

TRANSPARENT GOVERNMENT

*Developing Public Access
to Government Information*



Rule of Law Series Paper

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In response to the challenge of promoting human rights and the rule of law in countries throughout the world, Freedom House, the American Bar Association's Central European and Eurasian Law Initiative, and the National Democratic Institute (NDI) have established the Rule of Law Initiative and Global Human Rights Training and Support (RIGHTS) Consortium. The RIGHTS Consortium offers both rapid response and long-term development assistance to developing democracies and countries in transition with an aim to promote human rights protections and practices, develop judicial, legal, and regulatory frameworks that support democratic institutions and market-based economies, strengthen justice sector institutions and processes, ensure equitable access to justice, and develop technical excellence and state of the art sustainable activities in the field of rule of law and human rights.



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CHAPTER ONE

The Right to Know

Citizen access to government information is essential for developing and maintaining a civil and democratic society. Information facilitates public knowledge and discussion, and provides an important guard against abuses, mismanagement and corruption. Openness and transparency in the decision-making process also help to maintain citizen trust in government actions.

PAST PRECEDENTS

International

On the global level, many international human rights instruments provide for a right to information.¹ At its first session in 1946, the General Assembly of the United Nations recognized that “freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.”² The 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Political and Civil Rights ensure that individuals have a right to seek information. Finally, the UN Special *Rapporteur* on Free Expression has repeatedly written that access to information is an essential part of the right to free speech.

The international community has also recognized the importance of access to information for other reasons. The United Nations Conven-

Brief History of Freedom of Information

The world’s first Freedom of Information Act was adopted in the Kingdom of Sweden in 1766. The right to know about government expenditures was also recognized in the late 18th century in France (“Declarations of the Rights of Man”). The next country to adopt a comprehensive law was Colombia in 1888. Right-to-know laws were later adopted in Finland (1951), the US (1966), Denmark and Norway (1970), the Netherlands (1978) and Australia, Canada and New Zealand (1982).

tion on Corruption, approved in October 2003, calls on governments to allow for citizens to access information as a means of fighting corruption.³ The Rio Principles released at the 1992 UN Earth Summit call for access to information held by public authorities on the environment to enhance citizen participation in decision-making regarding environmental matters.⁴ Moreover, the 1997 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) has been signed by forty countries.⁵

Other international bodies—including the Organization of American States, the Council of Europe, the Commonwealth Secretariat, and the European Court of Human Rights—have also

recognized the right of individuals to access information held by governments.

For example, the OAS helped develop freedom of information legislation in Guatemala and other countries in the region, while the Council of Europe issued guidelines in 2002 for members on information access laws. More recently, the COE initiated the development of the first international treaty on access to information.⁶ The Commonwealth Secretariat issued a resolution in 1980 encouraging its members to adopt access laws, which was followed by principles in 1999 and a model bill in 2003.⁷

The European Union has adopted two directives requiring national governments to adopt laws on access to environmental information; other EU directives relating to environment, human rights and procurement also include provisions on information access rights.⁸ Regional conventions such as the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) also provide for a right of access.

National Laws

The most visible codification and implementation of the right of access to information has been at the national level. Many national constitutions, especially those adopted in the past 20 years, characterize freedom of information as a basic human or political right. Courts in the Philippines, Chile and Uganda have ordered government bodies to provide information under provisions of their constitutions, even in the absence of an implementing law. In other countries, including South Korea, Israel, Japan and India, the highest courts have found that access to government information is an important component of freedom of expression. In fact, the Indian Supreme Court ordered the Election Commission to require candidates for political office to publish information about their criminal records, assets, liabilities and educational qualifications.⁹

Most significantly, fifty countries have enacted comprehensive Freedom of Information or Access to Information (FOI) Acts.¹⁰ The trend to adopt comprehensive acts began in North America and Europe—where nearly all countries have adopted FOI laws—but this movement has progressed globally so that acts are found in multiple regions and on many continents. In Asia, India, Pakistan, Japan, Thailand and South Korea have adopted FOI laws; furthermore, a number of other countries are currently considering similar legislation. In South and Central America, a half dozen countries have adopted laws while nearly a dozen more are currently considering similar action. South Africa adopted the Promotion of Access to Information Act in 2000. Other African countries, including Nigeria, Ghana, Uganda and Kenya, are considering similar legislation.

There are FOI laws at the provincial, state and municipal levels in many countries, including Argentina, Australia, Canada, Germany, India, Japan, Mexico, Switzerland and the United States. In Japan, nearly 3,000 local municipalities have adopted FOI ordinances.

Finally, many laws on administrative procedure, environmental regulation and consumer or data protection include provisions giving individuals the right to access information to protect their interests. Other laws require the publication of certain information for reasons of public interest; these include laws on archives, statistics, elections, political parties and anti-corruption.

BENEFITS OF FOI

In a 2003 study, the World Bank said that “more transparent governments govern better for a wide variety of governance indicators, such as government effectiveness, regulatory burden, corruption, voice and accountability, the rule of law, bureaucratic efficiency, contract repudiation, ex-

propriation risk and [a combined transparency corruption index].”¹¹ Overall, it has been found that FOI laws provide a wide range of benefits to citizens and governments alike. Such benefits are highlighted below.

Improved Democratic Participation and Understanding

The public is better able to participate in the democratic process when it has information about the activities and policies of the government. Public awareness of the reasons behind decisions can improve support and reduce misunderstandings and popular dissatisfaction. FOI laws also enable individual members of Parliament to better conduct oversight.

Government Decision-Making Less Likely to be Driven by Questionable Motivations

Decisions that will eventually be made public are more likely to be based on objective and justifiable reasons. Moreover, confidence in the government is improved if the public knows that its decisions will be predictable and generally fair. The New Zealand Law Commission, for example, found in 1997 that: “the assumption that policy advice will eventually be released under the Act has in our view improved the quality and transparency of that advice.”¹²

Diminished Opportunity for Corrupt Practices

FOI legislation is considered a key tool in anti-corruption measures since it requires that reasons for awarding contracts and other financial transactions be documented and justified.¹³ In fact, the UN Convention on Corruption calls for governments to make procurement information generally available. In India, for example, the Mazdoor Kisan Shakti Sanghathan (MKSS), a grassroots social activist group, obtained information on local public works. They then held *jan sun-wais* (public hearings) and read the files aloud to the local community, thus revealing the amounts

said to have been paid for schools and road projects. Community members were asked if the projects had been completed and how much they were paid. This highlighted many instances in which actual payments were less than the amount that had been recorded as given to people who had died and supplied to projects that were never completed, publicly revealing the amount of money being siphoned off by corrupt officials.¹⁴ In Thailand, the Prime Minister recently called for the public to use the Official Information Act to assist the government in reducing corruption.

Abuse of Power by Past Leaders More Likely to be Confronted

In countries that have recently transitioned to democracy, FOI laws allow governments to break from the past and help society better understand what happened to victims of state sponsored abuse and their families. In Mexico in 2002, President Fox made public all files regarding previous human rights abuses so that families could find out what happened to loved ones who were disappeared.

Improved Government Efficiency

FOI can improve the internal flow of information within governments. Excessive secrecy reduces the ability of government departments to share information and impinges upon efficiency. Many countries have reported that enacting FOI laws improved coordination and policy development.

Government Records Better Managed and More Accurate

In many countries, the adoption of FOI laws has resulted in a measurable improvement in record-keeping practices, as government agencies revise their record-keeping to meet the new legal requirements. In some countries, such as Ireland, FOI was part of a greater government management reform.

Moreover, the right of access to government files

ensures that records are accurate and decisions are not based on out-of-date information.

