of the Commission. The Commission is composed of a Chief Information Commissioner and two other Information Commissioners, who are appointed by the Government at the recommendation of a committee. The committee consists of the Minister for Information and Communication, the President of the Federation of Nepalese Journalists and the Speaker of Parliament, with the latter acting as chair (Article 11(1)-(4)).

Candidates for membership in the Commission must be Nepali citizens who hold a bachelor’s degree and have at least 15 years of experience in a relevant field (Article 12). Persons who have been convicted by a court of a crime involving ‘moral degradation’ are ineligible, as are those who are employees of a government or public institution or hold a political position (Article 13). In making its nominations, the committee is further required to follow “inclusive principles” as much as possible, and ensure that the Commission includes at least one female member (Article 11(4) and (5)).

The term of office for members of the Commission is five years, non-renewable, although an Information Commissioner can be reappointed as Chief Information Commissioner (Article 14). The post of a Commission member may become vacant upon completion of the term, death, resignation, attainment of the age of 65 or conviction of a crime involving moral degradation (Article 15). A member may be removed by a vote of two-thirds of the parliamentary committee concerned with information and communications, if it finds the member unfit to hold office due to incompetence, misconduct or failure to perform the

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duties of a member honestly. The member concerned has the right to present their case to the committee (Article 16). The level of remuneration of members is not set in the Act; Article 17 merely states that it shall be “as prescribed”.

Article 19 sets out the functions, duties and powers of the Commission. These include observing and studying records and documents of public importance held in public agencies, ordering public agencies to make information public, prescribing timeframes to provide information, and so on. The Commission’s budget is provided by government (Article 23). An annual report of the Commission’s activities must be published and laid before Parliament every year (Article 25).

Analysis

2.5.1. The complaints procedure

As discussed above, the RTI Act requires an applicant to seek reconsideration from the head of the public authority before appealing a failure to provide the requested information. A similar rule is found in several countries. This has a number of benefits. It may help to avoid unnecessary appeals to the Commission. At the same time, it can also serve as a device for public bodies to deliberately delay access to information. In order to reduce such abuse to a minimum, we recommend adding a deadline within which the head must take his decision.

An applicant is entitled to complain to the head in a number of different situations, namely where an Information Officer “does not provide information, denies providing information, partially provides information, provides wrong information or does not provide information by denying the applicant as a stakeholder” (Article 9(1)). These are positive rules, but we believe there are other circumstances in which a complaint should be permitted, such as where the information is not provided in the requested form, not provided promptly without a good reason, in violation of Article 7(2) or 7(5), or the fee charged is excessive (currently, as discussed in Section 2.3.4 above, a requester may appeal an excessive fee to the Commission, but not to the head of the public authority). These could be specifically listed as additional grounds for a complaint or the Act could be amended to state simply that an applicant may complain against any material failure to process a request in accordance with the Act.

Finally, the 7-day deadline for filing a complaint seems excessively tight; many requesters will in practice file their complaint within a short period, particularly if the information is needed urgently, but there is no good reason why a complaint should not be accepted after 14 or 21 days.

2.5.2. The appeals procedure and remedies

If the complaint to the head does not yield a satisfactory result, the requester may file an appeal with the National Information Commission. We assume the grounds on which such an appeal may be filed are the same as those for a complaint.

While the RTI Act sets out some powers of the Commission, including compelling witnesses and inspecting documents held by public authorities, it offers little detail on the procedure to be followed when hearing an appeal. Article 10(5) states simply that the procedure “shall be as prescribed.” To a large extent, the adoption of procedural rules by the Commission itself is appropriate. However, there are two important matters which we

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believe should be set out in the RTI Act itself; the right of both parties to make representations in appeals before the Commission, and the burden of proof. Given the presumption of openness, the burden of proof should always lie on the public body.

We welcome the power of the Commission to impose a fine in cases where a request for information has been dealt with improperly, as well as the possibility of awarding compensation to an applicant who has sustained damages as a result of such improper processing.

2.5.3. The National Information Commission

The establishment of the National Information Commission is a highly commendable step and will help ensure effective protection of the right to information in Nepal. Experience in countries around the world shows that independent information commissions are an essential compliment to courts in offering effective protection for the right to know. They can develop specific expertise on access to information. They can also process appeals cases more quickly and less expensively than courts, so that they are more accessible to ordinary people. Furthermore, information commissions are able to undertake a range of activities to help improve awareness and implementation of the right to information legislation.

For an information commission to enjoy public confidence, it is important that it is truly independent from the government whose actions it is supposed to oversee. In this regard, we have a number of concerns about the appointments procedure and composition of the Nepali National Information Commission.

There is only one civil society representative on the nominating committee, alongside two officials, who may represent the same political party. While it is positive that there is at least some civil society representation, in the form of the President of the Nepalese Federation of Journalists, this is not sufficient to ensure independent decision-making. A related concern is that the appointments process is, somewhat ironically, lacking in transparency, since there is no opportunity for public participation. This could be corrected by giving members of the public an opportunity to nominate candidates or to comment on a shortlist of candidates.

The RTI Act should also provide stronger safeguards for the Commission's financial independence. Rather than relying on an essentially discretionary grant from the government, which could be used as a means to apply pressure, the Commission should draw up its own budget, which should be approved by Parliament. The Act should also set the salaries of Commission members at a reasonable level, perhaps linked to existing civil service or judicial salaries, to avoid any possibility of this being used to influence the Commission's decision-making.

Finally, while the criteria for eligibility to serve on the Commission are well-designed, we believe that the rules of incompatibility found in Article 13 should continue to apply after appointment, for the entire duration of the member's term. It should be possible to remove a member of the Commission who, for example, takes up parallel employment as a civil servant or is elected to a political position. Another ground for removal which is currently absent from the Act but which should be added is incapacitation – if a member is no longer able to perform his/her duties due to prolonged illness, removal should be possible according to the ordinary procedure.

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Recommendations:

- A timeframe should be added to Article 9, within which the head of a public authority must respond to a complaint.
- Applicants should be able to challenge any material failure to process their request in accordance with the Act. In addition to the circumstances listed in Article 9, a complaint or appeal should be possible against a failure to provide the information in the requested form, a failure to provide it promptly without a good reason or the charging of an excessive fee.
- The 7 day deadline for filing a complaint in Article 9(1) should be increased to at least 21 days.
- The RTI Act should specify that when the National Information Commission hears a case, both parties shall have an opportunity to make representations, and the burden of proof shall rest on the public body to justify any refusal to disclose information.
- Consideration should be given to making Parliament responsible for selecting the members of the Commission, by a two-thirds vote of its members, or to significantly broadening the scope of the nominations committee to include more civil society representatives.
- The appointments process should be conducted in an open and participatory manner and members of the public should be given an opportunity to nominate candidates.
- The Commission should draw up its own budget, which should be approved by Parliament. Commission members' salaries should be shielded from political interference.
- The rules of incompatibility found in Article 13 should continue to members of the Commission after their appointment. Inability to perform the functions of a member due to illness should be added as a ground for removal under Article 16.

2.6. Protection of good-faith disclosures

Overview

The Act contains two types of safeguards for disclosures made in good faith. First, Article 36 provides that no case shall be filed and no punishment imposed on a head or Information Officer for disseminating information in good faith. In other words, a civil servant will not be held liable for disclosing information which should have been withheld on the basis of the exceptions in Article 3, if the mistake was an honest one.

Second, Article 29 provides protection for whistleblowers. It affirms the responsibility of employees within public agencies to provide information proactively on any ongoing or probable “corruption or irregularities” or any deed constituting an offence under prevailing laws. Pursuant to paragraph 3, it is forbidden to cause harm to or punish a whistleblower and paragraph 4 guarantees the right of whistleblowers to complain to the Commission and demand compensation in cases where they are nevertheless penalised.

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Analysis

We strongly support these two safeguards. The guarantee that civil servants will not be prosecuted for disclosing information in good faith will help ensure that requests are processed in a balanced way, rather than excessively venturing on the safe side.

The protection of whistleblowers is an important part of any effective right to information regime, and can help tackle a culture of secrecy. We do believe that Article 29 could be improved upon in two ways. First, whistleblower protection should only apply to disclosures made in good faith in the belief that the information is substantially true; there can be situations in which a civil servant makes a disclosure for improper purposes, such as to deliberately discredit someone else. Second, whistleblower protection should apply not only to disclosures which reveal corruption or irregularities, but generally in any situation which presents a serious threat to the public interest, including threats to public health, safety or the environment.

Recommendations:

- The whistleblower protection of Article 29 should be limited to disclosures of information made in good faith, in the belief that the information is substantially true.
- Whistleblower protection should apply to disclosures of information which reveal the existence of a serious threat to the public interest, such as a grave threat to public health, safety or the environment, in addition to corruption and other irregularities.

3. RELEVANT INTERNATIONAL STANDARDS

The right to access information has long been recognised as an extremely important human right, for its key role both in a democratic society and in the realisation of a number of other fundamental human rights. The United Nations, at the very first meeting of the General Assembly, adopted a Resolution on the free circulation of information in its broadest sense, stating:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.¹¹

That the right to information is an aspect of freedom of expression has repeatedly been confirmed by United Nations bodies. The UN Special Rapporteur on Freedom of Opinion and Expression declared in 1998 that:

[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems....¹²

Article 19 of the *Universal Declaration of Human Rights*¹³ defines the right to freedom of expression as the right to “seek, receive and impart information”. Similar guarantees of freedom of expression can be found in the *International Covenant on Civil and Political Rights*,¹⁴ the principal UN human rights treaty, again under Article 19, as well as in the three regional human rights treaties, the *European Convention on Human Rights*,¹⁵ the *African Charter on Human and Peoples’ Rights*¹⁶ and the *American Convention on Human Rights* (ACHR).¹⁷

In 2000, the Special Rapporteur provided extensive commentary on the content of the right to information, as follows:

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; “information” includes all records held by a public agency, regardless of the form in which it is stored;
- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public agency functions and the content of any decision or policy affecting the public;
- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims

¹¹ Resolution 59(1), 14 December 1946.

¹² Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, para. 14.

¹³ UN General Assembly Resolution 217A(III), 10 December 1948.

¹⁴ UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.

¹⁵ Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953.

¹⁶ Adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

¹⁷ Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.

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which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;

- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public agency.¹⁸

His views were welcomed by the UN Commission on Human Rights.¹⁹

In December 2004, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and the Special Rapporteur on Freedom of Expression of the Organisation of American States – issued a Joint Declaration which included the following statement:

The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.²⁰

The right to information has also been explicitly recognised in all three regional systems for the protection of human rights. Within Europe, the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents in 2002.²¹ Principle III provides generally:

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

The Council of Europe's Group of Specialists on Access to Official Documents is currently developing a binding treaty in the area of right to information.

Within the Inter-American system, the Inter-American Commission on Human Rights approved the *Inter-American Declaration of Principles on Freedom of Expression* in

¹⁸ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.

¹⁹ Resolution 2000/38, 20 April 2000, para. 2.

²⁰ See <http://www.cidh.org/Relatoria/showarticle.asp?artID=319&IID=1>.

²¹ Recommendation No. R(2002)2, adopted 21 February 2002.

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October 2000.²² The Principles unequivocally recognise right to information, including the right to access information held by the State, as both an aspect of freedom of expression and a fundamental right on its own:

4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

In an important decision on 19 September 2006, the Inter-American Court of Human Rights confirmed that a right to access publicly-held information is included in the right to freedom of expression under the ACHR:

77. In respect of the facts of the present case, the Court considers that article 13 of the Convention, in guaranteeing expressly the rights to “seek” and “receive” “information”, protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention. Consequently, the said article encompasses the right of individuals to receive the said information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised by the Convention, the State may limit the access to it in the particular case.²³

In 2003, the African Commission on Human and Peoples’ Rights adopted a *Declaration of Principles on Freedom of Expression in Africa*,²⁴ Principle IV of which states, in part:

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

The growing international consensus that there is a fundamental right to access officially held information is further reflected in the rapid growth in the number of such laws worldwide over the past ten years. States which have recently adopted right to information legislation include India, Israel, Jamaica, Japan, Mexico, Pakistan, Peru, South Africa, South Korea, Thailand, Trinidad and Tobago, and the United Kingdom, as well as most of East and Central Europe. These countries join a number of other countries which enacted access laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia and Canada, bringing the total number of States with right to information laws to more than 70. A growing number of inter-governmental bodies, such as the European Union, the UNDP and the World Bank, have also adopted policies on the right to information.

²² 108th Regular Session, 19 October 2000.

²³ *Claude Reyes and Others v. Chile*, 19 September 2006, Series C No. 151, para. 77 (Inter-American Court of Human Rights). Unofficial translation from the Spanish judgement.

²⁴ Adopted at the 32nd Session, 17-23 October 2002.

VII. Freedom of Information

PHILIPPINES



Republika ng Pilipinas
Komisyon ng Karapatang Pantao ng Pilipinas
(Commission on Human Rights of the Philippines)

**Position Paper on “Freedom of Information Act of 2009”
from the Commission on Human Rights**

“We all pay taxes. Even a beggar on the street pays sales tax when he buys anything from the market. This money belongs to us. But where does this money go? Why are there no medicines in the hospitals? Why are people dying of starvation? Why are the roads in such pathetic conditions? Why are the taps dry?”

Now we have a right to question governments. Right to Information Laws,¹ empower citizens to question the government, inspect their files, take copies of government documents and also to inspect government works.”²

Right to Information in International
Human Rights Law

People cannot speak or express themselves unless they know. Access to information is key to an informed choice and ultimately, to meaningful decision-making, action and participation.

In international human rights law, the right to information is embedded in the freedom of expression enunciated under Article 19 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, to wit:

“2. Everyone shall have the right to freedom of expression; this right shall include **freedom to seek, receive and impart information and ideas of all kinds**, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

“3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”

¹ passed on October 12, 2005 by the Parliament of India

² <http://www.righttoinformation.org/>, original quote was taken in the context of the Right to Information Laws in India

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Right to Information in Other Parts of the World

The first Access to Information (ATI) law was enacted by Sweden in 1766, largely motivated by the parliament's interest in access to information held by the King. Finland was the next to adopt, in 1953, followed by the United States, which enacted its first law in 1966, and Denmark and Norway, which passed laws in 1970. The interest in ATI laws took a leap forward when the United States, reeling from the 1974 Watergate scandal, passed a tough Freedom of Information (FOI) law in 1976, followed by the passage by several western democracies of their own laws.³ By 1990, the number of countries with ATI/FOI laws had climbed to 13.

The fall of the Berlin Wall and the rapid growth of civil society groups demanding access to information – about the environment, public health impacts of accidents and government policies, draft legislation, maladministration, and corruption – gave impetus to the next wave of enactments, which peaked in the late 1990s and early 2000s. Between 1992 and 2006, 27 countries in Central and Eastern Europe and the former Soviet Union passed ATI laws.

During that same period through to the present,⁴ at least 37 countries in other regions of the world enacted similar laws, including Latin America, the Caribbean, Europe, Africa and Asia.

The right of access to official information is now protected by the constitutions of at least 48, and arguably 55, countries. At least 43, and arguably 50, of these expressly guarantee a “right” to “information” or “documents,” or else impose an obligation on the government to make information available to the public.⁵

The fact that so many countries have afforded the right constitutional status is noteworthy, and provides support for strengthening the status of the right under international, regional and national laws.

Most recently, the European Court of Human Rights rendered a decision⁶ expanding the right of watchdog groups to access government information.

The decision recognized for the first time Article 10 of the European Convention on Human Rights which guarantees the “freedom to receive information” held by public authorities. The Court

³ France 1978, Netherlands 1978, Australia 1982, New Zealand 1982, Canada 1982, Greece 1986, Austria 1987, Italy 1990, <http://right2info.org/constitutional-protections-of-the-right-to>

⁴ Ibid. The most recent enactment is the “Transparency and Access to Information Law” in Chile which came into force on April 20, 2009

⁵ The difference in numbers is due to differing definitions of the right to information, <http://right2info.org/constitutional-protections-of-the-right-to>

⁶ April, 2009

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noted the important role played by the media and other independent monitors in creating “forums for public debate” and emphasized that any interference with the ability of such groups to obtain information of public interest must be able to withstand the “most careful scrutiny.” The court emphasized that governments have an obligation “not to impede the flow of information” on matters of public concern.

In 2004, a member of the Hungarian parliament filed a complaint with the country’s Constitutional Court over Hungary’s national drug laws. The Hungarian Civil Liberties Union — a rights group active in the field of drug policy — applied to that court to receive a copy of the complaint. Both the Constitutional Court and Hungary’s regular courts denied the request on privacy grounds. The Hungarian Civil Liberties Union took the case to the European Court of Human Rights alleging that the denial interfered with its right to access state-held information necessary to fulfill its role as a public watchdog.

The European Court of Human Rights is now the second regional human rights tribunal, after the Inter-American Court of Human Rights, to recognize that the “freedom to receive and impart information and ideas,” guaranteed by the Universal Declaration on Human Rights as well as regional human rights treaties, includes a right to receive information of public interest held by government authorities. Both courts highlighted the strong connections among the right to information, freedom of expression, and democratic accountability.

Right to Information in the Philippines

In the Philippines, the right to information is recognized as a distinct Constitutional guarantee.⁷ No less than the Bill of Rights of the 1987 Constitution⁸ states:

“The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.”

Clearly enough, this right is unconditionally and specifically granted under the most supreme law of the land and its exercise being subject only to restrictions as may be given by law.

⁷ The guarantee was first recognized in the 1973 Constitution. Article IV (Bill of Rights), Section 6, of the 1973 Constitution reads: *“The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, shall be afforded the citizen subject to such limitations as may be provided by law.”*

⁸ Article III, Section 7

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The Supreme Court declared the right to be enforceable in 1987, in a case⁹ involving access to information regarding the civil service eligibility of certain individuals:

“These constitutional provisions [re the right to information] are self-executing. They supply the rules by means of which the right to information may be enjoyed ... by guaranteeing the right and mandating the duty to afford access to sources of information. Hence, the fundamental right therein recognized may be asserted by the people upon the ratification of the constitution without need for any ancillary act of the Legislature What may be provided for by the Legislature are reasonable conditions and limitations upon the access to be afforded which must, of necessity, be consistent with the declared State policy of full public disclosure of all transactions involving public interest”

The Court continued by noting the importance of the right to information for democratic decision-making:

“The incorporation in the Constitution of a guarantee of access to information of public concern is a recognition of the essentiality of the free flow of ideas and information in a democracy.... In the same way that free discussion enables members of society to cope with the exigencies of their time..., **access to information of general interest aids the people in democratic decision-making ... by giving them a better perspective of the vital issues confronting the nation.**”¹⁰

The 1987 Constitution also contains a provision in Article II¹¹ Declaration of Principles and State Policies, Section 28, which reads:

“Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest.”

For many years, this latter provision was regarded merely as providing emphasis to the guarantee under the Bill of Rights. However, in the recent case of Chavez vs. National Housing Authority,¹² the Supreme Court for the first time gave this Section 28 an independent construction. The Court distinguished between “the duty to permit access to information,” which is required by Section 7 of the Bill of Rights, and “the duty to disclose information,” which is what Section 28 mandates. The Court stated:

“Sec. 28, Art. II compels the State and its agencies to fully disclose all of its transactions involving public interest. Thus, **the government agencies, without need of demand from anyone, must bring into public view all the steps and negotiations leading to the consummation of the**

⁹ Legaspi vs. Civil Service Commission, 150 SCRA 530

¹⁰ Ibid.

¹¹ Declaration of Principles and State Policies

¹² GR No. 164527, August 15, 2007

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transaction and the contents of the perfected contract. Such information must pertain to “definite propositions of the government,” meaning official recommendations or final positions reached on the different matters subject of negotiation.”

The other aspect of the people’s right to know apart from the duty to disclose is the duty to allow access to information on matters of public concern under Sec. 7, Art. III of the Constitution. The gateway to information opens to the public the following: (1) official records; (2) documents and papers pertaining to official acts, transactions, or decisions; and (3) government research data used as a basis for policy development.

Thus, the duty to disclose information should be differentiated from the duty to permit access to information. There is no need to demand from the government agency disclosure of information as this is mandatory under the Constitution; failing that, legal remedies are available. On the other hand, the interested party must first request or even demand that he be allowed access to documents and papers in the particular agency. A request or demand is required; otherwise, the government office or agency will not know of the desire of the interested party to gain access to such papers and what papers are needed. The duty to disclose covers only transactions involving public interest, while the duty to allow access has a broader scope of information which embraces not only transactions involving public interest, but any matter contained in official communications and public documents of the government agency.¹³

However, while the guarantee in the Bill of Rights is self-executing, the Court stated that Section 28 requires implementing legislation.¹⁴

In addition to the foregoing provisions spelling out general rights and duties, there are also specific classes of information that the Constitution requires to be made public. These include information on foreign loans obtained or guaranteed by the government. Article XII,¹⁵ Sec. 21 of the 1987 Constitution which states that:

“Foreign loans may only be incurred in accordance with law and the regulations of the monetary authority. Information on foreign loans obtained or guaranteed by the government shall be made available to the public.”¹⁶

The constitutional guarantee is applied to all branches of government – legislative, judicial, and executive, including all their instrumentalities. Further, the public’s right of access to declarations

¹³ <http://right2info.org/constitutional-protections-of-the-right-to>

¹⁴ Ibid.

¹⁵ National Economy and Patrimony

¹⁶ <http://right2info.org>, supra

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by public officers or employees of their assets and liabilities is also recognized.¹⁷

Comments from the Commission on Human Rights on the Proposed Right to Information Law

The instant substitute bill, entitled “An Act Implementing the Right of Access to Information on Matters of Public Concern Guaranteed under Section Twenty-Eight, Article II and Section Seven, Article III of the 1987 Constitution and for Other Purposes,” simply known as the “Freedom of Information Act of 2009,” affirms not only the Constitutionally, enshrined right to information but also the internationally-recognized right to freedom of expression.

Transparency, Accountability and Accessibility

The Commission on Human Rights fully supports the instant bill which further gives life to the human rights based approach principles and standards of transparency, accountability and accessibility. A democratic government, such as ours, is ultimately accountable to the people, hence, all information that affects them should be made available as guaranteed under the Constitution. While not an absolute right, the Commission regards relevant limitations and restrictions to access this freedom provided they are prescribed by law and are necessary, reasonable, valid, objective and consistent with human rights norms.

Balancing of Interests

The Commission notes the exemptions provided under this Act. However, we would like to give attention to confidential information of vulnerable sectors of society, such as women and children who may have been subjects of abuse, trafficking and similar forms of violence, to information with respect to the rehabilitation of people under the influence of drug abuse and to other information which may be best left private even if part of public records. This may constitute an infringement of their right to privacy. In essence, the Commission respectfully recommends a balance of what can and cannot be made public taking into consideration all factors that will best promote, protect and respect the human rights of as many stakeholders possible.

Exemption Involving Human Rights Violations

While the Commission notes and concurs with the procedure and guidelines set forth under Sections 9 to 15 of this bill for seeking

¹⁷ Ibid.




information as properly laid out, we would like to provide additional exemption for its application in matters of extreme urgency involving human rights. By this we mean information involving the whereabouts of persons believed to be victims of enforced disappearance, extrajudicial killings, torture and other human rights violations. In these instances, following strictly the procedures herein provided may mean loss of precious time needed to prevent further damage and prejudice to victims. Proper government agencies must not be given a justification, in the guise of this law, to conceal information relevant to any investigation for violations of human rights.

Other Considerations

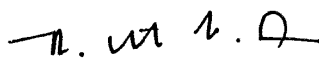
The Commission also notes the criminalization of violations of this Act through the imposition of penalties of imprisonment with the understanding that this does not prejudice possible violations of the Administrative Code as well as Republic Act No. 3019 or the Anti-Graft and Corrupt Practices Act.

In sum, the Commission on Human Rights advocates for the peoples' right to know, access to information and the freedom to express themselves in a free and democratic society subject to such guidelines and restrictions as may be necessary and reasonable without sacrificing due regard to the promotion and protection of human rights.

Respectfully submitted. 6 May 2009.


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Chairperson

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NORBERTO DELA CRUZ
Commissioner


JOSE MANUEL S. MAMAUAG
Commissioner

VIII. Freedom of Information

SRI LANKA

Access to Information – The Sri Lanka Experience

Dr. Amrith Rohan Perera, PC¹

Introduction

Sri Lanka belongs to the shrinking list of countries that are yet to enact a specific law or formulate a comprehensive legal framework on access to information. However, the lack of a statutory framework should not undermine the creative role played by the Supreme Court of Sri Lanka in expanding existing constitutional provisions on the freedom of expression to provide in some way a right (albeit limited) to information. There has also been a reasonable effort on the part of successive Governments to move towards a statutorily protected right to information, although such efforts are yet to mature into an Act of Parliament. Sri Lanka's efforts to move towards a more 'open government' must also be looked into from the perspective of the issues she faces as a developing country and a country involved in an ongoing conflict.

The Constitution The Creative Role Of The Supreme Court Of Sri Lanka

The Second Republican Constitution of Sri Lanka (1978) (the Constitution) is the first Constitution since Sri Lanka adopted the 'Westminster model' of government, which created legally enforceable rights against the State. While the Fundamentals Rights Chapter (Chapter 3) was a landmark in terms of accountability of the State, it did not expressly provide a right to information.

However, Chapter 3 contains provisions, which are of relevance to issues relating to mass media freedom and to the question of access to information. The most frequently cited provision is Article 14(1)(a), which enshrines the freedom of speech and expression by guaranteeing to every citizen, the freedom of speech and expression, including publication, from unreasonable interference by executive or administrative action. It has been argued that Article 10, which provides that "every person is entitled to freedom of thought, conscience and religion," is the 'mental aspect' of the freedom of expression and therefore buttresses the right to access of information, as the freedom of thought would be illusory without information. However, the views on this argument are divergent both amongst lawyers and legal academics. While this could be dismissed as an academic argument, its importance lies in the fact that the State cannot restrict the provisions of Article 10 in any manner while Article 14(1)(a) can be restricted in limited circumstances set out in Article 15, which is in keeping with international standard setting human rights documents.

As stated although the right to information is not expressly referred to in Chapter 3 the Supreme Court of Sri Lanka has held in several judgments that the right to information is implicit in the Constitution in particular Article 14(1)(a) - freedom of speech and expression.

The issue whether the right to information is part of the freedom of speech, came up for determination in the case of *Visuvalingam v. Liyanage*². This case arose out of applications filed by several petitioners, who were regular readers of a newspaper that had been banned.

¹ President's Counsel; Member of the United Nations International Law Commission; Former Legal Advisor to the Ministry of Foreign Affairs (Sri Lanka); Consultant on International Legal Affairs.

²*Visuvalingam v. Liyanage*, [1984] 2 Sri. L.R. 123.

They alleged that the ban violated their fundamental right of freedom of speech and also their right to equality, since other newspapers had not been banned, but only subjected to censorship. It was the contention of the petitioners that, within the ambit of freedom of expression is included the freedom of the recipient of information. In order to give a meaning to the freedom of speech, it was contended that one has of necessity, to recognise the freedom of the recipient to information, news and views. The Supreme Court, while pronouncing that public discussion was important in a democracy, and that for its full realisation, public discussion demanded the recognition of the right of the person who is the recipient of the information, held that the fundamental right to the freedom of speech and expression, includes the freedom of the recipient to information.

In the subsequent case of *Fernando v. Sri Lanka Broadcasting Corporation and Others*³ where the petitioner alleged that his freedom of speech, qua participatory listener had been infringed, consequent to the stoppage of an educational programme, which prevented further participation by him, the Court had the opportunity of expressing itself on the scope and content of Article 14 (1)(a) of the Constitution on the Freedom of Speech and Expression. After examining a series of local and foreign decisions, the Court came to the conclusion that Article 14(1)(a) on Freedom of Speech and Expression is not to be interpreted narrowly. The Court stated –

Not only does it include every form of expression, but its protection may be invoked in combination with other express guarantees (such as the right to equality....) and it extends to and includes implied guarantees necessary to make the express guarantees fully meaningful... Thus it may include the right to obtain and record information.

The Court while opting to follow a broad interpretation of the freedom of speech and expression, so as to include the right to information, nevertheless qualified it by the caveat that, it by no means follows that there is a right to information ‘simpliciter’ (i.e. for one’s own edification only) but must be intended to facilitate the exercise of freedom of speech. In other words, the right was ancillary to giving effective meaning and content to the petitioner’s freedom of speech.

In its review of previous decisions, the Court cited the dicta of Sharvananda CJ, in the case of *Joseph Perera v. Attorney General*⁴ wherein it was observed -

Freedom of speech and expression consists primarily, not only in the liberty of the citizen to speak and write what he chooses, but in the liberty of the public to hear and read what it needs. No one can doubt if a democracy is to work satisfactorily that the ordinary man and woman should feel that they have some share in government. The basic assumption in a democratic polity is that the government shall be based on the consent of the governed. The consent of the governed implies not only that the consent shall be free, but also that it shall be grounded on adequate information and discussion aided by the widest possible dissemination of information from diverse and antagonistic sources. The crucial point to note is that the freedom of expression is not only politically useful, but that it is indispensable to the operation of a democratic system.

³ *Fernando v. Sri Lanka Broadcasting Corporation and Others*, [1996] 4 Sri. L.R. 57.

⁴ *Joseph Perera v. Attorney General*, [1992] 1 Sri. L.R. 199.

The pith and substance of these judicial decisions is in consonance with Article 19 of the Universal Declaration of Human Rights, which states –

Everyone has the right to freedom of opinion and expression. This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

In the absence of a comprehensive law on access to information or an express provision in the Constitution, the judicial interpretative process has thus had a salutary effect towards recognising a right to information.

Initiatives To Frame Legislation On Freedom Of Information

Initiatives taken in Sri Lanka to formulate legislation on freedom of information reflect the policy dilemmas that have surrounded the issue. The first steps in the direction of setting in place a legislative framework on access to information go back to 1994, when a new Government which had assumed office then, on a platform of promotion and protection of human rights, adopted a “Statement on People’s Alliance Government’s Media Policy.” The Statement recognised, inter-alia, “the media’s right to expose corruption and misuse of power, widen the scope of constitutional guarantee of freedom of expression by including the right to information...”

The outcome of the Statement as a policy document was the appointment of a Committee in 1995, to advise the Government on the reform of laws affecting media freedom and the freedom of expression. The Committee recommended the enactment of a Freedom of Information Act and in addition, the inclusion of an express provision on right to information in a package of constitutional reforms that were then under consideration.

On the proposed Freedom of Information Act, the Committee made the following policy recommendations, which were in keeping with current international trends –

- (i) Such legislation should display a clear commitment to the general principle of open government;
- (ii) Disclosure should be the rule rather than the exception;
- (iii) All individuals have an equal right of access to information;
- (iv) The burden of justification the withholding of information rests with the government and not the burden of justification for disclosure with the person requesting information; and
- (v) Individuals improperly denied access to documents or other information, have a right to seek relief in courts.

The Committee also recommended that the proposed legislation should also make provision for exempt categories from the scope of the duty of disclosure, such as, those required to protect individual privacy, including medical records, trade secrets and confidential commercial information, law enforcement investigations, information obtained on the basis of confidentiality and national security.

Consequent to these recommendations, the Law Commission of Sri Lanka (Law Commission) produced in 1996 a Draft Bill referred to as the “Access to Official Information Draft Bill - 1996” for consideration by the Government. In its Report, accompanying the Draft Bill, the Law Commission dealt with the policy imperatives that need to be taken into account and the

contending interests that need to be safeguarded and carefully balanced, in the framing of such legislation. The Report stated -

The current administrative policy appears to be that all information in the possession of the Government is secret, unless there is good reason to allow public access. This policy is no longer acceptable... On the other hand, law reform, which allowed for the principle that all information in the hands of the Government should be accessible to the public, unless there is good reason to make it secret, would also be inappropriate. The Commission feels that, while we should progressively advance towards the establishment of an open access to information regime, at a future date, Sri Lanka should currently adopt a regime, that clearly defined what information was secret and establish guidelines in respect of exercise of discretion by Government officials for giving access to other information.

The recommendations of the Law Commission were also subject to the caveat that the right of access to information in the custody, control or possession of the Government should be limited to those who are or are likely to be affected by the decisions made, proceedings taken or acts performed under Statute law.

The Law Commission also developed a number of exceptions under which information which otherwise may be accessed, may be denied. These include the 'defence and foreign policy' exception, 'privacy,' 'law enforcement' and 'finance and taxation' exceptions.

The Law Commission further recommended an enforcement regime that allows the Supreme Court to review denials of access or inadequate access and also a more informal review process through the Parliamentary Commissioner for Administration (Ombudsman) or other appropriate authority.

It becomes thus evident that the Draft Bill was somewhat of a modest nature than what was envisaged in the Report of the Committee on Reform of Laws Affecting Media Freedom. The Draft Bill envisaged a step-by-step approach and a progressive advancement towards a complete liberal regime relating to access to information. The need to strike a delicate balance between free access to information on the one hand, and the overriding interests of the State on the other, particularly in the context of a democracy caught up in an internal armed conflict situation, could have been among the key factors for such a modest approach. (See further discussion below).

Nevertheless, the legislative development process drew in a broad participation of civil society groups, which made a positive contribution to the process, even though it may not have been possible to accommodate all their recommendations.