Decreased Need for Regulatory Laws and Improved Public Safety

Governments collect large amounts of information on the activities of the private sector. When disclosed, this information may be used as an alternative to enacting regulations: NGOs and citizens will be able to monitor private businesses by publicizing undesirable practices.¹⁵ Public release of information can motivate private actors to improve their behavior to avoid criticism and losses in the marketplace. In the US, the Toxic Release Inventory is considered to have successfully reduced the amount of toxic materials released within the country by nearly half.¹⁶ In addition, many nations, including the Philippines, Indonesia, Mexico and the Slovak Republic, publish information about pollutants released by industry as a means of informing communities about potential dangers.

Increased Transparency

The adoption of FOI laws generally leads to more openness in government activities. Governments realize that the release of most information does not harm their employment or political position; therefore, they increasingly make information available, even if it is outside the parameters of the given FOI law. The New Zealand Official Information Act says that one of its goals in this regard is “to increase progressively the availability of official information.”

WHO USES FOI?

Individuals

Individuals are often the largest users of FOI. In many countries, the FOI law is the primary legislation allowing individuals to obtain personal records and to examine the government or business decisions that affect them. For instance, government employees in Ireland use FOI to obtain em-

Using Electronic Data

In the US, the Transactional Records Access Clearinghouse (TRAC) at Syracuse University uses the Freedom of Information Act to obtain electronic records from different government agencies, including all federal criminal cases and the details of all federal employees and their jobs. It then merges that data with other information such as census records to analyze the workings of the national enforcement system. The information is put into a searchable web-based system that is open to the media, civil society and other groups. Organizations such as Human Rights Watch have used the system to analyze the enforcement of criminal and civil laws, including consumer protection, civil rights and environmental laws, and compare the levels of enforcement over time or between jurisdictions. TRAC has also analyzed nuclear safety and tax investigations.

Source: <http://www.trac.syr.edu>

ployment records. In Thailand, a mother whose daughter was denied entry into an elite state school demanded access to the school’s entrance exam results. When turned down, she appealed to the Thai Official Information Commission and the courts. Ultimately, she obtained records showing that the children of influential people were accepted into the school even if they received low test scores. As a result, the Thai Council of State issued an order that all schools accept students solely on merit.

In South Africa, the private access provisions of the Promotion of Access to Information Act have been used to obtain the records of a private company for a shareholder who was denied access. The same legal provisions were applied against a bank by an individual who wanted to know why the bank had denied his application for a home loan. In countries that have recently made a tran-

sition to democratic government, individuals often request information about abuses committed against them and their families under previous regimes. In Germany, the laws regulating access to files of the former East German secret police have been utilized by thousands to examine how their lives were affected by the police. Academic scholars also employ FOI laws, especially when researching current events.

Civil Society

Civil society groups are often the most visible users of FOI. Environmental groups request information on potential environmental hazards. Consumer groups in the US access records of product recalls and reports on the cleanliness of food processing plants. Trade unions often make requests for information on circumstances that would affect the health or safety of their members. The National Security Archive in the US made thousands of requests and obtained information from the US government relating to human rights abuses in Mexico, Peru and Chile that it then made available to the Truth Commissions operating in those countries.

Media

FOI is a powerful tool for journalists who are developing stories and require government information. In most countries, the media do not generally utilize FOI in their daily work because the

delays in obtaining documents tend to be slower than news cycles; in addition, journalists usually have other sources inside the government. In some jurisdictions, however, FOI use by journalists is more common. In Ireland, 12 percent of all requests are from the media (down from a high of 19 percent) and there are daily articles in the major media based on FOI requests.¹⁷ Most laws, however, do not give journalists special privileges.

Companies

Governments have access to a wide variety of information that may be used commercially. This includes scientific research conducted or commissioned by government bodies (e.g., genetic research that has medical applications, census data that can be used for marketing, and legal and administrative data that may be resold in compendiums). In 2003, the EU approved a directive on the commercial reuse of information, recognizing that information such as geographical and legal databases can be packaged and combined with other information and resold.¹⁸

Opposition Parties

In many countries, political parties not in government are denied adequate information on government activities, which inhibits them from exercising their oversight role.

CHAPTER TWO

Developing FOI Laws

There are broad similarities among FOI laws in most countries. The basic elements are: the individual's right to demand information from government bodies without having to show cause; the government's duty to respond and provide information; exemptions to allow withholding of certain information if its release would cause harm; internal appeals mechanisms; and some form of external review process. Generally, there is also a requirement that government bodies affirmatively publish some information on their own activities.

This chapter briefly reviews some of the more common elements of FOI laws and suggests some "best practices" based on experiences in over 50 countries.

SUBSTANTATIVE PROVISIONS

Given the variations in laws and legal systems from country to country, there is no one perfect freedom of information law that will work everywhere. Countries have developed their laws in many different ways and for many reasons; some have done so in response to scandals or under international pressure. In other countries, transition to democracy required that the past be revealed and confronted.

Generally, the more successful laws have come

about through cooperative efforts between government bodies and civil society. Gerry Kearny, the head of the Irish FOI unit, summarized the necessary groundwork:

[A]ny country planning to introduce FOI must have a critical mass in favour of its development. In Ireland, the critical mass included strong cross-party political support, the readiness of departments to engage with change, the invaluable assistance of key officials, and the wealth of expertise both at home and abroad so readily available to us from administrative, academic and expert sources.¹⁹

In Ireland, the law was developed cooperatively across government departments, led by the Deputy Prime Minister. A discussion document was developed and other departments were invited to comment and negotiate provisions. This exercise also reportedly had the positive benefit of raising awareness about the issue throughout the government.

Increasingly, the international community has played an important part in assisting countries in developing laws. As noted above, organizations such as the Council of Europe (CoE), Organization for Cooperation and Security in Europe (OSCE), United Nations, Commonwealth Secretariat, and the Organization for American States (OAS) have helped many countries to draft FOI laws based on the experiences of other countries.

In Bosnia-Herzegovina, for example, a group of national and international experts brought together by the OSCE developed one of the most progressive laws in the world. Unfortunately, it has not been fully adopted because of a lack of general awareness about the issue.

International civil society groups have also been important in helping government and indigenous civil society groups develop national FOI laws. These groups often have extensive experience in areas such as law, environmental protection, anti-corruption or freedom of speech and act as advisors in conjunction with local NGOs.²⁰

A number of bodies have developed guidelines or model laws (see Appendix) that can help in writing provisions. Experiences of other countries are also illustrative. The US Freedom of Information Act has been widely used, as have the national and sub-national laws in Canada and Australia. Given the large number of countries that now have FOI laws, it is possible to find ones from similar legal systems to learn from and improve upon. Reviewing more current laws is recommended, as most nations have made significant advancements based on the experiences under older laws that were later amended.

STATEMENT OF PURPOSE

However the law on access is developed, it is crucial to ensure that its intents and purposes are clear; a complex or confusing law will undermine the free flow of information. At the same time, it might be necessary to include many detailed rules: in South Africa, for example, the concept was new and details were considered necessary to ensure that it was understood.

In most laws, the opening statement of purpose or extended title sets the tone for implementation of the act. If broadly defined, it can clarify to all parties that the purpose of the act is to increase

government's openness. Courts often use this opening statement of purpose to guide further analysis of legal provisions.

At the most general level, the statement of purpose should specify that the default is to disclose information and that any non-disclosure should be exceptional, limited in scope and temporary. It should also reference any constitutional provisions on FOI.