A critique of the Draft Bill submitted by the Commonwealth Human Rights Initiative, for instance, while welcoming as an extremely positive measure the fact that the Government was considering the enactment of legislation to entrench the right to information made, among others, the following detailed comments on the Draft Bill :

- (i) On the scope of application of the proposed Act, the Draft Bill should not restrict the right of access to "official information" that is in the "possession, custody or control of a public authority." In order to more effectively implement the principle of maximum disclosure, the Bill should confer a more "general right to information," which would only be restricted by those exceptions specifically described in the Draft Bill.

- (ii) The right of access is restricted, in conformity with Article 14(1)(a) of the Constitution, to citizens of Sri Lanka only. The Commonwealth critique recommends that consideration be given to allowing all persons, whether citizens, residents or non-citizens, access to information under the proposed Act.
- (iii) Consideration should be given to extending the coverage of the Act from public authorities only, to enable access to information held by private bodies, which is necessary to exercise or protect a person's rights. This recommendation takes into account the fact that private bodies are increasingly exerting significant influence over policy, especially as a result of outsourcing of public functions and should therefore not be exempt from public scrutiny, because of their private status.

Despite such intensive interaction with civil society, and notwithstanding the gazetting of the Bill, further action for passage through Parliament did not materialise, largely due to intervening political developments, leading to the dissolution of Parliament in 2004. The proposal has since not been revived. Nevertheless, the outcome of this interaction continues to have relevance, not only from a limited historical perspective, but also from the point of view of providing important signposts in any future initiatives to formulate laws on access to information.

It is noteworthy in this regard that the Working Group constituted to formulate a comprehensive Bill of Rights is currently considering the inclusion of an express provision relating to the "right to seek, receive and impart information," in the proposed Bill.

Access To Information And Issues Relating To National Security

Although the term 'national security' constitutes a recognised exception to access to official information, particularly where it concerns information of a sensitive nature having a bearing on military strategy *etcetera* a certain degree of uncertainty surrounds the precise scope of the term 'national security.' This aspect assumes particular importance in countries such as Sri Lanka where the Government is engaged in an on-going internal armed conflict and legislative measures in the form of Emergency Regulations are required to be introduced, *inter-alia*, to protect sensitive military information.

In instances where action taken under such Emergency Regulations have been judicially challenged as being violative of the fundamental right to free speech and expression (though not in the specific context of access to information) the Courts have opted to follow a cautious path and opted to give effect to executive action. This conservative approach is sought to be justified primarily on the ground of the grave threat confronting the State in the context of an armed conflict, and the lack of competence on the part of the Courts to determine sensitive questions involving national security.

Thus for instance in the case of *Sunila Abeysekera v. Ariya Rubasinghe*⁵ which challenged the Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulation, No. 1 of 1998, which prohibits the publication, *inter-alia*, of "any publication pertaining to official conduct, morale, the performance of the Head or any member of the Armed Forces, or the Police Force or of any other person authorised by the Commander in Chief of the Armed Forces, for the purpose of rendering assistance in the preservation

⁵ *Sunila Abeysekera v. Ariya Rubasinghe*, [2000] 1 Sri. L.R. 314.

of national security” as violative of the petitioners freedom of speech, the Court held the regulations to be “framed in reasonably precise terms and confined in their application to defined circumstances” and thus not violative of the freedom of speech of the petitioner. In this case the Court found that there was not only “a proximate and reasonable nexus” between the restriction of the right and the interest of national security, but also that the Regulations passed the test of necessity as well.

Critiques of this judgment and several others, which followed the same line of reasoning, have made the point that the approach of the Court would not have passed the “imminent lawless action” or the “Brandenburg Test” favoured in western jurisprudence. What needs to be appreciated in this regard is that active on-going conflict situations pose a different set of challenges that go beyond a straightforward application of concepts that may serve as a general guide in non-conflict situations.

A more appropriate test is perhaps to be found in the following dicta of the House of Lords in the case of *Conway v. Rimmer*⁶.

When there is a clash between public interest that harm should not be done to the nation or the public service by the disclosure of certain documents and that the administration of justice should not be frustrated by the withholding of them, their production will not be ordered, if the possible injury to the nation or the public service is so grave, that no other interest should be allowed to prevail over it, but where the possible injury is substantially less, the Court must balance against each other, the two public interests involved.

However difficult the challenge, particularly, when issues pertaining to military strategy in on-going conflict situations arise for consideration, in the context of freedom of speech and expression, including the right to information, the above dicta of the House of Lords points to a nuanced judicial approach, requiring a delicate balancing of the contending interests involved.

Current Developments

A statutorily entrenched right to information needs to be buttressed by the ability of the Government to provide information expeditiously. While information and communication technology (ICT) is being increasingly used to carry out this task, the large amount of money, which needs to be expended to provide the infrastructure for such an electronic infrastructure poses severe problems to developing countries like Sri Lanka.

A significant step, which has a bearing on access to information, was taken through the enactment of the Information and Communication Technology Act, No.27 of 2003. This Act as subsequently amended in 2008, provided for the establishment of an Inter-Ministerial Committee on Information and Communication Technology. The Act further provided for the establishment of the Information Communication Technology Agency of Sri Lanka (ICTA), with the authority to develop and implement strategies and programmes on information and communication technology, both in the public and private sectors.

⁶ *Conway v. Rimmer*, [1968] AC 910.

The current work being undertaken by the ICTA through a programme known as “e-Sri Lanka” includes the providing of basic information, on-line to all parts of the country, through access to official web sites of the Government, particularly on developmental issues.⁷ This includes the dissemination of information through ‘information hubs’ located in different parts of the country, in particular the rural areas.

Access to information, which at present is stored and easily disseminated through electronic means, would have little meaning unless the ‘digital divide’ is bridged through capacity building. The ‘e-Sri Lanka programme is geared towards building up the capacity of the society (infrastructure) as well as building up the capacity of individuals (training). The objective of greater access to information through the ‘e-Sri Lanka’ programme is thus geared towards making the access to information a reality to the people by providing the necessary technological capacity. Without such capacity, the concept of access to information would remain an abstract concept to the larger segments of the people of developing countries.

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- <<http://www.gov.lk>>
- <<http://www.icta.lk>>
- <<http://www.documents.gov.lk>>

³ *Sunila Abeysekera v. Ariya Rubasinghe*, [2000] 1 Sri. L.R. 314.

IX. Freedom of Information

AUSTRALIA

History of the FOI Act

The text below contains an extract from: “Annual Report on the Operation of the Freedom of Information Act 1982 for the period 1 December 1982 to 30 June 1983”
(Canberra, AGPS, 1983)

Gareth Evans

First Annual Report - Foreword

Effective freedom of information (FOI) legislation in Australia has been a long time coming. The Freedom of Information Act 1982 had its origins in a 1972 election policy commitment of the Australian Labor Party. Until that time, FOI had scarcely been part of the academic's prescription for administrative reform, let alone part of the political agenda. It is a matter of regret that the relative brevity of the Whitlam government's term of office did not allow the policy commitment to crystallize into legislation.

Subsequently, however, the concept of FOI legislation was also adopted by the Federal Liberal Party and in due course the first FOI Bill in Australia was introduced by the Fraser Government in 1978. The 1978 Bill was exhaustively reviewed by the Senate Standing Committee on Constitutional and Legal Affairs whose 1979 Report resulted in the significantly reshaped legislation which ultimately became the FOI Act 1982.

The FOI Act came into force on 1 December 1982. This is the first Annual Report on the operation of the Act, prepared in compliance with section 93 of the Act, and it deals with the first 7 months operation of the Act to 30 June 1983. Having been personally associated for some time with the campaign for effective freedom of information legislation, and having had the opportunity as a member of the Senate Committee to explore in depth the scope and limits of the concept of freedom of information, it gives me particular pleasure to present this report to the Parliament.

The basic purposes of FOI legislation, and the benefits which it is intended to confer upon the relationship between citizens and government are as follows:

- to improve the quality of decision-making by government agencies in both policy and administrative matters by removing unnecessary secrecy surrounding the decision-making process;
- to enable groups and individuals to be kept informed of the functioning of the decision-making process as it affects them and to know the kinds of criteria that will be applied by government agencies in making those decisions;
- to develop further the quality of political democracy by giving the opportunity to all Australians to participate fully in the political process;
- to enable individuals, except in very limited and exceptional circumstances, to have access to information about them held on government files, so that they may know the basis on which decisions that can fundamentally affect their lives are made and may have the opportunity of correcting information that is untrue or misleading.

Whatever the shortcomings of the 1982 Act - and the FOI Amendment Act 1983 is designed to correct many of them - it was path breaking legislation. The commencement of the Act marked a fundamental change in the law relating to access to official information in the possession of Commonwealth ministers and agencies. That change has two important dimensions. The Act:

- gives members of the public a legally enforceable right of access to official information in documentary form held by ministers and agencies, except where an essential public interest requires confidentiality to be maintained; and
- requires information about the operations of Commonwealth agencies to be made publicly available, particularly rules and practices affecting members of the public in their dealings with those agencies.

The basic concept and objectives of FOI have now been accepted by all major political parties at the Federal level. There remain, however, differences of opinion as to just how far FOI legislation should go in opening up government information to public scrutiny. The reservations expressed about the scope of FOI have been principally of two kinds - first that the resource costs of FOI would outweigh the likely benefits, and secondly that FOI in practice runs counter to the Westminster system of responsible government as it operates in Australia. Those reservations have not only been expressed at the political level but have also been, as is well-known, strongly held within important sections of the Australian Public Service.

Although the FOI Act has now been in operation for a comparatively short period, my own firm view is that the prophecies of doom have not been, and will not be, fulfilled. The exhaustive review process which has preceded the preparation of this report has not turned up any evidence which would suggest that the operation of the FOI Act has had a detrimental effect on our system of Government. Most departments and authorities appear to have responded well to the major changes in procedure and attitude required of them.

The resource implications have been far less serious than was forecast:

- the number of requests for access to documents under the Act has been a fraction of the numbers feared by some departments and authorities when the Bill was before the Senate Committee. Similarly, the fear of a substantial volume of review litigation in the Administrative Appeals Tribunal has not been realized;
- most of the requests have been for documents relating to the personal affairs of the applicant and have been made to the large client-oriented agencies such as the Department of Social Security, the Commissioner of Taxation and the Department of Veterans' Affairs;
- most requests have been dealt with well within the 60 day time limit even though many departments and authorities are still in the learning stage of handling requests.

The fact that less use is being made of the Act than was anticipated suggests that public awareness of the rights created and benefits conferred by the Act is not as great as it should be. It is somewhat less likely but nevertheless possible that those rights are perceived by the public to be overly restricted and therefore not worth pursuing. To date there has been some government publicity, in the form of seminars and brochures, but priority has inevitably been given to ensuring that the Public Service itself was equipped to meet its obligations. The time has now come to give greater priority to increasing public awareness of the Act and to improving its effectiveness.

The Hawke Labor Government was elected on 5 March 1983 with a firm commitment to broadening the rights of citizens under the FOI Act, as part of a policy to implement fully the principles of open government. The starting point for the reform of the FOI legislation was the 1979 Report of the Senate Committee.

On 2 June 1983 I introduced into the Senate the Freedom of Information Amendment Bill 1983. The main changes effected by the Bill, as amended by Parliament and passed by it on 20 October 1983 are:

- a substantial expansion of the scope of the legislation will be achieved by an amendment allowing the public a greater right of access to 'prior documents';
- the special Document Review Tribunal is to be abolished and its functions transferred to the Administrative Appeals Tribunal (AAT);
- where a minister does not adopt the AAT's recommendations in relation to conclusive certificates, he or she will be required to table in the Parliament a statement of reasons for his or her decision not to accept the recommendations;
- an overriding public interest test in favour of disclosure of information will be introduced for several important categories of exemption;
- there is to be a progressive reduction in time to comply with requests from the present 60 days to 30 days by 1 December 1986;
- the Ombudsman will be given an enhanced role including the power, in appropriate cases, to represent applicants before the AAT in FOI matters.

When the 1983 Amendment Bill comes into force it will complete the first phase of the introduction of FOI legislation in Australia. All Australians will then have a statutory right of access to most government-held material which affects them, whether as members of the Australian community, as members of particular interest groups or as individuals. The next phase will be to ensure that Australians become fully aware of these rights, and are able to exercise them as straightforwardly and cheaply as possible.

In December 1985 the Senate Committee will embark on a review of the operation of the Act over the first 3 years. This report and those which will succeed it in 1984 and 1985 should provide invaluable information and analysis to assist the Committee in its work. I take this opportunity to commend the officers of my Department who prepared this report: their care and thoroughness which characterizes the report has similarly enhanced the administration of the FOI legislation since its inception. I hope that this report will be

read with interest by all who have a concern for the development of open government in Australia.

The Philosophy of Freedom of Information - a Key

Element of the 'New Administrative Law'

1.1 Advent of the Freedom of Information Act 1982

1.1.1. The Freedom of Information Act 1982 ('FOI Act') commenced operation in Australia on 1 December 1982 after a gestation period spanning more than a decade. During that period the merits of FOI legislation were discussed in the community at large, considered by a royal commission, two public service committees and a committee of the Parliament. Bills for an FOI Act were debated at length by two successive Parliaments. That debate frequently crossed party lines. The FOI Act in its final form incorporates many amendments made in the course of parliamentary debate. For a single legislative proposal to undergo such extensive processes of preparation, debate, criticism and modification was unusual indeed.

1.1.2. The FOI Act is the first national legislation of its kind to be introduced in a Westminster type system. Its advent marks a major step towards open government in Australia. The FOI Act:

- establishes for the Australian community a legally enforceable right of access to information held by Commonwealth ministers and government agencies, except where an essential public interest or the private or business affairs of persons may require confidentiality to be maintained
- gives Australian citizens and permanent residents the right to request amendment of government-held records relating to their personal affairs that are incomplete, incorrect, out of date, or misleading
- requires agencies to publish information about their organization and functions and the types of documents they hold and to make available manuals, rules, guidelines and precedents used in making internal decisions affecting the public.

The Act is not a code of access to information and does not prevent or discourage the giving of access - it sets a minimum not a maximum standard.

1.1.3. Because of the new ground broken by the FOI Act, the level of public interest in it and the fact that this is the first annual report on its operation, the opening two chapters are devoted to the origins of the Act. This Chapter looks at the broad principles and basic premises on which the case for open government was built and examines how events and

circumstances over the last decade gave rise to progressively increasing access to information and documents held by governments. The second Chapter traces the history of FOI legislation proposals in Australia to explain how the Act came to be passed in its present form. Later chapters go on to deal with implementation and co-ordination arrangements (Chapter 3), use of the legislation (Chapter 4), use of exemptions (Chapter 5), impact of the Act (Chapter 6) and future directions (Chapter 7).

1.2 Philosophic issues

1.2.1. The philosophy underlying the legislation is that:

- when government is more open to public scrutiny it becomes more accountable
- if people are adequately informed and have access to information, there is likely to be more public participation in the policy-making process and in government itself
- groups and individuals who are affected by government decisions should know the criteria applied in making those decisions
- every individual has a right:
 - to know what information is held in government records about him or her personally subject to certain exemptions to protect essential public interests
 - to inspect files held about or relating to him or her
 - to have inaccurate material on file corrected.

The Senate Standing Committee on Constitutional and Legal Affairs ('Senate Committee') examined the background and operation of these principles in its 1979 report on the Freedom of Information Bill 1978 ('Senate Committee Report').

1.2.2. Against a background of governments having an increasingly greater impact on the lives of individuals, groups and corporations, the inadequacy of traditional forms of accountability has now been widely recognised in Australia. At the Federal level, all major political parties agree that members of our community must have adequate access to information in order to make valid judgments about government policy and to exercise effectively their choice as to who should govern them. The Senate Committee said:

'The essence of democratic government lies in the ability of people to make choices: about who shall govern; or about which policies they support or reject. Such choices cannot be properly made unless adequate information is available. It cannot be accepted that it is the Government itself which should determine what level of information is to be regarded as adequate.'

1.2.3. The greater the extent of open government, the more effective is the opportunity for participation by individuals, groups and the community generally in important political decisions before they are made and for public understanding and acceptance of

decisions after they have been taken. Public debate on issues and policies and substantial community participation in the processes of policy-making and government itself, establish essential dialogue between government and those affected by its decisions.

1.2.4. Since activities of modern governments so closely affect the lives of individuals in fields such as social security, repatriation, health, immigration and citizenship, it is also important that people should have access to information concerning them held in government records. It follows that people should be entitled to inspect government-held documents relating to them and to have those documents corrected if they are inaccurate. False or misleading information about individuals can have serious effects on their lives and should be subject to prompt amendment at the instance of the person affected.