Examples of statements of purpose include:

- * *South Africa* – To give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights; and to provide for matters connected therewith.
- * *Estonia* - The purpose of this Act is to ensure that the public and everyone has the possibility to access information intended for public use arising from the principles of democratic and social rule of law and open society, and to create possibilities for monitoring the public upon performance of public duties.
- * *Romania* – The free and unrestrained access of a person to any information of public interest, defined in this way through the present law, constitutes one of the fundamental principles of the relations between persons and public authorities, in accordance with the Constitution of Romania and the international documents ratified by the Parliament of Romania.
- * *Jamaica* - The objects of this Act are to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely— (a) governmental accountability; (b) transparency; and (c) public participation in national deci-

sion-making, by granting to the public a general right of access to official documents held by public authorities, subject to exemptions which balance that right against the public interest in exempting from disclosure governmental, commercial or personal information of a sensitive nature.

THE REQUEST

Who can ask?

Access under typical FOI laws is available to all individuals, corporations and organizations. A minority of laws restrict access only to citizens and residents of the country, but most laws enacted in the last 10 years do not require this.

An important component of an FOI law is that it allows anyone to request information from government bodies, without requiring the requestor to show a legal interest, i.e. participation in a legal or administrative decision. This is a defining difference from the many laws where access to certain documents is granted only if an interest can be demonstrated. A number of laws, such as Finland's, allow for anonymous requests. Most laws will fall somewhere in the middle, however, requiring an illustrated interest only if the information is personal or covered by commercial confidentiality exemptions.

Forms

Most countries require some type of written request that refers to the act and describes the information desired. Many further require that the inquirer use a form designed by the government body; it is now common for governments to accept electronic and faxed requests. Many countries, especially those with lower literacy rates, accept oral requests. The Council of Europe recommends that formalities be minimal in order to eliminate unnecessary barriers to obtaining information.

Assistance and Transfer of Information

Most laws compel the inquirer to be as specific as possible when describing the information requested. For instance, the South African PAIA insists that the request "provide sufficient particulars to enable an official of the public body concerned to identify the record or records requested."

There is usually a duty on the government's part to provide citizens with officials trained to assist them in the FOI process. This is essential as the FOI law is otherwise limited to knowledgeable insiders who know how to use the system. Trained FOI officers benefit the government too, as their assistance often leads to more specific and easily completed requests. FOI administrator duties include contacting the requestor to clarify the information desired if unclear and forwarding requests to other appropriate bodies if the information is held elsewhere.

INSTITUTIONS FOI ENCOMPASSES

Most FOI laws focus primarily on the administrative and executive bodies that comprise the modern bureaucratic state, including ministries or agencies at national level and related local bodies.

Some countries' laws, especially in the Commonwealth, list the bodies covered. However, this means that each time a body is created, changes its name, or modifies its purpose or structure, the schedule must be updated either by parliament or through regulation. This can be slow and time consuming. In Canada, a growing number of institutions are not covered under the act because of Parliament's failure to include them. Certain bodies can be excluded through non-action, even though there was a professed intent at the time of the legislation to be all encompassing. In Ireland, the police are not yet included under FOI regulations.

In a few countries, agencies that handle highly sensitive information, such as national security and intelligence, are exempt from the act. The problem with this approach is that while some of the information they have is quite sensitive, much of it can be mundane (e.g., the purchase of coffee pots). Creating a bulk exemption removes a necessary oversight mechanism that could prevent corruption or misuse of power. The better approach is to mandate broad access to information and use specific exemptions to ensure sensitive information is protected.

In some countries, such as the US, the courts and legislatures are outside the scope of the FOI law. There are often other rules relating to judicial and legislative transparency that determine the availability of information. It is becoming more common, however, to include these bodies in the FOI act. Provisions are usually inserted to prevent disruption of court proceeding and limit access to records held by legislators in their capacity as elected representatives, while leaving open files relating to committees and ministerial duties.

Subnational Governments

In governance systems where there are states or provinces such as in Mexico, Germany, India, Canada and Australia, it may be necessary for subnational jurisdictions to enact their own laws for those areas of information where they hold sole jurisdiction. Often, these laws are adopted before the enactment of a national law and incorporate progressive provisions that are tried out and later adopted at the national level.

Non-governmental Bodies

As government functions are contracted out to private bodies, most countries have extended their FOI laws to include non-governmental bodies such as publicly owned companies, private companies and non-government organizations that receive public money to conduct public projects or make decisions that affect the public.

There is also a more limited right in some countries to access information held by private bodies not conducting public business. In South Africa, the Promotion of Access to Information Act allows individuals and government bodies to demand information from private entities if necessary to enforce a given right. In many countries, data protection laws mandate a right of access and correction by individuals to their own files held by any public or private body.

Other sectoral laws may apply. For example, environmental protection laws require companies to publish information about potential threats to the environment and public health. There is also growing international pressure by civil society groups and some governments to require oil companies to publish the amount of money they pay governments for oil revenue and other natural resources as an anti-corruption and social justice measure,²¹ as well as for other companies to reveal information on how they are affecting local communities.²²

International Bodies

As international governmental organizations play an increasingly important role, the right of access to information needs to be codified in new agreements. Decisions that were once made on a local or national level—where the citizen had access to the process—are now being reoriented and made outside the country in a more secretive setting. The European Union's decisions are binding on all the member states, but their information access provisions are significantly weaker than most of the members' laws. In Bosnia-Herzegovina and Kosovo, access to information held by international bodies that currently run the countries has been limited. International financial and trade organizations (IFTIs) can force countries into adopting new financial rules without publicly revealing their reasons. Activists have steadily pressured the WTO, the World

Bank and the IMF to release more information; they have become progressively more open, but access is still limited.²³

The best approach is that the legislation should state in broad terms that all government bodies are subject to the FOI laws. Typically, this includes all national, regional and local government bodies and private bodies that are exercising government powers. International bodies that exercise power that was previously exercised by national governments should be subject to the same rules.

THE FORM OF INFORMATION

There is a wide variation among FOI laws in the terminology that is used to describe information held by government bodies and what individuals have a right to demand from them. Older laws tend to refer to the right to access records, documents or files, while newer laws refer to a right to information. In practice, there is generally not much difference as most laws broadly define the right to include all forms of information, no matter what the medium. However, in some countries, the definition of ‘official documents’ does not include documents in preparation.

Generally, the right only applies to information that is written or recorded. This can leave gaps as certain information used in making a critical decision may have only been orally transmitted and not recorded—such as in a meeting. In Denmark, authorities receiving information orally that is important to a decision by a government body have an obligation to take note of the information.

The best practice is to ensure that the right to information be construed broadly and not be dependant upon the medium or method of storage, and that as new technologies are developed the law applies automatically without requiring further amendment.

Nearly every law allows a person to view the information directly as long as s/he does not endanger it. Most laws also allow the requester to ask for copies of the information in any reasonable form. This includes electronic records in their original form to facilitate searches (see textbox on TRAC), printouts if the user does not have the proper equipment, transcripts, or copies of audio tapes or video converted to a format that makes them viewable on commonly available machines.

RESPONSE TIMES

The amount of time that government bodies are given before they must respond to a request varies among countries. Ideally, the response should be immediate or as soon as possible. Excessive delays can frustrate the intent of FOI by preventing information from being available when it is useful to the requester, especially in the case of media requests. In reality, however, this is not feasible for many agencies, which require sufficient time to review and fill requests. Vital to this process is an adequate records management system.

Typically, the standard is that the government should handle a request as soon as possible, with a maximum response time between two and four weeks. In smaller countries and in those that have had a law for a number of years—such as in Scandinavia—the common practice is to require that the given agency respond immediately and provide the information as soon as possible. In most jurisdictions that allow for oral requests, an immediate response (within days) must be given if possible. There are usually provisions for additional response time if the request is lengthy, complex or must be transferred to another body that holds or has control over the information.