1.2.5. An FOI statute should enable members of the public to exercise their rights effectively and to know what their obligations are. The internal rules, policies and guidelines of departments and agencies which affect, in important ways, the outcome of discretionary decisions made under legislative and administrative schemes should be readily available. Examples are manuals and guidelines concerning social security and repatriation benefits, legal aid and housing grants.

1.2.6. FOI legislation ensures greater accountability of public servants to their ministers and to the public. But if it is to be soundly based, such legislation must achieve a proper balance between, on the one hand, the rights of members of the community to obtain access to information and, on the other, the need for confidentiality in the innermost workings of government and the need to protect essential public and private interests. Where that balance should lie is the issue which has attracted most of the debate on FOI legislation.

1.2.7. Proposals for FOI legislation in Australia initially raised fears that it would be incompatible with a number of features of our system of government and create excessive pressures on public resources. The Senate Committee identified these features as:

- collective ministerial responsibility ('Cabinet solidarity') which was said to require all ministers to consider themselves equally responsible for and bound by the decisions of the executive government
- individual ministerial responsibility, which was said to hold each minister personally responsible for all decisions made and carried out by his or her department
- a politically neutral public service in no way involved in partisan controversies, which was said to be able to serve any government with an equal degree of loyalty and efficiency regardless of the government's political persuasion
- personal anonymity of members of the public service (as far as possible), so that particular views are neither ascribed to individual public servants or seen to be at variance with the views ultimately expressed by the executive government.

1.2.8. After carefully examining the arguments advanced by those raising fears about the impact of FOI legislation on our system of government, the Senate Committee concluded:

'We value the Westminster system of government; we do not seek to change it; nor do we believe effective freedom of information legislation would change it. A great deal of the talk about the Westminster system and how it would be altered by freedom of information legislation has been obscure and misleading. To a great extent the term 'Westminster system' has been used as a smoke - screen behind which to hide, and with which to cover up existing practices of unnecessary secrecy. Very often people have alleged that the Westminster system is under attack by freedom of information legislation when what is actually under attack is their own traditional and convenient way of doing things, immune from public gaze and scrutiny. We are indeed seeking to put an end to that. What matters is not the convenience of ministers or public servants, but what contributes to better government. The only feature of the Westminster system which cannot be in any way modified without fundamentally subverting that system is the need to ensure that members of the Executive Government are part of, and drawn from, the Legislature. Freedom of information legislation does not alter this one iota. The other features of the Westminster system which we have identified will either not be significantly changed by our freedom of information proposals or else will, we believe, be changed for the better.

1.2.9. Excessive secrecy in matters of government has its roots in the English tradition (established at the time when royal officials were subordinate to the person of the monarch) that official information was the property of the Crown which the Crown could disclose or withhold at will.

1.2.10. Over time, secrecy in official decision-making extended to the detail of government administration. As government activities and institutions grew in size and complexity the concepts applied in earlier ages to the conduct of great affairs of State came to be applied to a broad range of the administrative acts carried out today by modern governments. Judicial attitudes to secrecy were reflected in observations such as:

'To set up any rule that [the challenged] decision must on demand, and as matter of right, be accompanied by a disclosure of what went before, so that it may be weakened or strengthened or judged thereby, would be inconsistent, as I say, the efficiency, with practice, and with the true theory of complete parliamentary responsibility for departmental action'

and more directly -

'The counsels of the Crown are secret and an inquiry into the grounds upon which the advice tendered proceeds may not be made for the purpose of invalidating the act formally done in the name of the Crown . . . '

It was not until recently that this tradition of official secrecy came to be questioned and challenged at the popular and political levels.

1.3 Judicial developments towards more open government

1.3.1. In the last 20 years in Australia and elsewhere there has been a significant trend in judicial decisions towards greater access to official information and more open government. One important aspect of this trend has been the re-emergence and substantial development of the concept of natural justice and, in particular, of the right of a person whose rights or legitimate expectations are in issue to know the case against him or her.

1.3.2. Another aspect of the same trend has been the change in attitude of the courts to what used to be known as 'Crown privilege'. Decisions such as *Conway v. Rimmer* 1 and *Sankey v. Whitlam* have established that it is the duty of the court and not the privilege of executive government to decide whether a Crown document will be produced or withheld in court proceedings. The test is whether the public interest in the administration of justice outweighs any public interest in withholding the documents. The emphasis has shifted from the privilege of the Crown to a privilege from disclosure based on the public interest involved.

1.3.3. At issue in *Sankey v Whitlam* was whether Crown privilege protected certain Cabinet documents, Executive Council documents, documents recording the deliberations of Cabinet ministers, the advice given by heads of Commonwealth departments, Loan Council documents and various inter-departmental and inter-ministerial documents from production in criminal proceedings. The documents were, in the main, concerned with the very highest levels of executive government. The High Court held that only the Loan Council documents were privileged and then only privileged in part. It ordered all documents to be produced including parts of the Loan Council documents.

1.3.4. *Commonwealth v John Fairfax & Sons Ltd & Ors* was the first major Australian case seeking the prevention of publication of sensitive government documents relating to Australia's national security and foreign policy. The Commonwealth succeeded on the grounds that publication would be an infringement of copyright, but failed on an alternate ground that publication would constitute a disclosure of confidential information contrary to the public interest. The High Court said:

'But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be are restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action. '

and

'If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality.'

1.3.5. The Court found that the contents of some of the documents in issue could, if published, embarrass Australia's relations with other countries and consequently affect their willingness to make available defence and diplomatic information on a confidential basis. However, it was not persuaded that the degree of potential embarrassment to Australia's foreign relations was enough to justify the Court preventing publication.

1.3.6. Although the extent of the protection the courts have been willing to give to maintaining candid advice appears to have diminished the issue is still very much alive. It is interesting to note in this context the comments of the Governor-General, Sir Ninian Stephen, in an address to a seminar on FOI delivered on 27 May 1983, 5 years after his judgment as a member of the Court in *Sankey v Whitlam*:

'This is not, for a moment, to deny the virtue of open government but only to suggest that there may be limits to frankness which our own earthy natures impose and beyond which we go at our peril.

'Perhaps an instance of this occurs in the case of what used to be a proper consideration when Crown privilege was claimed for classes of documents. It was said that if Crown privilege did not apply to certain classes of documents public servants would not feel free to express candidly their views, particularly their advice to Ministers. In *Sankey v. Whitlam* I rejected this consideration, sharing Lord Radcliffe's view that Crown servants were, or perhaps should be encouraged to be, "Made of sterner stuff". I am now not sure whether that was not to some extent a perfectionist view, perhaps not according sufficient weight to human failings.

1.3.7. It can no longer be expected that immunity from production of a document in legal proceedings will be granted merely because it is a Cabinet minute, or contains a high level communication between a minister and his or her senior advisors. It must be shown that to disclose the documents in question in the course of the particular judicial proceedings will be contrary to the balance of the public interest.

1.4 Political and administrative changes towards open government in Australia

1.4.1. Changes in judicial attitudes have been paralleled by changes in administrative practices. Developments have included:

- extensive and detailed use by parliamentarians of questions on notice to elicit information

- an expansion of the role of parliamentary committees (including standing committees, select committees and estimates committees)
- the regular appearance of senior public servants before these committees where quite free exchanges of opinion and information occur
- wide-ranging royal commissions and committees of inquiry
- publication of annual reports by departments and statutory authorities
- public release of reports by a range of advisory bodies such as the Industries Assistance Commission
- the repeal in 1974 of Regulation 34(b) of the Public Service Regulations (the statutory restriction on public comment by public servants on any administrative action or the administration of any department)
- canvassing in the press, Parliament and elsewhere of the views of senior public servants
- greater participation of public servants in public affairs e.g. public addresses and regular dealings with representatives of industry and interest groups
- alterations to decision-making processes e.g. environmental impact statement procedure, regular public hearings by the Australian Broadcasting Tribunal
- the tabling in Parliament of official documents (e.g., the tabling, on 22 September 1982, of documents revealing exchanges between the Commissioner of Taxation and the Treasurer and between ministers on taxation policy.)

1.5. Reforms in other areas of administrative law

1.5.1. The most substantial changes have come through statutory reforms in Commonwealth administrative law, an important aim of which has been to draw back the veil of official secrecy in administrative decision-making. This has been achieved by new provisions requiring reasons for decisions and by making decisions more open to review.

1.5.2. At common law, the means of review available to a citizen aggrieved by an administrative decision were generally technical, cumbersome and costly. In many cases there was no opportunity at all for review on the merits. There was an obvious need for more effective and accessible forms of redress and review. Three Commonwealth Acts, the Administrative Appeals Tribunal Act 1975, the Ombudsman Act 1976 and the Administrative Decisions (Judicial Review) Act 1977 have provided new mechanisms of redress and review of Commonwealth administrative action. Together they are referred to as 'the new Commonwealth administrative law'.

1.5.3. The Administrative Appeals Tribunal Act 1975 established a new high level independent tribunal, the Administrative Appeals Tribunal ('AAT'), with jurisdiction to review on the merits a wide range of decisions made by ministers, public servants, statutory authorities and various tribunals. Jurisdiction is conferred on the AAT by over 140 Commonwealth Acts and regulations. This jurisdiction is being continually expanded.

1.5.4. Under the Administrative Decisions (Judicial Review) Act 1977 the lawfulness of Commonwealth administrative decisions may be reviewed by a new and simple procedure in the Federal Court of Australia.

1.5.5. The Administrative Appeals Tribunal Act 1975 and the Administrative Decisions (Judicial Review) Act 1977 both contain provisions enabling those who are entitled to seek a review of an administrative decision under those Acts to obtain a written statement setting out the reasons for the decision.

1.5.6. A more informal avenue of complaint is to the Commonwealth Ombudsman established by the Ombudsman Act 1976. He has wide powers to investigate administrative acts and recommend remedial action, including the power to report to the Prime Minister and the Parliament.

1.5.7. Taken together, the Administrative Appeals Tribunal Act 1975, the Ombudsman Act 1976 and the Administrative Decisions (Judicial Review) Act 1977 have substantially advanced Australia's progress towards open government by creating rights to reasons for decisions and establishing more effective mechanisms for the review of administrative action.

1.5.8. The Freedom of Information Act 1982 is a key element in this package. By providing a general right of access to documents on the basis that:

- the right of the Australian community to information in the possession of the Commonwealth Government should be extended as far as possible
- the Government must justify withholding access rather than the applicant justify his or her case for access
- there should be provision for a review of decisions to withhold access and a mechanism for amendment of government-held personal records,

the Act makes its own substantial contribution to the further evolution of open government in Australia.

History of the Freedom of Information Act 1982

2.1 Introduction

2.1.1. Chapter 1 looked at the principles and basic premises of FOI. This Chapter outlines the history of proposals for FOI legislation in Australia culminating in the Freedom of Information Act 1982 and the Freedom of Information Amendment Bill 1983.

2.1.2. The first political commitment to enact FOI legislation in Australia was made during the 1972 election-campaign by the then Opposition Leader, Mr E.G. Whitlam, Q.C., M.P.. In his policy speech he stated:

'A Labor Government will introduce a Freedom of Information Act along the lines of the United States legislation. This Act will make mandatory the publication of certain kinds of information and establish the general principle that everything must be released unless it falls within certain clearly defined exemptions. Every Australian citizen will have a statutory right to take legal action to challenge the withholding of public information by the Government or its agencies.

2.1.3. The United States Freedom of Information Act 1966 had commenced operation on Independence Day 1967. The scheme of the Act was that :

- Congress specified that access be given to all documents other than those falling within certain classes where on grounds of public policy there should be no right of access
- the final decision as to whether a particular document fell in one or more of the exempt classes was left to the courts
- the agency concerned had the final power to decide whether access would be given to a document in an exempt class.

The Act contained 9 categories of exempt documents, namely:

- those specifically authorised under criteria established by an Executive order to be kept secret in the interest of national defence or foreign policy and which are in fact properly classified pursuant to such Executive order
- those related solely to the internal personnel rules and practices of an agency
- those specifically exempted from disclosure by statute
- trade secrets and commercial or financial information obtained from a person which is privileged or confidential
- inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency
- personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy
- certain investigatory records compiled for law enforcement purposes
- certain documents prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions
- geological and geophysical information and data, including maps, concerning wells.

2.2 First Interdepartmental committee (1973-1974)

2.2.1. Following the election of a Labor Government at the December 1972 general election, the then Attorney-General, Senator the Hon. Lionel Murphy, Q.C., (now Mr Justice Murphy) announced on 10 January 1973 that the Government had decided to take action to ensure that undue secrecy in public affairs should be avoided and that a proper flow of information should be achieved. He said that the legislation would be along the lines of the system in operation in the United States of America under the Freedom of

Information Act. However, modifications would be required to adapt the American system to the Australian constitutional and administrative structure. An interdepartmental committee ('IDC') was established to identify the modifications required and any important issues involved in adapting the United States legislation to Australian circumstances.

2.2.2. The report of the IDC was completed in September 1974 and tabled in Parliament on 5 December 1974 ('1974 Report'). The principal recommendations were that the scheme of the United States Act be modified:

- to ensure confidentiality of Cabinet discussions and of consultations between ministers
- to maintain the authority of ministers over departments for which they are responsible.

These two features of Cabinet government and ministerial responsibility distinguish the Australian constitutional and administrative structure from that of the United States and, together with the issue of resource costs of FOI, have pervaded all subsequent debate on the development of FOI legislation in Australia.

2.2.3. The legislation proposed by the IDC was based upon the fundamental proposition that a person has an enforceable right of access to an official document without showing special interest or need. However, the IOC considered that the realities of ministerial responsibility and the need for confidentiality in some areas of Government operations required that certain categories of documents should be specifically exempted by statute from the requirement of disclosure. These were:

- documents conclusively certified by a minister to be excluded from the Act (national security, defence, foreign or Commonwealth/State relations, and information received in confidence from foreign governments). In the case of Cabinet documents, the IDC favoured conclusive certificates, but left the question open for further consideration
- documents the disclosure of which is prohibited by statute
- documents containing matter in the nature of opinions, advice or recommendations and other material reflecting deliberative or policy-making processes
- drafts of documents and documents not brought into the final form for which they were prepared
- documents the disclosure of which would be reasonably likely to have a substantial adverse effect on
 - the financial, property or personnel management interest or operations of a department
 - the position of a department in negotiations or in legal proceedings

- the suppression of criminal activities and the enforcement of the law
- documents the disclosure of which would
 - constitute an unreasonable invasion of personal privacy
 - reveal trade secrets or other commercial or financial information that would expose a commercial or financial enterprise unreasonably to disadvantage
 - otherwise constitute a breach of confidence by revealing material obtained in confidence.

In respect of exempt documents other than those the subject of conclusive certificates, the IDC recommended that an appeal lie to the then proposed AAT on the question of whether the document is exempt.

2.2.4. Where a document was within an exempt category the IDC felt that the document could, as a matter of discretion, be released by the minister or authorized officer, unless the document was required by law to be kept secret.

2.2.5. There was little public comment on the 1974 Report and the Government received only 7 submissions on the proposals. These were from 1 trade union and 1 trade union peak council, 3 public interest groups, a minor political party and an individual. While tending to favour the idea of FOI legislation they also raised a number of criticisms of the Report, including:

- its brevity and its failure to discuss important procedural amendments made to the United States Act in 1974
- the proposed legislation was prospective only and gave no right of access to 'prior documents' 1
- ministerial discretion to withhold certain classes of documents would not be reviewable
- the exemption of Cabinet documents was too wide and the internal working document exemption undesirable
- publication of departmental manuals and the like should be required.

No action was taken on the 1974 Report prior to the 1975 general election.

2.3 Second interdepartmental committee (1976)

2.3.1. Following the election of the Liberal-National Country Party Government in December 1975, the then Prime Minister, the Hon. J.M. Fraser, M.P., established a further inter-departmental committee ('1976 IDC') to study and report to the Attorney-General on policy proposals for FOI legislation, taking into account, among other things, the 1974 Report and the implications of amendments to the United States FOI Act made in 1974 but not dealt with in the 1974 Report. The Prime Minister explained the new

Government's support for FOI legislation at an address to mark the 50th anniversary of 'The Canberra Times' on 22 September 1976:

'If the Australian electorate is to be able to make valid judgments on government policy it should have the greatest access to information possible. How can any community progress without continuing an informed and intelligent debate? How can there be debate without information?'¹

2.3.2. The report by the 1976 IDC ('1976 Report'), was tabled in Parliament on 9 December 1976. The 1976 Report became the basis for the Freedom of Information Bill 1978 (see para 2.5 below). Its proposals substantially developed the cryptic outline of legislative proposals contained in the 1974 Report. They were based on the same principle that a person should have a legally enforceable right of access to any identifiable document in the possession of a department unless the document was in an exempt category.