A number of countries demand an immediate response for public interest reasons, such as threats to a person’s health or safety. The US Freedom

of Information Act was amended in 1996 to provide for a two track system in which requests for information of a public interest receive priority and must be responded to more quickly.

FEES

Many FOI laws authorize government bodies to demand a fee. Fees are often controversial since the public has already paid for the creation of the information through their taxes and the government should have a duty to inform the public of their activities. There is also the issue of being charged for the exercise of a constitutional right. There is a balance between the right to access and the financial responsibility of government bodies.

In most jurisdictions that allow for fees, they are not imposed in the majority of requests because the cost of providing the information is less than the administrative cost of collecting and processing the fee. A general principle adopted in all jurisdictions is that fees should not be used as a profit-making device.

Common Types of Fees:

- * *Application Fees.* A few countries require applicants to include a nominal amount (usually around US\$10-15) with the application.
- * *Search and Processing Fees.* This is the most controversial fee as it can result in substantial costs being imposed even prior to a search being conducted. Most jurisdictions do not charge for the cost of searching and processing. Those that do tend to charge only for the searching and not for the time spent examining the documents.
- * *Copying and Postage.* The most common fees are for the cost of copying and mailing

the located records. Most acts assert that a certain number of pages are provided free and allow individuals to view the records in person without cost.

- * *Appeals.* A few countries, such as Ireland and Australia, charge fees for appeals of FOI decisions. Such fees can be used to distort the purpose of the law by limiting an individual's ability to challenge unwarranted withholdings by government bodies. The high fees imposed for appeals in the Australian Commonwealth law is widely seen as a means to limit the right of applicants.

In some jurisdictions, fees are used to limit requests. Governments demand large amounts of money before providing the information as a challenge to the requestor. As a consequence, only those who have the financial means to pay fees or obtain legal assistance are able to gain access to information.

Fee Waivers

Many jurisdictions also provide for fee waivers when it is in the public interest to release the information. In the US, media and NGOs are generally exempt from fees, while commercial requesters are asked to pay. Fees are also waived in many jurisdictions for those who show that they are on public assistance or cannot otherwise afford it.

The best practice is to limit fees to actual costs for providing information, provide waivers and not charge for appeals.

EXEMPTIONS

All freedom of information laws recognize that there are circumstances under which information should not be released because it would harm public or private interests. Generally, these exemptions are included in the FOI law.

Council of Europe's Model Exemptions

The Council of Europe suggested the following exemptions in 2002:

1. national security, defense and international relations;
2. public safety;
3. the prevention, investigation and prosecution of criminal activities;
4. privacy and other legitimate private interests;
5. commercial and other economic interests, be they private or public;
6. the equality of parties concerning court proceedings;
7. nature;
8. inspection, control and supervision by public authorities;
9. the economic, monetary and exchange rate policies of the state;
10. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents, 21 February 2002.

http://cm.coe.int/stat/E/Public/2002/adopted_texts/recommendations/2002r2.htm

There are a number of common exemptions that are found in nearly all laws. These include the protection of national security and international relations, personal privacy, commercial confidentiality, law enforcement and public order, confidential information, and internal discussions.

Principles for Exemptions

The Council of Europe recommends use of the following principles when defining exemptions:

- * Access should be the rule and confidentiality the exception, in cases where other legitimate interests take precedence

- * Limitations of the exemption should be set down precisely in the law
- * Exemptions should not be only those necessary in a democratic society
- * Exemptions should be over broad but rather proportionate to the aim of protecting other legitimate interests

Partial Disclosure

Almost all laws enable the redaction of documents or files of exempted information before the remainder are disclosed to the requestor. This prevents officials from withholding a document or entire file based on the inclusion of a single piece of information or document, which might not even be relevant to the request or placed there just to prevent access.

Duration

Exemptions should not be set for an indeterminate duration. Most laws require that once the reason for exemption has passed, it should be made available. Other laws set time limits. The Estonian Public Information Act sets a five year limit on withholding information that is deemed internal. In Mexico, the Federal Transparency Act limits the application of exemptions to a 12 year period.

Harm Tests

Most FOI laws require at least some exemptions if the government body can demonstrate harm will occur if the information is made public. The test for harm generally varies depending on the type of information to be protected. National security, privacy and international relations tend to get the highest level of protection.

Public Interest Test

A number of countries—including South Africa, Jamaica, Japan, Ireland, United Kingdom, New Zealand and Bosnia-Herzegovina—require that a public interest test be applied for some exemp-

tions. This requires information to be released if the public benefit of accessing the information outweighs any harm that may be caused by its disclosure.

In Japan, the head of the administrative organ is given the power for a discretionary release “when it is deemed that there is a particular public interest necessity.” In South Africa, the PAIA compels an information officer to release the record if “the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law; or an imminent and serious public safety or environmental risk; and the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.”²⁴ This test can be applied both at the administrative level when a body is reviewing information for release and at the appeals level when an independent commission or court is reviewing an agency's decision.

Factual Information

Most FOI laws assert that while internal discussion of policies may be exempted, the underlying factual information used to make the decisions cannot. It is necessary to consider how this distinction can be maintained in documents that include both exempted information—such as policy recommendations—and factual information. The Irish government has recommended to bodies that they structure their internal documents to facilitate access, stating “Departments are advised that... as a matter of course they should prepare their Memoranda and Aides Memoire for Government in a structure which readily enables access to factual information underlying published decisions.”²⁵

Other Non-Exempt Information

Many FOI laws prohibit certain information from being withheld, including evidence of a crime or information relating to human rights abuses. The Mexican Federal Transparency and

Access to Information Law states that: “[i]nformation may not be classified when the investigation of grave violations of fundamental rights or crimes against humanity is at stake.” The Peruvian Law on Transparency and Access to Public Information prohibits the withholding of information relating to human rights abuses or violations of the Geneva Convention of 1949. The Georgian Freedom of Information Act includes environmental hazards, descriptions of an agency's principles, structure, officials, elections, audits and elections.

Administrative Exemptions

In addition to exemptions based on substantive concerns, most FOI laws include provisions that allow for the rejection of requests based on certain administrative reasons. These include circumstances where information is available by other means or will be published shortly; overbroad requests; and, “vexatious” or repetitive requests.

The best practice is to ensure a standard of reasonableness. A broad request might be necessary for a scholar writing a book on a historical figure. Repeated requests may be necessary to keep an updated date record of a government agency's activities (see textbox on TRAC). The government should not use administrative defenses to unreasonably deny requests. If a request is insufficiently specific, most FOI laws require the FOI official contact the requestor and discuss the request to see if it can be clarified or narrowed down to something that satisfies both parties.

RELATIONSHIP WITH OTHER LAWS

In most legal systems, there are other laws that affect access to information. Some can require that information be published; others may require that information be withheld. Some can be based on constitutional provisions or international agreements. An essential part of adopting a FOI

law is to identify these laws and ensure they are consistent with the FOI law and do not undercut the right of access.

The best practice is to give the FOI law priority over other laws and to incorporate any necessary restrictions into the FOI law. However, it is also important to ensure that adopting the FOI law does not result in the withholding of information that is already being released under other laws.

The following laws are typically found in most legal systems:

- * *Archive Laws.* Most countries have laws that require important documents and information to be organized and retained for historical purposes. At some point, usually after 30 years, that information is made available to the public without limitations.
- * *Data Protection and Privacy Laws.* These acts have two general functions: to ensure that personal information is protected and to allow individuals to access and correct their own records held by government and private bodies. Such laws are often required by national constitutions and international agreements such as the EU Directive on Data Protection, the European Convention on Human Rights, and the American Convention on Human Rights. Care must be taken to ensure the integrity of personal information as well as freedom of access to information about government bodies, officials and their activities.
- * *Laws on national security, official secrets and classified information.* Most countries have provisions in their criminal code or an Official Secrets Act that prohibits the unauthorized release of sensitive information by government officials. More recently, many countries have adopted new laws setting rules on classified information as part of joining NATO.
- * *Environmental Protection.* Many new constitutions require access to environmental information that would affect the community's health and safety. International agreements such as the Aarhus Convention and the European Convention on Human Rights require that countries give individuals access to environmental information. Sometimes the right is in the general FOI law but often it is a separate environmental protection act.
- * *Confidentiality.* Many laws on the census, statistics, or other types of government data collection have provisions that ensure that information is kept confidential for a certain period of time.
- * *Other open government laws.* Other laws on the national and local levels may also require transparency, including requirements for government bodies to hold open hearings, meetings, and trials and to provide access to legislative and court records.

FORM OF DENIALS

All laws require the government body to inform the requestor if his/her request has been denied. The best practice is to promptly inform the requester in writing of any denials or redactions and to explain the reasons clearly.

This benefits both the body and the requestor. When requestors understand that there are justified reasons for denial, they are less likely to appeal unnecessarily. In addition, a detailed justification will facilitate the appeals process where it is likely the body will have to explain again why the information was withheld.

APPEALS AND OVERSIGHT

In all countries, the decision of the public body is

subject to some form of review. Under most laws, there is both an internal review and a final review by an independent external body. The courts are the final recourse in nearly all systems. In general, the jurisdictions that have created an outside monitor such as an ombudsman or information commissioner appear to have more successful implementation of FOI laws.

Internal Review

The first level of review in all but a few countries is an internal appeal. This typically involves asking a more senior decision-maker in the body or a higher level department to review the withholding of information.

Internal review can be an inexpensive and quick way of reviewing decisions and releasing more documents. However, the experience in some countries (such as Australia) is that the internal system tends to uphold the denials and that departments use reviews to delay release rather than enhance access.

External Review

Nearly all countries have some form of external review that can be requested once the internal appeals have been completed to ensure the decision by the government body was not flawed. Usually, under standard administrative procedure practice, internal appeals must be exhausted before external review can be requested. Some laws, such as in the US, state that the failure to respond is considered to be a denial and allow the requestor to immediately file suit.

Ombudsmen

The most common form of external body to review decisions is an ombudsman, typically a constitutional officer or a representative of the parliament. Ombudsmen are generally not given the power to make a binding decision, but in most countries their decisions are influential and typically followed by the government body. Many

ombudsmen are limited to handling specific cases and are not able to look more systematically at the overall system.

Information Commissioners

Over a dozen countries have created an independent information commission, which can be part of the Parliament, Prime Minister's Office (as in Thailand) or an independent body.²⁶ The Commissioner's powers vary. In many jurisdictions, such as in Canada, they are similar to an ombudsman and are only given the power to issue opinions. In Mexico, Ireland and the UK, the Commissioner can make binding decisions. In Hungary, the Commissioner can make recommendations on FOI cases but can also order changes in the classification of certain state secrets.

A Commissioner can be tasked with many duties besides merely handling appeals. This includes general oversight of the system but also reviewing and proposing changes, training, and increasing public awareness (see implementation section below for more details).

The Commissioner may have additional duties based on other laws. The national UK, Hungarian, Thai, Estonian, Latvian, and Canadian and German provincial models have combined the FOI Commission with the national data protection authority. In Ireland, the Information Commissioner is also the general Ombudsman. In South Africa, the Human Rights Commission is given oversight authority but does not handle appeals.

Courts

Almost all countries allow the requestor to appeal refusals to provide information to the national courts, which are often empowered to obtain copies of most records and make binding decisions. Requesters can usually file an appeal with a court instead of appealing to the ombudsman or infor-

mation commission, although where the ombudsman is considered to be influential (as in Scandinavia) court cases are rare. In other countries, such as Ireland, the court can only make a limited review of legal (rather than factual) questions once the independent tribunal issues a decision.

A less efficient system has the courts serve as the only external point of review, such as in the United States and Bulgaria. This effectively prevents many requestors from enforcing their rights because of the costs and significant delays involved in bring cases to courts. The courts are also often deferential to agencies, especially in matters of national security related information.

SANCTIONS

Nearly all FOI laws provide for sanctions if the law is not followed. Typically, these cases involve a government body or employee unreasonably refusing to release information, or altering or destroying documents. Sanctions can be imposed against the body itself or specific employees. Sanctions are a necessary part of every law to show the seriousness of failure to comply. However, getting a government body to sanction its own employees for following what are often general, if unlawful, practices can be problematic.

Most laws impose fines and even jail time for egregious violations of FOI laws. The Polish Law on Access to Public Information states: "Whoever, in spite of his obligation does not access public information, shall be liable to a fine, restricted freedom or imprisonment for up to a year." Jail sentences are quite rare. In 2003, there were only a few cases in the US on the local level.

Sanctions that compensate the requestor can also be brought against bodies that refuse to release

information. In the US, courts impose a form of sanction by awarding legal costs to requestors when it is found that the documents should not have been withheld. According to the Romanian Freedom of Information Law, the court can order the public authority to "pay moral and/or patrimonial damages."⁵ The Association for the Defense of Human Rights in Romania-Helsinki Committee (APADOR-CH) sued Prosecutor-General Joita Tanase in June 2003 after he refused to obey a court decision to release a report on the number of wiretaps in Romania.²⁷

AFFIRMATIVE PUBLICATION

A common feature in most FOI laws is the duty of government agencies to routinely release certain categories of information. This can reduce the administrative burden of answering routine requests.

Thus, more recent FOI laws tend to mandate the disclosure of certain information as a matter of practice. Under the Estonian Public Information Act, national and local government departments and other holders of public information have a duty to maintain websites and post an extensive list of information on the internet. They are also required to ensure that the information is not "outdated, inaccurate or misleading."

Other countries, such as the UK, require that bodies adopt a publication scheme. The Information Commissioner has developed model schemes for different types of bodies, usually in conjunction with the given agency, and has the power to approve and reject schemes. In Slovenia, the Ministry of the Information Society sets regulations regarding which records a public body must publish.

In South Africa, public and private organizations must publish manuals describing their structure, functions, contact information, access guides,

services and description of the categories of records they hold. The Human Rights Commission is required to create a guide based on those manuals.

Recommended categories of information include:

Structural Information

Information on the structure of the organization, its primary functions, a listing of its employees, annual reports, audits, services offered, and other related information. In Wales, the Assembly provides the minutes and agendas of meetings.²⁸ In Mexico, this includes a directory of employees and monthly salaries.

Budget Documents

Detailed information on projected revenues and expenses. The IMF notes that “fiscal transparency is of considerable importance to achieving macroeconomic stability and high-quality growth.”²⁹

FOI Procedural Information

Most laws require that information detailing the procedures for filing an appeal and contract information must be made widely available to facilitate people’s rights. Some jurisdictions now make available request and disclosure logs so that potential requestors can see what has already been requested and released.

Record Systems

This includes information describing the types of records systems and their contents and uses. In countries such as Sweden that have document registers, this includes providing facilities for the public to search and review documents. This can also include statistical information on the use of the FOI or documents already released.

Internal Law

A common requirement is for bodies to make available the internal rules, regulations, manuals and other information on how the body makes

decisions. Several Australian states reported that a positive benefit of making this information public was that the departments were forced to update, revise and clarify the information, making it more useful to the departments and promoting consistent decision-making.