2.3.3. The 1976 Report took a much stronger stand than that taken in the 1974 Report on the issue of conclusive certificates and the range of matters to be covered by them. It concluded that no public access should be given to the proceedings of Cabinet or to the advice and consultation between a minister and his or her department. Further, ministers and not courts or independent tribunals were to have final responsibility for determining whether release of a document would be prejudicial to national security, defence, international relations or Commonwealth/State relations.

2.3.4. The main differences in detail between the 1976 IDC proposals and the 1974 IDC proposals were:

- a new exemption for documents the disclosure of which would otherwise be in contempt of court or infringe Parliamentary privilege
- the exemption for investigatory records compiled for law enforcement purposes was more specifically and comprehensively defined
- a new exemption in respect of documents the disclosure of which would be reasonably likely to have a substantial adverse effect on the public interest in the efficient and economical operations of a department
- the Attorney General was to be able to certify that a document should be withheld on a ground of public interest such as would support a claim of crown privilege for the document in judicial proceedings (review was to lie to the AAT on the question of whether the particular document might be made available without damage to the public interest)
- deferral of access was to be permitted where deferral was in the public interest or reasonably necessary to permit normal administrative action or action required by statute before access was granted (appeal was to lie to the AAT)
- where it was reasonably practicable to delete or excise exempt matter, a copy of the document with the exempt material excised was to be made available (appeal was to lie to the AAT)

- departments were to be authorised to impose charges on the basis of direct cost of search and, where appropriate, copying. Charges were to be prescribed by regulation. No charge was to be made where a request was not met (AAT to have jurisdiction to review questions relating to charges)
- time limits on the access decision were not to be fixed for the present on the basis that powers given to the ombudsman under the ombudsman Act 1976 should be adequate to prevent undue delay
- departments were to be required to make available to the public

- interpretations of statutory provisions administered by a department and used in deciding questions of rights, privileges, benefits or obligations under those provisions

- staff manuals and other rules of procedure used to guide officials in carrying out their duties

- written decisions given in the exercise of a statutory discretion or other adjudicative functions where these have general application to future cases.

2.3.5. The 1976 Report also addressed the questions of cost of administration and impact on departmental resources, in an attempt to avoid some of the administrative dislocations that had occurred in some United States agencies. These issues had not been addressed in the 1974 Report. The 1976 IDC identified a number of types of costs that would be incurred under an FOI scheme but produced no quantitative predictions. These anticipated costs were:

- re-organization costs - new procedures for handling requests, staff training, publication of departmental manuals, initial publicity on how to make requests
- recurrent costs each time a document is requested search time, ascertaining whether an exemption should be claimed, whether exempt portions could be deleted, cost of actually making documents available, provision and maintenance of facilities for inspection and salary costs of decision-makers, especially as refusal would be likely to be made at a senior level, costs of providing advice to agencies, staff training programs.

2.3.6. The IDC found it impossible to predict the likely workload. It saw it as depending on factors such as the amount of publicity given, topical issues of the day and the type and complexity of requests. It considered that total costs would have to recognise that many requests for documents will be met in the future, as in the past, with or without a legislative scheme and so only those costs that arose from the additional volume of requests would be relevant. The 1976 IDC proposals sought to avoid some of the most expensive and administratively burdensome features of the United States FOI Act by not recommending the introduction of specific time limits and making less onerous proposals for publication of departmental rules.

2.3.7. As with the 1974 Report, only a few submissions on the 1976 Report were received, in this case from organizations such as the Associated Chambers of Manufacturers of Australia, the Council of Australian Government Employee Organizations and a number of FOI legislation lobby groups. However, the Report appeared to generate much more press and public interest. The Report was criticized for proposing legislation that would unnecessarily restrict the public right of access to documents. It was seen as weighted unduly in favour of administrative convenience. Other critics felt it failed to articulate the reasons why FOI legislation was necessary.

2.4 Royal Commission on Australian Government Administration

2.4.1. Concurrently with debate on the 1974 Report and the preparation of the 1976 Report, the Royal Commission on Australian Government Administration examined, amongst others matters, aspects of the availability of government information. Its Report tabled in Parliament on 18 August 1976 included a Minority Report of Commissioner Paul Munro containing a draft FOI bill and explanatory memorandum. The Commission itself felt it was inappropriate either to endorse or to recommend a specific draft bill. However, it did urge greater openness and freedom of access to information about governmental processes, and agreed that legislation could well contribute to those objectives. The draft bill supported by Commissioner Munro went much further than either of the IDC reports in requiring agencies to respond to public requests for information.

2.4.2. The main distinguishing features of the Minority Report Bill can be summarised as:

- narrow exemptions, some of which listed criteria favouring disclosure that must be considered by an agency
- none of the exemptions were conclusive the AAT was to have a general power to order that any exempt document should be released in the public interest
- a general Index of available documents to be prepared by each agency
- requests to be answered within 10 working days, and charges to be regulated by criteria in the Act
- a wide range of powers to be conferred on the AAT, e.g. to award costs against the Government or decide that no charge be levied for a document decided on review not to be exempt.

2.5 Freedom of Information Bill 1978

2.5.1. On 9 June 1978 the Freedom of Information Bill 1978 was introduced into the Senate by the then Attorney-General, Senator the Hon. P.D. Durack, Q.C., with the following remarks:

"The Freedom of Information Bill represents a major initiative by the Government in its program of administrative law reform. It is, in many respects, a unique initiative. Although a number of countries have freedom of information legislation, this is the first occasion on which a Westminster-style government has

brought forward such a measure. This Bill, together with the Archives Bill, which is the responsibility of my colleague the minister for Home Affairs ..., will establish for members of the public legally enforceable rights of access to information in documentary form held by Ministers and Government agencies except where an overriding interest may require confidentiality to be maintained.

2.5.2. The Bill was substantially based on the proposals of the 1976 IDC. The Bill applied to all Commonwealth departments and agencies but not to Parliament or the courts. Agencies could be excluded from the Bill by regulation, either entirely or as to certain functions and a regulation so made would be subject to disallowance by either House of the Parliament.

2.5.3. A minister who had a document in his or her possession relating to the affairs of an agency was required to allow access to that document unless the document was exempt or contained matter not relating to the affairs of an agency. However, the legislation did not apply to documents relating to party matters or to a minister in his or her capacity as a member of Parliament.

2.5.4. The Bill exempted the following categories of documents from production:

- documents conclusively certified as exempt by a minister or an official responsible to the minister (documents affecting national security, defence, international relations and relations with the States, Cabinet documents, Executive Council documents and internal working documents)
- documents affecting enforcement or administration of the law
- documents to which secrecy provisions of other legislation applied
- documents the disclosure of which would have a substantial adverse affect on the financial, property or staff management interests of the Commonwealth or an agency, or on the efficient and economical conduct of the affairs of an agency
- documents affecting personal privacy
- documents affecting legal proceedings or subject to legal professional privilege
- documents containing trade secrets or other commercially sensitive information
- documents affecting the national economy
- documents containing material obtained in confidence
- documents the disclosure of which would be in contempt of Parliament or in contempt of court
- documents certified by the Attorney-General as ones which could be protected by crown privilege if sought in legal proceedings and which should not be disclosed in the public interest.

2.5.5 The Bill required that denial of access to a document be accompanied by a statement of reasons for that denial. Only part of the information in a document being exempt material would justify denying access to the document but wherever practicable a copy of the document with that exempt matter deleted was to be produced and made available.

2.5.6. Procedures for gaining access to documents were kept as simple as possible. A request for access did not have to be in any particular form. However, if an applicant wished to insist on a 60 day time limit for a response to his or her request that request was required to be identified as being made under the Act and was required to be sent to the agency concerned at a prescribed address.

2.5.7. A person whose request was not dealt with promptly could:

- Complain to the Ombudsman if he or she thought there had been undue delay, even though the 60 day time limit had not expired
- appeal to the AAT after 60 days on the basis that the AAT would deal with the matter as if the request had been refused and could allow the agency further time.

2.5.8. A person who was refused access to a document could appeal to the AAT, except where a conclusive certificate had been issued. The AAT was to decide whether the document concerned was within an exempt category but was not to have power to give access to an exempt document.

2.5.9. Dealing with FOI requests was expected to have a significant impact on agency resources. The Bill attempted to strike a balance in the application of these resources. This was expressed in a number of provisions of the Bill:

- the Bill did not apply generally to documents in existence and in the possession of agencies before it came into operation, except departmental manuals and the like
- the Bill did not require agencies to make available information that was not already in documentary form except in two cases. The first was in relation to publication of material under Part II of the Bill (statements about agencies' organization, functions, powers, types of documents held or used in decision making, the second related to the obligation to provide computer printouts of information stored in computers or to provide transcripts of sound recordings)
- the Bill required an applicant for access to a document, in consultation if necessary with the agency concerned, to provide a reasonable identification of the document sought. This provision was intended both to assist applicants in making their requests and to eliminate 'fishing' expeditions into the files of agencies
- the requirement to give a decision on a request as soon as practicable but in any event within 60 days represented a compromise between the desirability of early decisions and the diversion of resources that would be required to meet shorter time limits.

2.5.10. At the same time as the 1978 Bill was presented to the Senate, Senator Durack tabled, on behalf of the then Government, a ministerial statement on access to official information. The statement canvassed the other steps which had been taken to provide access to official information through the mechanisms of the Ombudsman, the AAT and the Administrative Decisions (Judicial Review) Act 1977, as well as by administrative measures.

2.5.11. A number of criticisms were made of the 1978 Bill shortly after its introduction. Among the more important were :

- the Bill left decisions on requests in the hands of public servants who had an interest in preventing access
- there should be right of Appeal against a refusal in all cases
- the Cabinet documents exemption was too broad; Federal/State relations should not be an exemption; the internal working documents exemption only served to protect the bureaucracy; and a public servant wielding a secrecy stamp could prevent access to a document
- the Bill gave no right of access to 'prior documents',
- the 60 day time limit for replying to requests for access was too long
- the legislation would impose substantial burdens on departments, particularly in view of budget restrictions and staff ceilings.

2.5.12. Late in 1978 the Attorney-General's-Department published a booklet which set out, among other things, the main criticisms of the Bill, explanations and answers.

2.6 Senate Standing Committee on Constitutional and Legal Affairs

2.6.1. On 28 September 1978 the Senate referred the Freedom of Information Bill 1978 and the public access provisions of the Archives Bill 1978 to the Senate Standing Committee on Constitutional and Legal Affairs ('the Senate Committee') for detailed examination and report.

2.6.2. The Senate Committee undertook an extensive inquiry and received almost 170 submissions from individuals and organizations. In addition it sought elaboration of written submissions through 16 public hearings throughout Australia attended by 52 organizations and 13 private individuals. A total of 129 witnesses appeared.

2.6.3. The Senate Committee presented its comprehensive report to the Senate on 6 November 1979. the Report canvassed in detail many of the issues associated with access to official information and made 106 recommendations in relation to the 1978 Bill and the associated Archives Bill 1978. The Committee's main recommendations in relation to the 1978 Bill were:

Agency Publications

- expansion of the range of information directories, indexes, manuals and 'internal law' required to be made available by agencies and these to be updated quarterly rather than annually

Implementation

- substantial training, guidance and publicity work to be undertaken

- imposition of a responsibility on agencies to make the maximum amount of Information available promptly and inexpensively
- agencies to have 60 days to respond to requests, reducing to 45 days after 2 years and 30 days after 4 years, with further reduction subject to future review
- refusal of access on administrative grounds to be based on a substantial and unreasonable burden on agency operations or ministerial functions
- revision of the Protective Security Handbook
- establishment of reading rooms and other inspection facilities
- a scheme of charges and fees designed to minimize charges to applicants and enable remission of charges

Personal affairs

- access to be given to 'prior documents' relating to the personal affairs of the applicant
- access to be given to all other prior documents up to 5 years old at the time of proclamation (right of access not to be effective until 1 year after proclamation) with access to documents up to 30 years old being progressively given by subsequent amendments to the Act whenever administratively possible
- creation of a right for Australian citizens and permanent residents to have corrected inaccurate or misleading information about themselves in official records

Exemptions/exclusions

- Commonwealth/State relations exemption to include a public interest test and be reviewable by the AAT
- the scope of conclusive certificates to be significantly narrowed and the way opened for a right of appeal to the AAT in relation to documents affecting security, defence and international relations, Cabinet and Executive Council documents and internal working documents
- secrecy provisions after enactment to be subject to Parliamentary scrutiny and prescribed under the Bill with urgent consideration to be given to limiting the statutory prohibitions on disclosure of official information
- deletion of the breach of confidence and the 'substantial adverse affect on the national economy' exemptions
- Parliamentary control over the exclusion of agencies or of the activities of agencies

Reverse FOI

- the incorporation of a reverse-FOI procedure with appeal to the AAT in respect of the business affairs exemption

Ombudsman

- substantial expansion of the Ombudsman's powers to investigate ministerial decisions, act as counsel before the AAT on behalf of any applicant, advise agencies about their obligations under the Act and oversee administration of the Act, calling attention to misbehaviour or maladministration in FOI matters

Review and appeal

- various amendments to enhance the position of an applicant to the AAT including a power in the AAT to award costs in favour of the applicant and to extend its jurisdiction to review the merits of exemption claims

Monitoring

- A group of recommendations was also made for detailed administrative monitoring of the implementation and operation of the Act and Parliamentary monitoring by way of annual reports and a review by the Senate Committee after 3 years' operation.

2.6.4. The Senate Committee also undertook an extensive evaluation of the resource implications of the 1978 Bill both as drafted and in the form to which the Committee proposed that it be amended. It was assisted by the Public Service Board which, at the Committee's request and in consultation with it, surveyed the responses of 37 departments and agencies to a resources impact questionnaire. The Committee also examined a number of witnesses on the likely impact of the legislation on Commonwealth administration and in relation to overseas experience with similar legislation, particularly in the United States. On the resources question, the Committee concluded that:

- there was almost universal uncertainty about the expected extent of utilisation of the Act, and it was not possible to predict the resource consequences of the 1978 Bill with any precision
- agency estimates of the net resource consequences of the 1978 Bill had tended to over state the likely extent of the problem, particularly in the area of expected utilization of the Act
- systematic training and development should not be especially costly
- off setting savings should flow from better information keeping and management within government; savings could also result from improving the effectiveness of existing departmental information services and bringing procedures into line with those associated with FOI
- by bringing forward the Bill, the Government had implicitly accepted responsibility for providing necessary resources to make it work effectively

The Committee acknowledged that the changes proposed to the Bill would have resources effects, particularly in the area of 'Prior documents' and reduction of response time. However, it considered that phasing-in should minimise these and that other

changes proposed such as the establishment of more far-reaching review and appeal procedures would not significantly increase resource demands.

2.7 The Fraser Government's response to the Senate Committee's recommendations

2.7.1. The Fraser Government's response to the Senate Committee's Report was tabled in the Senate on 11 September 1980. The response was to accept some recommendations but reject the majority. Recommendations that were rejected included those for the restriction of the system of conclusive certificates, and those that seemed to require a substantial increase in the commitment of resources. However, the Government agreed that there was much in the report which would lead to improvements in the Bill and in the administration of the legislation. It undertook to include these improvements in proposed Government amendments to the Bill. The Government's intention was that there should be a period of experience in working with the legislation and that it should be reviewed by the Senate Committee after 3 years.

2.7.2. Important aspects of the former Government's response to the Committee's proposals included:

Agency publications

- accepted that agencies should be required to publish particulars of FOI access procedures and points of contact, however other additional information sought could be made available by administrative direction without any statutory obligation
- statutory expansion of categories of internal law unnecessary - publication and indexing already required by the terms of the Bill as they stood
- no reduction in index - updating requirement for 'internal law' from 12 monthly to 3 monthly, but agencies will be encouraged to update more frequently where reasonable and efficient to do so.

Implementation

- progressive reduction of response time from 60 to 45 days after 2 years and 30 days after 4 years with further reductions subject to future review accepted in principle. The Government was not prepared to adopt a rigid timetable at that stage, however it was prepared to amend the Bill to allow response time to be reduced by regulation in the future
- the question of appropriate charges and fees would be dealt with by Regulations and consideration would be given to reduction or waiver of fees at that time

Personal affairs

- no phased-in right of access to 'prior documents' or scheme for amending personal records because of the likely administrative burden on agencies. The Government was prepared to reconsider the position after the 3 year review

- no final decision on issues of access of an individual to documents containing information relating to that person until the Law Reform Commission had reported on the whole question of privacy.

Exemptions/exclusions

- deletion of the breach of confidence, Crown privilege and protection of the national economy exemptions was rejected; however the Government was prepared to review the scope of the national economy exemption
- no public interest test or appeal to the AAT with the Commonwealth/State relations exemption; differences of opinion to be resolved at the political level and not by legal procedures
- parliamentary control over the exclusion of agencies was accepted

Reverse FOI

- scheme governing the response of agencies to requests for sensitive business documents accepted

Ombudsman

- expansion of Ombudsman's role accepted to the extent of ensuring that the Ombudsman could investigate a complaint where there was also a right of appeal to the AAT, but otherwise rejected on the basis that his powers ought to be sufficient and that in any event the Ombudsman's role was in the process of being reviewed and reported on by the Administrative Review Council

Review and appeal

- broader review powers for the AAT rejected on the grounds that final decisions on Cabinet and Executive Council documents, internal working documents and on other exempt documents in the areas of defence and national security, the conduct of international relations and the maintenance of proper relations between Commonwealth and State Governments, should rest with ministers and officials who are responsible to them, with Parliament as the proper forum for challenge

Monitoring

- proposals accepted in principle, however implementation to be by administrative arrangement, not statutory requirement.

2.8 Freedom of Information Act 1982

2.8.1. The Fraser Government introduced the revised FOI Bill into the Senate on 2 April 1981 ('the 1981 Bill'). The 1981 Bill incorporated the amendments to the 1978 Bill foreshadowed in its response to the Senate Committee's recommendations. In particular,

it incorporated a 'reverse-FOI' procedure in respect of sensitive business information and provided for the Ombudsman to investigate complaints of delay. In addition, the Bill gave a limited right of access to 'prior documents' where access was reasonably necessary to gain a proper understanding of another document to which a person has lawfully had access.

2.8.2. The 1981 Bill was subjected to extensive amendment during its passage through the Senate. The Senate amendments gave effect to a number of recommendations by the Senate Standing Committee which had the support of Government members of that Committee. However, many of the Committee's recommendations, particularly the more fundamental ones, were not accepted by the then Government. A compromise was reached whereby the Government agreed to some changes and in return the Government members of that Committee did not press for other changes. Opposition senators pressed for all the changes recommended by the Committee.

2.8.3. The effects of the more important amendments made in the Senate were:

Agency publications

- agencies required to publish more information about their functions and the documents they hold, e.g. arrangements for participation by outside bodies in policy formulation and agency administration
- agencies required to make available to the public more documents containing 'hidden law' applied in reaching agency decisions
- members of the public not to be prejudiced by decisions based on unpublished 'hidden law'

Implementation

- the establishment of special offices where applicants could be given access to documents
- the provision of machinery to enable the remission of access charges and an appeal right to the AAT on the question of charges - this was a government amendment in response to concern that the power to impose access charges could be used to prevent a person from obtaining access

Personal affairs

- a right of access provided to 'prior documents' up to 5 years old relating to the personal affairs of the applicant
- a right provided to amend personal records that are incomplete, incorrect, out of date or misleading, including a right to appeal to the AAT on the question

Exemptions

- clarification and narrowing of exemptions relating to national security, defence, international relations, relations between the States, internal working documents, the enforcement or administration of the law, the operation of agencies and the national economy
- deletion of the exemption relating to documents the disclosure of which would be reasonably likely to have a substantial adverse effect on the interests of the Commonwealth or an agency in pending or listed legal proceedings
- deletion of the exemption whereby the Attorney-General could certify (but not conclusively) that a document or class of documents would be protected by Crown privilege and disclosure would be contrary to the public interest

Review and appeal

- right of appeal to a new Document Review Tribunal (DRT), in respect of conclusive certificates; the DRT to decide whether reasonable grounds existed for the exemption claimed; the Minister retaining the discretionary power to revoke a certificate, having regard to the decision of the DRT. This was a government amendment in response to concern about the conclusive certificate system

Monitoring

- specification of extensive statistical reporting requirements in the annual report to Parliament by the Minister administering the FOI Act to enable proper parliamentary monitoring of the operation of the Act.

2.8.4. The 1981 Bill passed the Senate on 12. June 1981 and the House of Representatives on 24 February 1982. It was assented to on 9 March 1982 and came into operation on 1 December 1982 (A summary of the Act is set out at Appendix 'A'). Commencement was originally proposed for 1 July 1982 but this date was put back first to 1 October 1982 then to 1 December 1982. The delay was mainly due to the extent and nature of the preparatory work that had to be completed to ensure successful implementation. This work is reported in detail in Chapter 3.

2.9 Freedom of Information Amendment Bill 1983

2.9.1. The Hawke Government was elected to office in March 1983 with a commitment to expand the scope of the FOI Act. The starting point was to give effect to those changes to the FOI Act proposed by the Senate Committee which had not been incorporated in the 1982 Act.

2.9.2. After the election, immediate action was taken to prepare amendments to the Act and on 2 June 1983, the new Attorney-General, Senator the Hon. Gareth Evans, introduced the Freedom of Information Amendment Bill 1983 ('the 1983 Amendment Bill') into the Senate. The Bill will amend the Act as it stands in several important respects:

- the scope of the legislation is to be substantially expanded by an amendment allowing the public a greater right of access to 'prior documents'
- the special Document Review Tribunal is to be abolished and its functions transferred to the AAT
- the AAT is to be empowered to consider and decide whether in its opinion there are reasonable grounds for the claim that a document is exempt in any case where a conclusive certificate has been issued and to recommend accordingly
- where a minister does not adopt the AAT's recommendations, he or she will be required to table in the Parliament a statement of reasons for his or her decision not to accept the recommendations
- an overriding public interest test in favour of disclosure of information will be introduced for several important categories of exemption
- the overriding public interest test will apply to the Commonwealth/State exemption, but a State will be entitled to be consulted before the release of a document and will be entitled to appeal to the AAT against a Commonwealth decision to release the document
- the time for compliance with requests is to be progressively reduced from the present 60 days to 30 days by 1 December 1986.

2.9.3. These changes, together with other amendments made by the 1983 Amendment Bill, will widen in various ways the scope of the Act, clarify or improve its practical operation and bring marked advantages to the public in the working of the legislation.

The Bill, when enacted, will enhance the standing of the FOI legislation as a substantial contribution to open government in Australia.

2.9.4. The 1983 Amendment Bill, details of which are at Appendix 'B' is expected to be considered during the 1983 Budget Sitzings.

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Overview of Freedom of Information in Australia

Transparency International

1. What is Freedom of Information

Freedom of Information ('FOI') laws in Australia grant members of the public a general right to access information which is held by Government Ministers, Departments and Agencies in documentary form. The framework of FOI rights in Australia is established by Federal and State legislation. In 1982, the Federal Parliament passed the *Freedom of Information Act 1982*. Each of the States have also enacted similar legislation.

There are three key facets to FOI laws in Australia. These are:

- (a) rights of access to public information in documents held by government agencies. The scope of documents extends beyond materials in paper form, and includes photographs, maps, films, emails, tape and video tape recordings;
- (b) a right to request access and amendments to personal information. If you believe that your personal information, as it appears in administrative documents which are being used by a government agency, is incomplete, incorrect, out of date or misleading, then you may request that the document be corrected; and
- (c) an obligation for government agencies to record and publish, or make publicly available, specified information. The purpose of publishing this information is to bring the affairs and procedures of government agencies into the public arena.

It is the third of these three features which is particularly relevant to the promotion of transparency in government.

2. Why is FOI relevant to Transparency International?

FOI laws are an important instrument in creating transparency and thus helping to make governments accountable. A key objective of FOI laws is to create an opportunity for individuals, businesses and media to monitor and review government decision making processes. The obligation on government agencies to publish, and the rights for individuals to access, information of general public interest is a crucial tool in the struggle to prevent corruption.

3. Restrictions on FOI

The rights granted by FOI legislation are not absolute. Rather, the scope of FOI is limited by certain exceptions and exemptions. Members of the public may not be entitled to documents which:

- (a) are subject to legal professional privilege;
- (b) are subject to public interest immunity;
- (c) contain private information about other people; or
- (d) contain information provided to a Government agency in confidence.

4. Criticisms of Australia's FOI framework

In June 2006, the Victorian Ombudsman published a report following a comprehensive review of the *Freedom of Information Act 1982* (VIC) ("Ombudsman Report"). The Ombudsman Report was critical of various aspects of the FOI system in Victoria and presented recommendations of a legislative, procedural and administrative nature. The key criticisms relate to unnecessary delays in processing FOI applications and poor quality of assistance offered to applicants. Many of the criticisms identified by the Victorian Ombudsman apply equally to the Federal FOI scheme and that of the other States and Territories. A copy of the Ombudsman Report is available from the Ombudsman Victoria website.

We set out below a discussion of the criticisms of Australia's FOI system raised in the Ombudsman Report and by other commentators.

US model grafted onto a Westminster system: Australia's Freedom of Information provisions are loosely based on the United State's Freedom of Information Act. The US model has been forced to interact with an Australian system of infrastructure which encompasses a UK approach to access to information, based on the idea that individual and collective responsibility before Parliament is the most appropriate way to create accountability. A wide ranging Act, which enhances accountability, provides citizen participation, and creates a general right of access to information in documentary form which is in the possession of Government agencies, is applied to a reluctant public sector with an established practice of secrecy. This may be a contributing factor to delays in dealing with applications for information, as well as the frequent recourse to ministerial certificates (see below) and inadequate recording of documents.

Legislative immunities are too broad: Australian FOI laws operate on a restrictive policy of granting wide exemptions to certain government departments, rather than encouraging availability of information unless there is a specific case for withholding it. It may be that vague drafting of certain sections in FOI legislation provides an opportunity for government agencies to take advantage of the lack of precision. In effect, it can be argued that the exemptions confer a discretion on agencies and ministers to claim immunity status for virtually any document – an outcome which is contrary to the pro-disclosure objective of FOI legislation. Dr. Moira Paterson suggests that existing clauses could be supplemented with a 'principle of availability' which would allow the information to be made available unless there is a good reason for withholding it.¹

Risk of misuse of conclusive certificates: A certificate is a conclusive mechanism which is issued by a Minister to deny access to certain documents. Government agencies are required to deny access to a document under the protection of a certificate unless it is possible to release the document with the protected material removed. Critics argue that the scope for review of a certificate is too narrow. The Administrative Appeals Tribunal ("AAT") does not have the power to grant access to a document the subject of a certificate. Rather, the AAT's power of review is restricted to determining whether reasonable grounds exist for the issuance of the certificate. The High Court of Australia is deciding an appeal relating to an AAT decision which found that there were reasonable grounds for the issuance of conclusive certificates.

¹ Paterson, Dr. M. (2005) *Freedom of Information and Privacy in Australia*, Butterworths, Australia at 42.

McKinnon v Secretary, Department of Treasury: The McKinnon case has been pivotal in attracting the attention of the media and public to the nature of conclusive certificates. In December 2002, Mr McKinnon, the Freedom of Information Editor of the Australian newspaper, made FOI applications to the:

- (a) Australian Taxation Office – for documents relating to taxation brackets; and
- (b) Federal Treasury – for documents relating to the national first home buyers scheme.

Prior to the hearing of the applications, the Treasurer issued conclusive certificates, under the *Freedom of Information Act 1982* (Cth), denying access to the documents on the grounds that their disclosure would be contrary to the public interest. Mr McKinnon applied to the AAT for the decision to be reviewed. As discussed above, the AAT's power of review is restricted to determining whether there exist reasonable grounds for the relevant Minister, in this case the Treasurer, to issue the certificates. The AAT held that such grounds did exist but failed to consider the public interest arguments in favour of disclosure in arriving at its decision. Mr McKinnon appealed to the Full Federal Court on the ground that, among other things, the AAT misconstrued its power of review and failed to take account of relevant considerations. The appeal was rejected.

In early 2006, in a final bid, Mr McKinnon appealed to the High Court of Australia. The question before the High Court was whether the Full Federal Court made an error of law in dismissing Mr McKinnon's appeal against the decision of the Tribunal. It is important to note that the High Court (like the Full Court and the Tribunal) did not have the power to decide whether the Minister's decision to issue the certificates was correct. The power of review accorded by the Act is clearly limited to determining whether there exist reasonable grounds for the claim that disclosure of the document would be contrary to the public interest.

Majority Judgement – Justices Callinan and Heydon recognised that there is tension between the objects of the Act – to make available, and create a general right of access to, information in the possession of the Australian government – and the limited power of review conferred upon the Tribunal. A restricted power to review Ministers decisions results in an increased capacity for Ministers to deny freedom of information claims. Nevertheless, his Honours noted that this tension is dealt with by the express and unmistakably clear language of the Act. They found that if one reasonable ground for a claim of contrariety to the public interest exists, even though there may be opposing reasonable grounds, a conclusive certificate will be beyond review. Callinan and Heydon JJ dismissed the appeal, as did Hayne J for similar reasons.

Dissenting Judgement – Chief Justice Gleeson and Justice Kirby delivered a joint judgement in dissent. His Honours were not satisfied that an application for review of a certificate should fail simply because there is one reasonable ground in support of the certificate. The question of whether there are reasonable grounds in support of a certificate can only be decided after considering all relevant propositions. His Honours considered that the Full Court had made an error of law in finding that the existence of one reasonable ground was sufficient to satisfy a review of the certificate.

Impact of the McKinnon Case – The decision of the High Court in the McKinnon case has had the effect of further constricting the limited right for the AAT to review a Ministerial decision to issue a conclusive certificate. The Majority judgment interprets the FOI Act to

require the existence of only one reasonable ground in support of a conclusive certificate for the certificate to be upheld, even though there may be a plethora of contradicting reasonable grounds. For this reason, FOI advocates and media commentators, have condemned the decision and called for the FOI Act to be amended.

You can obtain a copy of the High Court of Australia's full judgement from the following address: http://www.austlii.edu.au/au/cases/cth/high_ct/2006/45.html

Need to harmonise FOI laws with privacy legislation: Australian FOI legislation creates an exemption for documents the disclosure of which would involve unreasonable disclosure of "personal affairs". Critics argue that "personal affairs" should be amended to refer to "personal information" in order to bring FOI laws into harmony with the *Information Privacy Act 2000* and the *Health Records Act 2001*. These two acts protect the privacy of "personal information". The Ombudsman Report recommended that this amendment take place in order to harmonise the reach and effect of the legislation.

Risk of misuse of "irrelevance" *The Freedom of Information Act 1982* (Cth) allows for portions of a document to be deleted if the information in question can reasonably be regarded as irrelevant to an application for access. The test as to whether an edited copy can be practicably created rests with the decision maker, as well as the exercise of judgement as to what is relevant and irrelevant. Although an applicant provided with an edited copy has to be made aware of this situation and the reasons for it, there is no requirement to provide a statement of reasons unless an applicant specifically asks for one. This has been criticised as being contrary to the aim of the Act – to make public information easily accessible unless there is a valid exemption. It could be argued that irrelevance should only be applied with the consent of the applicant, thus limiting the power of the decision maker to withdraw information from the remit of the application. FOI laws in New South Wales and Victoria do not create a ground for editing a document on the basis of irrelevance.

5. Making a Freedom of Information application

If you are interested in making an application for FOI, the first step is to identify the information you are seeking and the government agency which is likely to hold the information. The Commonwealth and each of the States have FOI officers who can assist applicants with their FOI claims. Once you have identified these details, the next step is to prepare your application.

An FOI application form can be obtained from the government department (Federal or State – see the website addresses below) which holds the information you are seeking. Or alternatively, you may make an application by writing a letter which sets out the details of your request.

An FOI application will generally require payment of an application fee, and may incur other charges for agency decision-making and consultation time, locating documents and photocopying. These fees may be waived or remitted where an application relates to personal income maintenance documents or in circumstances where the applicant can demonstrate financial hardship or public interest.

If your FOI application is rejected, you will be provided with reasons for the decision. You may also have the right to apply for an internal review of the decision. If the decision to reject the application is upheld, then you may have the opportunity to appeal to the Administrative Appeals Tribunal or in some circumstances, the Federal Court of Australia.

The disadvantage in pursuing these options is the cost that you may incur. These costs may include: legal representation, court costs, witness costs and maybe even the costs of the government agency, if your appeal is not successful.

An alternative to bringing action in the Courts, is lodging a request with the Ombudsman to review the decision. The Ombudsman has the power to review decisions of government agencies. The Ombudsman does not have the power to overturn a government agency's decision. However, the Ombudsman will prepare a report which may recommend that a decision be overturned.