Reports

Regularly produced reports, both scheduled and ad hoc, are often the subject of requests. Many laws require that all reports be made public unless there are particular reasons for exemption. In some jurisdictions, this publishing process has allowed the bodies to better review their activities and reduce redundant efforts.

Tenders and Contracts

As part of electronic government, a number of countries are working to make more information available about their financial decisions. This can be an effective anti-corruption measure. In Mexico, the Federal Transparency and Access to Public Government Information Law requires that each public body must make available for each contract “the public works, goods acquired or rented, and the contracted service; in the case of studies or research, the specific subject must be indicated; amount budgeted; name of the provider, contractor or the physical or moral person to whom the contract has been granted; and periods within which the contracts must be completed.”

Commonly Requested Documents

Across jurisdictions, there are many types of documents that are frequent subjects of FOI requests. These include travel expenses, salaries and other expenses for public officials. Making these affirmatively available reduces the need to process them later.

ELECTRONIC ACCESS

Electronic networks are an efficient way of pro-

viding information. The Council of Minister in the European Union makes available many of its documents, including any document released under its access regulations, in an electronic register. This has resulted in both improved access by citizens and efficiency gains by the secretariat. As noted by the Council in the most recent annual report: “if the number of documents directly accessible to the public increases, the number of documents requested decreases.”³⁰ The US Justice Department reported in its 2002 review of agencies that many had substantially reduced the number of requests by putting documents of public interest on the web.³¹

Many other laws also require that government departments affirmatively publish information. These include acts on public administration, consumer protection, environment, court practices and statistics. The New York City Department of Health summarizes its restaurant inspections online,³² and the Consumer Product Safety Commission has a list of toy recalls.³³ Some US states make available indexes of doctors so consumers can see who has been disciplined.³⁴

One barrier is the inability of many individuals to use electronic resources due to lack of access or training. The digital divide is a significant problem in many developing countries: the telecommunications networks are of poor quality due largely to a lack of resources, dominance of state telecommunications providers and privatization. There are high fees for calls and broadband deployment has been limited. There is also generally a low penetration of computers in homes and low availability of public access to networks. Furthermore, much of the access is from the large cities; consequently, people in small towns and

rural areas are even less likely to have access.

Another large hurdle is the lack of education or even a willingness to use electronic services. Polls in countries around the world have found significant numbers of people, especially those from older generations, who are unwilling to go online, even if offered training. This is in part due to privacy and security concerns. It is also necessary to ensure that the information is provided in such a way that it is easy to use and find. Care should be taken to ensure that files are not too large to preclude users with telephone-based systems from viewing them, and that formats are commonly available.³⁵

Given these challenges, it should be possible for individuals to access the same information in physical form. Most laws enable requestors to view documents in government offices. In the US, government departments have “reading rooms” where individuals can view standard in-

ADDITIONAL RESOURCES: MODEL LAWS

Commonwealth Secretariat, Freedom of Information Act, May 2003

www.thecommonwealth.org/law/docs/Freedom%20of%20Information%20-%20revised%20on%207%20May%2003.doc

Council of Europe, Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents, 2002.

http://cm.coe.int/stat/E/Public/2002/adopted_texts/recommendations/2002r2.htm

Article XIX: Model FOI Law, August 2001.

<http://www.article19.org/docimages/1112.htm>

CHAPTER THREE

Implementing FOI Laws

formation and already released documents.

Once a FOI law is adopted, the difficult work begins. The first hurdle is convincing government departments and society in general that there is a right to ask for information. This is not a simple task. People who were used to being told by government officials what was right and wrong will not be accustomed to asking for information to prove things for themselves. Officials who may have been working in the same job for many years will not necessarily wish to change their entire way of working.

The public must be educated on what their rights are and how to use them. They must be assured that asking for information will not bring the wrath of officials against them.

In the government, top level officials must constantly emphasize that FOI is a positive step forward and an essential step in any democracy. Adequate resources must be provided and enough time should be set aside to ensure that the Act will be implemented without disrupting the normal activities of the bodies.

TIME FRAME FOR IMPLEMENTATION

Implementing a FOI act usually requires planning, training and changing administrative procedures. It is usually necessary, therefore, to allow some time before it goes into force or the proc-

esses to handle requests will not be adequate. Typically, countries have given themselves between 6 and 18 months (one year is average) to implement FOI Acts.

A longer period than one year tends to be counterproductive. The initial momentum and interest fades as other activities take precedence. Training is ineffective as it is forgotten or staff move on to other positions. In the UK, which set aside over four years to implement the Freedom of Information Act 2000, very little was done for the first two years and the time frame served as a delay rather than a preparation period.

Some governments have phased in implementation. This allows for larger organizations that have the resources to prepare and develop expertise and then use their experiences to assist other smaller bodies. It also helps prevent any central bodies that are providing advice, training or overseeing the process from being overwhelmed. In Jamaica, the law will first be applied to seven major government departments. In Ireland, central bodies were the first to implement the law, followed by smaller bodies over a five-year period.

Other aspects also can be phased in. In South Africa, the time frames for responding to access requests started at 90 days and were progressively lowered to 30 days over a period of two years as

Alberta's FOI Implementation Checklist

Step 1 – Establish a structure to administer the Act

Step 2 – Establish a training plan and conduct awareness training

Step 3 – Develop a communications plan

Step 4 – Develop procedures for tracking and responding to access requests

Step 5 – Pass a FOI by-law or regulation

Step 6 – Review records management and archives practices

Step 7 – Develop a directory of records

Step 8 – Decide what information will be available to the public without a request

Step 9 – Review manuals and guidelines

Step 10 – Develop a plan to ensure compliance with privacy protection provisions

Step 11 – Review contracting processes

Source: FOI and Protection of Privacy Checklist. Alberta Municipal Affairs, July 1997.

departments became more familiar with the requirements and more efficient with their responses. In the UK, the publication requirements were first adopted by central government and then extended to local governments and other bodies. In Ireland, the law initially applied to records created after the day it took effect with the expectation that access to older records would eventually be phased in.

CENTRAL COORDINATING BODY

The first action that a government must take is to appoint a central body that can develop a strategy

to coordinate the effort. The body should have adequate resources and high level support but should also have some knowledge of information management. In Jamaica, the Archives and Records Department in the Office of the Prime Minister set up an Access to Information Unit. In Slovenia, the job is shared by the Ministries of the Information Society and Interior. In Ireland, the Ministry of Finance set up a FOI Unit.

The function of a central body is to ensure that efforts are coordinated, provide a central point for expertise, and facilitate information sharing. The body should be able to perform a number of functions:

- * *Guidance.* Public bodies will need informed guidance ranging from the basic establishment of structures to advice on how to apply exemptions. The body can create model regulations and codes of practices.
- * *Training.* Depending on resources, it will be difficult for the central body to train all employees. However, it can at least train the senior staff and those employees who will train others.
- * *Oversight.* The central body can review plans and monitor processes. It can also gather statistical information and issue reports. It can be the focal point for questions from parliament, ministers and the public.
- * *Networks.* The body can facilitate the creation of networks of experts in different bodies who can discuss and learn from each other's experiences.

DEPARTMENTAL IMPLEMENTATION

The first act of every government body must be to appoint a coordinator in charge of implementing the act in their department. This will prefera-

bly be a senior-level executive who has the authority to make changes and set aside adequate resources. In some bodies, this is the Director or his/her Deputy; in others, governments have assigned the task to the Chief Information Officer. In a decentralized or large organization, it may be necessary to appoint coordinators for different divisions. It might be also useful to create a board of people from different divisions within the department, including information technology, archives and legal affairs who can advise the coordinator on different issues.