6. Useful links

If you would like further information regarding FOI, the following sources may be helpful:

Freedom of Information, Attorney-General's Department, Australia
<http://www.ag.gov.au/foi>

The Freedom of Information Act 1982
<http://scaleplus.law.gov.au/html/comact/4/2174/top.htm>

NSW Premier's Department
<http://www.premiers.nsw.gov.au/NSWCommunity/FreedomOfInformation/>

Freedom of Information Online, Department of Justice, Victoria
<http://www.foi.vic.gov.au/>

Office of the Information Commissioner, Western Australia
<http://www.foi.wa.gov.au/>

Queensland Government Freedom of Information Website
<http://www.foi.qld.gov.au/>

Office of the Information Commissioner, Queensland
<http://www.infocomm.qld.gov.au/>

Office of the Information Commissioner, Northern Territory
<http://www.nt.gov.au/justice/infocomm/foi/index.shtml>

Department for Administrative and Information Services, South Australia
<http://www.archives.sa.gov.au/foi>

Department of Justice and Community Safety, ACT
http://www.jcs.act.gov.au/eLibrary/foi_info.html

Paterson, M. (2005) *Freedom of Information and Privacy in Australia*,
Butterworths, Australia

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General Description of the Freedom of Information Act 1982

1. Introduction

1.1 The Freedom of Information Act 1982 (FOI Act) came into effect on 1 December 1982. It extends the right of every person to access to information in the possession of the Government of the Commonwealth and its authorities in two ways:

a. it requires Commonwealth agencies (Departments and authorities) to publish information about their operations and powers affecting members of the public as well as their manuals and other documents used in making decisions and recommendations affecting the public; and

b. it requires agencies to provide access to documents in their possession unless the document is within an exception or exemption specified in the legislation.

1.2 Access to all documents in the possession of the Government is not possible as confidentiality must be maintained where it is necessary for the protection of essential public interests and the private and business affairs of persons and organisations in respect of whom information is collected.

1.3 The FOI Act made a fundamental change to the emphasis of the law prior to 1 December 1982 in the following ways:

(i) The FOI Act creates a right of access. Prior to 1 December 1982, the release of information held by agencies was, as a rule, a matter of discretion and the agency was entitled to withhold information without having to justify its actions unless there was a requirement to disclose the information. Examples of the instances in which there are such requirements are as follows:

- a. subordinate legislation (regulations and by-laws) is required to be published;
- b. most agencies are required to publish annual reports;
- c. many appointments and the like are required to be published in the Gazette;
- d. reports of some advisory bodies must be tabled in Parliament and so become published;
- e. under certain legislation (eg the Administrative Decisions (Judicial Review) Act 1977) statements of reasons for decisions must be given on request by a person aggrieved by some decisions;
- f. subject to the application of the doctrine of public interest immunity, the courts have power to require documents to be produced in legal proceedings; and
- g. the Parliament has power to compel the giving of evidence and the production of documents. Royal Commissions have like powers.

(ii) The FOI Act does not require a person to establish any special interest or "need to know" before he or she is entitled to seek or be granted access.

(iii) The FOI Act sets out the circumstances in which access can be denied as a matter of discretion.

1.4 The FOI Act is not a code. It does not prevent or discourage the giving of access to any exempt document to which access can lawfully be given other than under the FOI Act. It is a minimum not a maximum standard.

2. Application of the Act

2.1 There are few Commonwealth Departments and authorities to which the FOI Act does not apply. It does not apply to Parliament or Parliamentary departments. Some authorities (listed in Schedule 2 of the FOI Act) are specifically excluded from the operation of the FOI Act either totally or in respect of defined areas of their functions. It applies to courts and tribunals only in respect of their administrative functions. It applies to all other authorities.

2.2 The FOI Act applies to "official" documents in the possession of a Minister i.e. those that relate to the affairs of an authority or of a department of State. The legislation does not apply to documents relating to Party matters or to a Minister in her or his capacity as a Member of Parliament.

3. Exemptions

3.1 Exemptions are based on what is essential to maintain the system of government based on the Westminster system and on what is necessary for the protection of the legitimate interests of third persons who provide information to the Commonwealth Government. The exemptions are designed to provide a balance between the rights of applicants to disclosure of government held documents and the need to protect the legitimate interests of government and third parties who deal with government.

3.2 In certain circumstances, documents relating to the following categories (where their release could damage Government or third party interests or other public interests) are exempt:

- documents relating to national security, defence or international relations;
- documents relating to Commonwealth/State relations;
- Cabinet and Executive Council documents;
- deliberative process documents;
- documents relating to enforcement of the law and protection of public safety;
- documents to which secrecy provisions of other laws apply;
- documents relating to financial or property interests of the Commonwealth;
- documents relating to certain operations of agencies;
- documents containing personal information;
- documents subject to legal professional privilege;
- documents relating to business affairs, etc;
- documents relating to the national economy;

- documents containing material obtained in confidence;
- documents disclosure of which would be contempt of Parliament or contempt of court; and
- certain documents arising out of companies and securities legislation.

3.3 Exemptions are to be claimed only where the relevant information is genuinely sensitive and real harm will be caused by its disclosure. They should not be claimed simply because they are technically available.

4. Decision-making

4.1 The onus for deciding whether an exemption applies or whether disclosure would be in or contrary to the public interest, is on the agency and not the applicant or the third party consulted.

4.2 The requestor must be notified of the agency's decision in writing. The decision must contain

- the day on which the decision was made;
- the name and designation of the decision-maker;
- findings on any material questions of fact;
- reference to the material on which the findings of fact were based; and
- information about review rights.

5. Refusal of Access

5.1 Where a Minister or agency decides to refuse access in accordance with a request, a statement of reasons for that decision must be given to the applicant (s26).

5.2 Sometimes only part of the information in a document is sensitive and needs to be exempted. Wherever practicable, a copy of the document with that information deleted is to be made available (s22).

6. Procedures For Applying

6.1 Procedures for access to documents have been kept as simple as possible. In summary, a request for access to a document must:

- be made in writing (but does not have to be in a particular form); and
- provide enough information to enable the document(s) sought to be identified; and
- specify an address in Australia for the service of notices; and
- be sent to the agency at an address specified in a current telephone directory; and
- be accompanied by the application fee (\$30).

6.2 The purpose of these formal requirements is to enable agencies to identify specific freedom of information requests and to handle them accordingly. Agencies are required to assist people to make valid applications where they are able to do so (s15).

7. Right of Review

7.1 A person whose request is not dealt with promptly may:

- complain to the Ombudsman if it is thought there has been an undue delay (s57);
- appeal to the Administrative Appeals Tribunal if no notice of a decision is received after 30 days (s56):-
 - the Tribunal is to deal with the matter as if the request has been refused; and
 - the Tribunal may allow the agency further time to make a decision.

Internal Review

7.2. Where a decision has been made not to grant access to documents to the applicant or where a decision has been made to disclose a document notwithstanding contentions to the contrary by third parties, there is an entitlement to have that decision reviewed by the agency concerned (s54):

- this does not apply where the original decision was made by the principal officer of the agency or by a Minister;
- the review is to be conducted by the principal officer or a person authorised by the principal officer specifically for the purpose;
- where there is an entitlement to this internal review, this must be sought before an appeal to the Administrative Appeals Tribunal (s55).

Administrative Appeals Tribunal

7.3 The applicant may apply to the Administrative Appeals Tribunal (the AAT) to review a decision given on internal review by an officer authorised under s.23, or a decision made initially by a Minister or principal officer, or a deemed refusal. The following points apply to AAT review:

- the AAT may review decisions to refuse access (in whole or part), to defer access, to grant access contrary to a contention of a third party or to impose charges in relation to a request for access;
- in the cases where a conclusive certificate has been issued, special arrangements operate but the AAT can still review the decision;
- in all cases, other than those involving conclusive certificates, the AAT can change the original decision; and
- if the AAT finds to be justified a claim that a document is exempt, it does not have any discretion to give access to that document.

7.4 The AAT is empowered to recommend to the Attorney-General, in appropriate cases, that, where an applicant is successful or substantially successful in an application for review before the AAT, the costs be paid by the Commonwealth.

Conclusive Certificates

7.5. Where a conclusive certificate has been issued, the AAT considers whether there are reasonable grounds for the claims that the documents to which the conclusive certificate relates are exempt rather than where the final public interest lies. The decision of the AAT takes the form of a recommendation to the Minister. The recommendation is public. Whether the Minister acts on a recommendation is a matter for the Minister's discretion but an explanation must be made to Parliament if a recommendation is rejected.

Commonwealth Ombudsman

7.6. An applicant may also apply to have an agency's decision investigated by the Ombudsman, or can appeal to the Federal Court from the AAT on a point of law, or may apply to the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 although the last avenue of review may be denied because of the comprehensive review rights before the AAT.

8. Use of Agency's Resources

8.1. Dealing with freedom of information requests inevitably has an impact on an agency's resources. The FOI Act attempts to strike a balance in the application of these resources. Departments and authorities are established to carry out Government programs of one kind or another and they must operate within the limits of staff and money made available within the overall budget. To divert an undue proportion of agency resources to responding to freedom of information requests would adversely affect the service to the public provided by those agencies (s24).

Administrative Impact

8.2. Account was taken of the administrative impact on agencies. This is expressed in a number of provisions of the FOI Act:

- the FOI Act applies to all documents which came into existence after 1 December 1977;
- in the case of documents relating to the personal information of the requestors it applies to all documents irrespective of how old they are;
- the FOI Act does not require agencies to make available information that is not already in documentary form (which is very broadly defined to include any record of information) except in two cases. The first is in relation to publication of material under Part II of the FOI Act (see paragraph 1); the second relates to the obligation to provide computer print-outs of information stored on computers or to provide transcripts of sound recordings;

- the FOI Act requires an applicant for access to a document, in consultation (if necessary) with the agency concerned, to provide a reasonable identification of the document sought. This provision is intended to assist applicants in making their requests;
- the requirement to take all reasonable steps to enable the applicant to be notified of a decision on a request as soon as practicable but in any event within 30 days represents a compromise between the desirability of early decisions and the diversion of resources that would be required by shorter time limits.

9. Fees and Charges

9.1 The FOI Act provides that fees and charges may be levied:

- a \$30 application fee must accompany each application if it is to be a valid request when received;
- the rates of charges are fixed in accordance with regulations made under the FOI Act (see the attached list of charges);
- no fees or charges are payable for requests for documents relating to the requestor's income support matters (Reg 6), benefits or allowances set out in certain regulations;
- the charges may be remitted in whole or in part in certain circumstances (eg cases of financial hardship, or the giving of access is in the public interest).

10. Amendment of Information

10.1. A person who has been lawfully provided with access to a document containing her or his personal information may request an agency to amend or annotate it if the information is incomplete, incorrect, misleading or out of date:

- if the agency grants the request for amendment it makes the amendment by altering the record or adding a notation;
- the agency must take all reasonable steps to enable the applicant to be notified of a decision on his request as soon as practicable but in any event within 30 days;
- if the agency fails to make a decision or makes a decision refusing to make the amendment, the applicant may apply for review to the AAT;
- an applicant who fails before the AAT is nevertheless entitled to have the relevant file endorsed to show the respects in which it is claimed the information is incomplete, incorrect, misleading or out of date.

11. Required Consultation

11.1 The FOI Act provides special procedures at sections 26A, 27 and 27A where a request is made for access to a document containing information relating to the business or professional affairs of a person, the business, commercial or financial affairs of an organisation or undertaking, the personal information of a person other than the applicant, or concerns Commonwealth/State relations:

- that person, undertaking or State is to be consulted, where practicable, before a decision to release the document is taken;
- if a decision is made to give access to the document, that person or undertaking may seek internal review or AAT review. Decision-makers should consult other agencies, organisations or people wherever necessary to obtain information upon which to make a proper decision. The documents are to be held for 30 days to allow the third party to be consulted and if need be to seek review.

12. Annual Report

12.1. The Minister administering the FOI Act is required to report annually to the Parliament on the operation of the FOI Act. The report contains detailed statistical information.

13. Schedule of Fees and Charges under the Freedom of Information Act 1982

For requests for access to documents other than income support documents

(a) Application Fee

- fee accompanying request for access: \$30.00
- fee accompanying application for internal review: \$40.00

(b) Other Charges

search and retrieval time - per hour	\$15.00
decision making time - per hour	\$20.00
extraction and production of written documents from computers or other like equipment	actual cost incurred
reproduction of computer information onto magnetic data	actual cost incurred
transcripts of sound recordings, shorthand, etc - per page	\$ 4.40
photocopies of written documents - per page	\$ 0.10
copies, other than photocopies, of written documents - per page	\$ 4.40
replaying or copying films, tapes etc.	actual cost incurred

inspection - per half hour (or part thereof)	\$ 6.25
despatch to an address other than an Information Access Office	cost of postage and delivery

(c) Deposits may be charged:

- where the charges under (b) above exceed \$25.00 but do not exceed \$100.00: \$20.00
- where the charges under (b) above exceed \$100.00: 25% of the preliminary assessment

X. Freedom of Information

GERMANY

European Laws Governing Access to Information in Theory and Practice

*Prof. Dr. Johannes Weberling**

In Germany, access to government information is regulated on two different levels. The basic rights of press and broadcast freedom, which are guaranteed by Article 5 of the Basic Law, grant the media and/or their editorial staff the right to request information from all government agencies and state-owned enterprises. Since 1994, however – in keeping with European initiatives – the Environmental Information Law (UIG), which was fundamentally restructured in 2005, has regulated the free access of all citizens to environmental information in the possession of government agencies and state-owned enterprises. The Freedom of Information Act (IFG) also guarantees the access of citizens to official information.

On the European level, Article 10 of the European Convention on Human Rights guarantees the right to freedom of expression and the right to receive and transmit news or ideas without interference from public authorities, regardless of national boundaries. Whether these rights also entail a right to information from public authorities used to be unresolved. Especially for the European Union, the regulation regarding public access of 30 May 2001 gives everyone the right to free access to documents of the European Parliament, the Council of Europe and the European Commission.

However, the implementation of these legal guarantees varies in practice.

1. Information Access in Germany

a) Guarantee of media freedom to receive information from official sources by Article 5 of the Basic Law (GG)

Article 5 of the German Basic Law (Grundgesetz – GG) states:

- (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.
- (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.

The German Federal Constitutional Court already dealt with the scope of the basic right of press freedom in its early decisions. Freedom of the press is an essential basic right for a democratic society. This right is not restricted to a classic defensive right against direct or indirect government influence. Instead, it obliges the government to create framework conditions within which this right to freedom can be realised. This also includes the duty of the state to guarantee the press the right to receive information from government agencies.

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The Federal Constitutional Court already derived this principle from the public function of the press in its so-called Spiegel Decision of 1966:

1. If the citizen is to make political decisions, then he must not only be comprehensively informed but also be able to know and then balance the opinions that others have formed. The press stimulates this on-going discussion; it *procures information*, comments on it itself and thus functions as an orienting force in the public debate. [...] In the representative democracy, the press is also located as a *permanent intermediary and control organ* between the people and its elected representatives in parliament and government. [...]

2. The *function of the free press* in the democratic State is reflected in its legal status under the Constitution. In art. 5, the Basic Law guarantees freedom of the press. [...] At the same time, however, art. 5 Basic Law also has an objective legal nature: it guarantees the institution 'Free Press'. Independent of the subjective right available to individuals under this provision, the State is obligated to ensure that in all areas of its legal system where the scope of applicability of a given norm affects the press, the basic tenet of freedom of the press is respected. Free founding of press organs, free access to press professions *and duties on public authorities to provide information are, for example, the fundamental result of this* [...].¹

According to the case law of the Federal Constitutional Court, the basic right of press freedom results in a direct right by the press to receive information from agencies. The same applies to radio stations. This right to information, which derives directly from Article 5 GG, has been concretised in the press laws of the states and in the Interstate Treaty on Broadcasting.² To the extent that administrative courts have rejected this constitutional right in earlier decisions, they have not taken into account the case law of the Federal Constitutional Court since the Spiegel decision.³ By contrast, the relevant literature has long taken the position that the constitutionally guaranteed access of the press to public information can be derived from Article 5 GG.⁴

¹ Cf. Bundesverfassungsgericht (Federal Constitutional Court, BVerfG), Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts, BVerfGE) 20, 162, 175 et seq.; for English translation see: *Jürgen Bröhmer / Clauspeter Hill, 60 Years German Basic Law: The German Constitution and its Court, Ampang / Malaysia 2010, pp. 391 et seq.*

² Cf. for example § 5 State Press Law of Brandenburg:

(1) The authorities are obliged to provide representatives of the press with useful information in the fulfilling of their public task.

(2) Information can be refused if and to the extent that

1. it could impede or endanger the appropriate prosecution of a pending action

2. it is prohibited by secrecy regulations,

3. a predominantly public or sensitive private interest would be violated,

4. its volume would exceed a reasonable level.

(3) General regulations that forbid an agency to provide interest to the press in general, to the press of a certain orientation or to a certain periodical, are not permissible.

(4) The editor of a newspaper or magazine can demand that the authorities provide him or her with their official announcements for use no later than his or her competitors.

³ Cf. Higher Administrative Court of North Rhine-Westphalia (Oberverwaltungsgericht, OVG NRW), *Neue Juristische Wochenschrift (NJW)* 1985, p. 2741 et seq.; also see Federal Administrative Court (Bundesverwaltungsgericht, BVerwG), *NJW* 1985, pp. 1655 et seq.