There are many tasks for each government body to complete before the law takes effect: structures and procedures must be set; records systems must be reviewed; and staff must be trained. As with the central body, senior officials in each department need to continually affirm FOI as a positive effort and give positive support to those affected by it.

Preparing for the Volume of Requests

It is difficult for any given body to estimate how many requests are likely to be received once the act is in force. It is the experience in most countries that the initial number of requests starts lower than expected and grows with time as awareness of the act expands. Those bodies that handle controversial or public issues are more likely to receive requests than those that do not.

The presence of a privacy or data protection act will make a significant difference. In many jurisdictions (including Australia and Ireland), a large proportion of requests are from individuals asking for their own files. If a government body is already subject to a data protection or privacy act, than the number of new requests will likely be lower than if individuals can for the first time access their own records. Similarly, bodies that are already subject to environmental access laws are not likely to see significant numbers of new requests if they already provide the information

under existing laws or regulations that remain in effect. The amount of information affirmatively published will also make a difference. As noted above, the number of requests has declined in jurisdictions where commonly requested information is routinely published.

The best way for any government body to estimate how many requests it is likely to receive is to identify similar bodies in countries or jurisdictions that have already implemented a FOI act and to contact them or examine their annual reports for guidance.

ROLE OF OMBUDSMAN/INFORMATION COMMISSION

Typically, the Ombudsman or Information Commission plays an important support role to both government bodies and the public on the FOI act. Some typical functions include the following:

Codes and Regulations

In some jurisdictions, the body is given the power, either singly or jointly, to develop codes of practice and other regulations on the use of the act. In the UK, the Information Commissioner must approve all publication schemes and develop model schemes for bodies to adopt.

Recommended Application of Exemptions

The office can develop guidelines or codes on how each of the exemptions should be applied. This will give the agencies guidance on how the Commission will review their decisions and encourage consistent application of the law across the government.

Public Interface

The body can play a liaison role between the public and government bodies. In Mexico, the National Commission on Access to Public Information has set up an electronic system for re-

quests on the Internet (SISI) for the Executive agencies.³⁶ The body can also conduct public seminars and trainings on the Act and produce brochures, guides and other materials to encourage the public to use the act.

Reports on Implementation

The body can formally or informally monitor the progress of each body as it implements the act, and can provide advice on best practices. At an early stage, informal advice is probably the most constructive. Once an act is in place, it can require the production of status reports and statistics and conduct audits and investigations.

Preparing for Appeals

The Ombudsman or Commissioner must be prepared to receive cases. Typically, only a small number of requests are appealed to this level. In Ireland, for example, around 4 percent of cases are appealed on average.

Posts such as the Ombudsman may be useful in setting up structures to handle appeals. However, in Ireland, a significant backlog on FOI cases developed in the first few years. After it was discovered that each case required more time to conclude than similar cases heard by the Ombudsman, more staff were hired.

The Irish, Canadian and a number of the Australian state commissions regularly publish their decisions. This promotes consistency of decision-making by government bodies.

ROLE OF CIVIL SOCIETY

Non-governmental organizations have an important role to play in the implementation of FOI laws. Those that were actively involved in developing the law can be an important source of advice on its implementation. They can also help publicize the act and test its provisions.

- * *NGOs as Users.* NGOs making requests can both force government bodies to implement the laws and educate the public on the use of the laws. In South Africa, the South African History Archive (SAHA) has sent dozens of requests to reveal and protect the files of the Truth and Reconciliation Commission. They have also discovered that thousands of intelligence files were never given to the Commission. This has involved working closely with the FOI officials in the Archive, as well as military and intelligence services.
- * *Training.* To increase the knowledge and use of the act, NGOs can train government officials, attorneys, other NGOs and the public. In Bulgaria, the Access to Information Programme has held extensive training seminars for requestors, government officials and judges throughout the country.
- * *Public Information Campaigns.* NGOs in many countries have run public awareness campaigns to inform citizens that they have the right to demand information. The materials they have used include television and radio advertisements, newspaper ads, and articles, posters, and brochures.
- * *Conferences & Public Awards Ceremonies.* Conferences and awards ceremonies of best and worst practices are a useful tool for focusing media attention on an often esoteric subject. They can bring about results that are either positive or negative in nature. The Canadian Association of Journalists holds the “Code of Silence Awards” to criticize government bodies that excessively withhold information.³⁷ After last year’s ceremony, the Nova Scotia government promised to release more information. Other groups hold positive awards. In the UK, the Campaign for Freedom of Information recognizes individuals who have championed openness. A number

of international groups are now organizing events around the International Right to Know Day each year in September.

- * *Testing and Audits.* In Bulgaria, the Access to Information Programme conducted two surveys of all central government bodies and major municipalities on their views of the Access to Public Information Act.³⁸ In the US, the National Security Archive is conducting a comprehensive audit of the FOI. It has submitted test requests to numerous agencies and has interviewed FOI staff. The Southeast Asia Press Alliance (SEAPA) compared access to public records in eight countries in the region and ranked them.³⁹
- * *Public Support.* Many NGOs provide legal assistance to the public on how to use their FOI law. The Peruvian Press Council runs a help line to advise people on how to make requests. In Bulgaria, the Access to Information Programme represents public interest groups and individuals who need to file lawsuits against government departments. The US Electronic Privacy Information Center publishes a yearly litigation handbook updating the case law. Many run websites that automatically create requests in the correct form for individuals.
- * *Litigation.* NGOs also file cases on their own behalf to generate legal decisions to clarify unclear provisions. In South Africa, the Open Democracy Advice Centre has filed many of the leading cases for access to information held by both public and private bodies.

TRAINING

Proper training is essential to successful adoption of FOI. As noted by the Scottish Executive in their plans, “FOI implementation should not come as a surprise to staff and managers in any

organization.”

The countries that have most successfully implemented their FOI laws generally have adopted a comprehensive approach, ensuring that everyone in the government has at least a basic understanding. Different levels of staff received training based on their needs, ranging from intensive and comprehensive to general awareness.

In Scotland, the Executive has divided the training into three levels:

- * *Strategic.* Chief executives, Board members and elected representatives. The strategic level would likely require basic knowledge about the FOI regime and more information about resource and presentational implications (e.g., media issues). Senior level staff will need to examine the implications of organization policies and what a “FOI culture” will mean for them. They will also need to consider their leadership role in implementing a culture of openness.
- * *FOI Practitioners.* Decision makers, records managers, review officers and lawyers. Training for practitioners will concentrate on key skills and knowledge required for successful operation of the FOI regime and a particular public body’s FOI policy.
- * *General.* All staff. The general level of training will cover awareness and some skills education related to information giving and customer service.⁴⁰

It is also necessary to ensure that other interested parties receive training on the act. Judges should receive training on the law and how to best handle cases.

Training does not necessarily have to be con-

ducted by government officials. Some can be included in standard civil service manuals. Professional associations and private training bodies can offer specialized help. Academic institutions can include sections on the subject in their legal courses. Finally, NGOs in many countries provide training as part of their advocacy work.

NETWORKS

Networks can share best practices and lessons learned from other departments. Most important, they can provide support so that individual FOI officials do not feel overwhelmed. The networks should also bring in outside users.

A variety of different networks can be created. In Ireland, the government organized networks under the FOI Central Policy Unit for both internal and external experts:

- * *Civil Service Practitioners.* Meet monthly to promote best practices and compliance; share information on requests; identify common approaches to security and implementation.
- * *Public Service Practitioners.* Similar to practices above but for those in public bodies outside the civil service.
- * *Business Advisory Group.* Develop awareness and understanding of FOI in business community; identify and address issues; produce short guide on FOI for business users. Participants include the Chamber of Commerce and tourist and exporters associations.
- * *Citizens Advisory Group.* Consider draft regulations; review findings of the Information Commissioner; review strategies for targeting FOI at consumer level; consider government publication systems.