⁴ For a detailed overview, see *Heintschel von Heinegg, Auskunftsansprüche der Presse gegenüber der Verwaltung*, in: *Archiv für Presserecht (AfP)* 2003, pp. 295 et seq, Raabe, *Informations- und Auskunftspflichten der öffentlichen Hand gegenüber der Presse. Der verfassungsunmittelbare Auskunftsanspruch der Presse aus Art.5 Abs.1 S.2 GG*, *Brandenburgische Studien zum Öffentlichen Recht*, Band 2, Hamburg 2010.

This is a consistent position. One of the undeniable tasks of the press is to inform the public of all matters of interest to it. Specifically, the press can only effectively fulfil its public task as a control organ if it has access to the necessary information. This information is essential for the realisation of press freedom. In many cases, only government agencies as well as their privatized companies possess such information and thus have a de facto monopoly on information. For this reason, too, the press can only fulfil its constitutional task when the government is obliged to provide information to the press.

Individual state press laws and the Interstate Treaty on Broadcasting only regulate the specific modalities of the right to information, particularly the conditions for exceptions, which are to be interpreted narrowly, for purposes of legal clarity.⁵ To the extent that information to the press has been denied in practice, the courts have in recent years decided with growing consistency in favour of press and broadcast freedom, thus affirming and implementing the right to information.⁶ The German press's right to information thus prevents the development of problem areas in public administration, since the responsible authorities have to expect that illegal actions cannot be concealed but will become known to the public.

b) Information access for citizens

By contrast, access to official information for individual citizens has only recently been regulated by law. In 1994 the first environmental information directive of the European Economic Community of 1990 was transformed into German law with the passage of the Environmental Information Act (UIG). With the UIG, each citizen was granted the right to principally free access to environmental information that is available to the public administration. In contrast to the right by media representatives to receive (mere) information, this right also included the right to be shown and given documents of all kinds. For this reason, too, this right became increasingly popular among media representatives since attempts by the authorities to interpret this right of access restrictively remained ineffective, since the courts to which the citizens appealed broadly interpreted the right of access to, and

⁵ Cf. Weberling, Informations- und Auskunftspflichten der öffentlichen Hand gegenüber Medien in der Praxis, AfP 2003, pp. 304 et seq.

⁶ Cf. particularly the decisions of the Higher Administrative Court of Munich (Verwaltungsgerichtshof, VGH) of 13 August 2004, case 7 CE 04.1601, in which a freelance journalist from the *Main-Post* was granted the right to receive information on personnel matters in a non-public meeting of the community council, as well as VGH Munich, 7 August 2006, case 7 BV 05.2582, on the approved right of the press to receive information from the Bavarian Central Authority for Reconstruction Financing, both of which have been published under:

http://www.pressrecht.de/index.php?option=com_content&view=category&id=26&Itemid=42 as well as judgement of the Bundesgerichtshof (BGH), the Federal High Court of Justice, from 10 of February 2005, AZ III ZR 294/04 on the right to information against a local energy supply company run as a limited by the local government, published under:

<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=d13be7360e59127ade5b67eacf6e9e90&Seite=3&nr=31948&pos=108&anz=179>.

See also OVG NRW, decision of 19 February 2004, case 5 A 640/02; administrative court (Verwaltungsgericht, VG) of Saarlouis, NJW 2003, pp. 3431 et seq.; VG Berlin, NJW 2001, pp. 3799 et seq.; appellate court (Oberlandesgericht, OLG) of Koblenz, NJW-RR 2004, p. 691, VG Cottbus, order of 6 November 2007, L382 /07, AG Plauen, order of 22 of April 2009- MZ-1093-GS09.; see also the case law examples in Weberling, AfP 2003, 304 et seq.

surrender of, relevant documents.⁷ This situation has continued to improve since the fundamental revision of the UIG in 2005.⁸

By contrast, the Federal Freedom of Information Act (IFG), which came into force in 2005, has shown itself to be a generally unsuitable instrument for citizens and media representatives desiring access to official information. The IFG contains a voluminous catalogue of issues where the public interest outweighs the citizen's interest in information. This catalogue of exceptions is additionally interpreted so broadly so far by the courts that in the past even the release of an overview of a minister president's official journeys has been denied.

2. Information access in Europe

a) *The freedom of information and information access according to Article 10 ECHR*

Article 10 of the European Convention on Human Rights (ECHR) regulates the following:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The scope of protection provided by Article 10 ECHR encompasses both the inner freedom to form an opinion and the outer freedom to proclaim one's opinion to third parties. It includes the right to receive and pass on information (freedom of information and/or freedom to pass on information). Article 10 ECHR is conceived as a comprehensive guarantee of the freedom of expression, which also includes the freedom to express one's opinion through art.⁹ Thus although the press is not literally cited, Article 10 ECHR nevertheless protects all imaginable forms of communication and thus also the press.¹⁰

Article 10 paragraph 1 p. 3 ECHR contains a special regulation for broadcast freedom. In Article 10 paragraph 2 it is stipulated that freedom of expression can only be restricted if this is necessary in order to achieve one of the reasons listed on the basis of a law.

⁷ See for example BVerwG, judgment of 6 December 1996, case 7 C 64/95, Bayerische Verwaltungsblätter (BayVBl.) 1997, p. 698 et seq.; BVerwG, judgment of 25 March 1999, case 7 C 21/98, BayVBl. 1999, pp. 598 et seq.

⁸ Cf. BVerwG, order of 21 February 2008, case 20 F 2/07, Deutsche Verwaltungsblätter (DVBl.) 2008, pp. 510 et seq.

⁹ See, among others, *Frowein*, EMRK-Kommentar, 3rd edition, Art. 10, marginal no. 2, 5 and 17.

¹⁰ Cf. only *Meyer-Ladewig*, Handkommentar zur Konvention zum Schutz der Menschenrechte und Grundfreiheiten (European Convention on Human Rights, ECHR), 2003, Art. 10 ECHR, marginal no. 5; *Frowein*, *ib.*, marginal no. 5.

The ECHR is not only a guideline for the member states of the Council of Europe for the interpretation and application of their legal regulations. In some European states, for example the Republic of Austria, it has directly applicable constitutional status.

Like the Federal Constitutional Court with its constant case law, the European Court of Human Rights in Strasbourg has also emphasised the public control function of the press. The press has the functions of a so-called '*public watchdog*'.¹¹ The press has the task of informing citizens of problem areas in the field of politics and of matters of public interest.¹² In recent cases, the court has emphasised that, in its function as a 'watchdog', the press even has the *duty* to '*report information and ideas regarding all questions of public interest in a manner pursuant to its obligations and responsibilities*'.¹³

The ECtHR has steadily developed its case law on the function of the press as a 'public watchdog'. In this way it has both expanded the scope of protection and concretised the opportunities for intervention provided by Article 10 ECHR paragraph 2. Examples include:

Although it is not expressly regulated by Article 10 ECHR, informant protection has been derived from Article 10 ECHR since the media would otherwise be unable to fulfil their role as a 'public watchdog'.¹⁴

The condemnation of a press publication pertaining to a public discussion must make allowances for the above stated role of the media pursuant to paragraph 2.¹⁵

The press is principally entitled to rely on the content of official reports without having to undertake an independent examination. This would otherwise endanger the essential role of the press as a public watchdog.¹⁶ In this respect, the obligation to exercise journalistic diligence is preserved.

Freedom of information is regulated in Article 10 paragraph 1 p. 2 ECHR as the freedom to receive and pass on information and ideas. It is the mirror image of Article 10 paragraph 1 p. 1 ECHR, i.e. it guarantees the right to unhindered access to the expressions of opinion of third parties (in the public) and thus also of the press.¹⁷ It is beyond dispute that Article 10 ECHR entails the right of the individual to inform himself or herself from generally accessible sources.

In regard to the freedom of information vis-à-vis government agencies, case law, particularly that of the ECtHR, had previously been charged with deciding on cases pertaining to the rights of *citizens* and thus of private persons. A decision on the rights of the *press* vis-à-vis

¹¹ The function of the press as a "public watchdog" has first been highlighted in the "Barthold" decision of the European Court of Human Rights (ECtHR), *Europäische Grundrechte-Zeitschrift* (EuGRZ) 1985, pp. 170 et seq.; also see ECtHR, case A/216, *Observer and Guardian Newspaper Ltd.*, judgment of 26 November 1991.

¹² Cf. *Holoubek*, *Medienfreiheit in der Europäischen Menschenrechtskonvention*, in: AfP 2003, 193, 194.

¹³ Cf. ECtHR, *Bladet Tromsø v. Norway*, NJW 2000, 1015, 1016; ECtHR, *Fressoz and Roire v. France*, NJW 1999, 1315, 1316: „so ist es doch ihre Aufgabe, unter Wahrung ihrer Pflichten und ihrer Verantwortung Informationen und Ideen über Fragen allgemeinen Interesses mitzuteilen.“

¹⁴ Cf. ECtHR, *Goodwin v. United Kingdom*, *European Human Rights Reports*, Vol. 22, 1996, No. 38.

¹⁵ Cf. ECtHR, *Fressoz and Roire v. France*, *ibid.*

¹⁶ Cf. ECtHR, *Bladet Tromsø v. Norway*, *ibid.*, p. 1018.

¹⁷ Cf. ECtHR, *Sunday Times*, EuGRZ 1979, 386, 390; *Meyer-Ladewig*, *ibid.*, marginal no. 14 and 21; *Frowein/Peukert*, marginal no. 11.

government agencies is yet to be made. Nevertheless, the judicature of the ECtHR provides at least indications that Article 10 ECHR also guarantees the right to information of the press vis-à-vis government agencies.

In a case where the nearby residents of a factory requested data from the responsible authorities on existing environmental dangers, the ECtHR determined that Article 10 ECHR did not impose upon the government the duty to collect information on its own but rather that the question of a potential right to information was only directed at existing data.¹⁸ In the context of other basic freedoms contained in the European Convention on Human Rights, the court affirmed citizens' rights to receive information from the government: in connection with Article 8 ECHR, this meant the surrender of personal data¹⁹ as well as access to information on the basis of the equality principle after the government had already surrendered information to other citizens upon request. Finally, the government also has a duty not to present one-sided information on issues.²⁰

That which applies to the freedom of information for citizens *at least* applies to the press as well. Due to the press's function as a 'public watchdog', as repeatedly emphasised by the European Court of Human Rights, it can be deduced that the press can assert its rights to receive information from government agencies.

To the extent that individual voices in the literature deny the existence of a right to information, this is solely justified by the argument that, when compared to the original draft, the convention's wording contains no such right.²¹ Even if the lack of such wording is not necessarily due to an editing error,²² the text of the draft convention was altered many times without any reasons having been given.²³ Nor are references to the details of its origins particularly helpful in light of the fact that several states with different legal traditions were involved. For this reason, the frequently cited comparison with the text version of Article 19 of the UN Covenant on Civil and Political Rights, which expressly mentions the 'gathering of information', likewise provides no valuable insights.²⁴

Moreover, the lack of such wording does not necessarily indicate the non-existence of a right. Thus freedom of the press as such is not literally mentioned, yet remains nevertheless a firm component of the guarantee of Article 10 ECHR. Ever since the *Lentia*- decision the ECHR derive from Art. 10 ECHR specific governmental duties to act, similar to the constitutional guarantee of media freedom²⁵.

¹⁸ Cf. ECtHR, *Guerra and others v. Italy*, *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 1999, p. 57.

¹⁹ See *Meyer-Ladewig*, *ibid.* marginal no. 14.

²⁰ Cf. *Frowein/Peukert* marginal no. 13.

²¹ Cf. *Meyer-Ladewig*, *ibid.*, marginal no. 14 with reference to ECtHR, *Leander v. Sweden*, judgment of 26 March 1987, stating that Art. 10 ECHR does not confer to the individual a right of access to information which the State is not willing to impart. Also see *Kloepfer*, *Freedom within the press and tendency protection under Art. 10 of the European Convention on Human Rights*, 1996, p. 22.

²² Cf. *Astheimer*, *Rundfunkfreiheit – ein europäisches Grundrecht*, 1990, p. 51.

²³ Cf. Federal Supreme Court of Switzerland (Schweizerisches Bundesgericht), *EuGRZ* 1979, 3, 4; *Frowein/Peukert* marginal no. 2.

²⁴ Exact wording in *Frowein/Peukert*, *loc. cit.*, marginal no. 2, footnote 15..

²⁵ Cf. ECHR *Lentia*, *AfP* 1994, 281; *Frowein/Peuckert*, *loc. Cit.* Art.10, marginal no. 10. *Frowein* and *Peukert* point out furthermore, that the Human Rights Commission have already shown in an *obiter Dictum*, that by claiming the right to receive information, the administration can not be forced to show out of bunds information, *loc. cit.*, marginal no.13.

The guarantee of the press's right to information from government agencies is nothing more than a consistent enhancement of the case law of the ECtHR. The press, as a 'public watchdog', not only has the task and duty of informing the public but also has a special responsibility toward the public.²⁶ Public information assumes painstaking research, which in turn relies on information from government agencies. And it is only through the ability of the press, if necessary, to assert its right to information through the courts that problem areas in matters of public interest can be uncovered.

Without the right to information, the 'public watchdog' would have no teeth.

b) Information access on the European level

Since the commencement of the regulation regarding public access of 30 May 2001, each citizen of the European Union has been enjoying the right of access to documents of the European Parliament, the Council of Europe and the European Commission. In the interim, the European Commission in particular has sought to interpret this regulation restrictively, and in numerous cases it has refused access to various documents that have been requested by citizens, including representatives of the press. By contrast, the case law of the European Court has interpreted this right broadly and has consistently ruled in favour of legal actions demanding access.²⁷

The European Commission currently wishes to overhaul the regulation with a view to greater 'citizen-friendliness'. In reality, however, this would considerably reduce information access possibilities in comparison to the situation today. This initiative on the part of the Commission has thus attracted considerable criticism and has failed for the time being.

4. Summary

Information access in Germany and Europe is guaranteed by numerous regulations for citizens and media representatives. These regulations only contribute to administrative transparency and prevent the development, or at least the consolidation, of problem areas in public administrations and in state-owned companies when this information access is broadly conceived and its implementation is supported by a functioning independent judicial system. This particularly applies to the information rights of media representatives.

²⁶ Stating this fact correctly, *Villiger*, Handbuch der Europäischen Menschenrechtskonvention, 1999, Art. 10, marginal no. 620.

²⁷ Cf. Court of First Instance of the European Communities (Gericht erster Instanz, EuG), judgment of 7 February 2002, case T-211/00, *Aldo Kuijer v. Council of the European Union*; EuG, judgment of 22 January 2004, case C-353/01 P, *Olli Mattila v. Council of the European Union*; EuG, judgment of 13 April 2005, case T-2/03, *Verein für Konsumenteninformation mit Sitz in Wien v. European Commission*; EuG, judgment of 12 September 2007, case T-36/04, *Association de la presse internationale ASBL (API) v. European Commission*, all published under: http://www.presserecht.de/index.php?option=com_content&view=category&id=26&Itemid=42.

ANNEX

Laws And Bills

Freedom of Information Legislation in Southeast Asia

Countries with enacted FOI Legislation:

- India* “Right to Information Act, 2005”
<http://righttoinformation.gov.in/rti-act.pdf>
- Indonesia* “The Law Regarding Transparency of Public Information”
<http://www3.telus.net/index100/indonesiafoi>
- Japan* “Law Concerning Disclosure of Information Held by Administrative Agencies, April 1, 2001”
http://www.soumu.go.jp/main_sosiki/gyoukan/kanri/low0404_2.htm
- Nepal* “Right to Information Act, 2064 B.S. (2007 A.D.)”
<http://www.moic.gov.np/acts-regulations/right-to-information-act.pdf>

Countries with pending FOI Legislation projects:

- Philippines* “An act providing a mechanism to implement the right of the people to information on matters of public concern guaranteed under section seven, article three of the 1987 constitution and the state policy of full public disclosure of all its transactions involving public interest under section twenty eight, article two of the 1987 constitution, and for other purposes” - Consolidated and Substituted in the Committee Report (6/3/09) -
http://www.senate.gov.ph/lis/bill_res.aspx?congress=14&q=SBN-3273
- Sri Lanka* “Freedom of Information Bill”
http://www.lawcomdept.gov.lk/info_English/index.asp-xp=723&xi=808.htm

Freedom of Information Legislation in other countries

- Australia* “Information Act 1982”
http://www.austlii.edu.au/au/legis/cth/consol_act/foia1982222/
- Germany* “Federal Act Governing Access to Information held by the Federal Government (Freedom of Information Act)”
http://bundesrecht.juris.de/englisch_ifg/index.html