Non-official networks are also useful. In the US,

the American Society of Access Professionals is a professional association of government officials and users that provides training and fora to meet and discuss issues. In smaller countries, networking is often more informal. However, developing common approaches to problems may be more limited without a central body to mediate.

MANAGEMENT REVIEW

If records are not managed well, it will be difficult to enforce a right of access. As noted above, a new FOI law provides an opportunity for governments to take necessary steps towards better administration. Since there are set time frames, it can focus on how a body is currently acting and allow managers to make changes. New acts to change processes may be necessary. In India, the government is considering a Records and Archives Management Act to complement the FOI act and to better organize the retention and management of information.

Registers of Documents

A number of governments keep detailed registers

The EU Council Register

The Council of the European Union has operated a register of documents since January 1999. All documents that are created are automatically included in the register as soon as they are produced. The searchable register is available on the internet, with many of the documents automatically accessible online. It includes the following information:

- | | |
|--------------------|------------------|
| • Reference number | • Addressee |
| • Title | • Document date |
| • File number | • Meeting date |
| • Subject | • Archiving date |
| • Document type | • Language |
| • Sender | |

Source: <http://register.consilium.eu.int>

of all documents that are created or received by government bodies. This is common in Scandinavian countries and is increasingly found elsewhere. Since 1999, the EU has required that all of its bodies keep registers.

A new problem that has emerged in the past ten years is how to handle electronic records. Governments are still struggling with setting rules on retaining and organizing electronic mail and files. A further problem is how to ensure access to those records in the future. As software evolves and changes, it will be necessary to develop common standards or keep old computer systems and software to ensure that disks and files can be read in the future.

MONITORING USAGE AND ANNUAL REPORTS

Once a FOI law is passed, it is critical that implementation be monitored closely. Many laws require that each government department monitor the use of the FOI, including how many requests are made, what exemptions are used, and how many documents are released.⁴¹

The UK Department of Constitutional Affairs has noted a number of reasons for keeping detailed records of requests and responses for internal management purposes:

- * There is a legitimate public and political expectation that Central Government should at

least be able, in one form or another, to give an account of how the FOI Act is operating.

- * Authorities have to record certain information about how they have processed requests in order to deal with any subsequent appeals.
- * Authorities that deal with more than a few requests at a time will need a system to ensure information is collected and recorded correctly.
- * For internal performance management purposes these systems should reveal where possible problems exist.
- * When separate government departments receive similar requests and a co-coordinated response is needed, a method will be needed

ADDITIONAL RESOURCES

Alberta Municipal Affairs, FOI and Protection of Privacy Checklist. July 1997.

http://www3.gov.ab.ca/foip/other_resources/publications_videos/pdf/checklist.pdf

Irish Manual for FOI Decision Makers.

<http://www.foi.gov.ie/foi.nsf/DecisionGuide?OpenFrameSet>

Open Democracy Advice Center (South Africa)
PAIA Resource Manuals, A User's Guide for Administrators in Government.

[http://www.opendemocracy.org.za/new%20files/SA/HRC%20Manual%20Module%201\(A\).doc](http://www.opendemocracy.org.za/new%20files/SA/HRC%20Manual%20Module%201(A).doc)

CONCLUSION

to easily identify these requests to ensure consistency of response.⁴³

LONG TERM ISSUES

Central Support

A knowledgeable central body is still required after the initial implementation period is completed. Central guidance and oversight are necessary to ensure consistent and appropriate operation of the act across government. Networks need support or they will atrophy. If staff do not feel supported, they will lose interest and the quality of service will decline. In New Zealand and Australia, the central bodies conducting oversight and providing assistance were eliminated or moved; since then, there have been increased problems with access and inadequate training.

Training

Once a law is in place, it is still important to continue training. New staff should be trained, and best practices and lessons learned from other departments should be shared.

Periodic Reviews

While the general principles of FOI are likely to remain the same, legal systems evolve over time. Many countries have reviewed FOI laws periodically to ensure they are operating properly, amending them to reflect new government structures, systems or advances in technology, and adding new provisions based on experience. Including a provision for review in the text helps

ensure the review takes place.

A variety of bodies can conduct reviews, including official bodies sponsored by the government. In Canada, the government formed a review committee comprised of government experts who commissioned a series of reports on the Act and international practices.⁴⁴ However, the body was strongly criticized by users who felt left out of the process. The final report focused mainly on administrative issues and did not address the problems cited by users and the Information Commissioner. A similar body, chaired by the Ombudsman and including media and human rights groups, was established in Denmark.

There can also be outside reviews. In Australia and New Zealand, the Law Reform Commissions have issued reports in recent years calling for substantial changes. The US General Accounting Office periodically reviews aspects of the Freedom of Information Act at the request of members of Congress.

Campaigns to Renew Interest

In Sweden, the government ran an “Open Sweden Campaign” in 2002⁴⁵ to increase public-sector transparency, raise the level of public knowledge and awareness of information disclosure policies, and encourage active citizen involvement and debate. The government said that even with the longstanding existence of freedom of information in Sweden, there were problems

APPENDIX 1 - LIST OF NATIONAL FOI LAWS AROUND THE WORLD

Albania	Latvia
Armenia	Liechtenstein
Australia	Lithuania
Austria	Mexico
Belgium	Moldova
Belize	Netherlands
Bosnia and Herzegovina	New Zealand
Bulgaria	Norway
Canada	Pakistan
Colombia	Panama
Croatia	Peru
Czech Republic	Philippines
Denmark	Poland
Ecuador	Portugal
Estonia	Romania
Finland	Slovakia
France	Slovenia
Georgia	South Africa
Greece	Spain
Hungary	Sweden
Iceland	Tajikistan
India	Thailand
Ireland	Trinidad and Tobago
Israel	Turkey
Italy	Ukraine
Jamaica	United Kingdom
Japan	United States
South Korea	Uzbekistan
Kosovo	Zimbabwe

Note that not all laws are yet in force or considered effective at providing access to government held information. For a review of these countries' laws, see David Banisar, *Freedom of Information and Access to Government Record Laws Around the World* (<http://www.freedominfo.org/survey.htm>).

APPENDIX 2 – ADDITIONAL FOI RESOURCES AND NATIONAL ORGANIZATIONS

Civil Society and Academic Sites

Access to Information Programme (Bulgaria) http://www.aip-bg.org/index_eng.htm

Access Initiative <http://www.accessinitiative.org/>

Article XIX: Global Campaign for Free Expression <http://www.article19.org/>

Campaign for Freedom of Information (UK) <http://www.cfoi.org.uk/>

The Carter Center <http://www.cartercenter.org>

Commonwealth Human Rights Initiative (India) <http://www.humanrightsinitiative.org>

FOI.net <http://www.foi.net/>

FOIA Advocates Network <http://www.foiadvocates.net/>

Freedom Info www.freedominfo.org

Freedom of Information in Asia <http://www.foi-asia.org/>

Global Access <http://www.publicintegrity.org/garesearch/>

Libertad de Información-México <http://www.limac.org.mx/html/>

Media Institute of Southern Africa <http://www.misa.org/>

Open Democracy Advice Centre (South Africa) <http://www.opendemocracy.org.za/>

Open Society Justice Initiative (Hungary/US) <http://www.justiceinitiative.org/>

Privacy International <http://www.privacyinternational.org/issues/foia/index.html>

Probidad <http://www.probidad.org/>

South African History Archive. <http://www.wits.ac.za/saha/programme.htm>

Transparency International <http://www.transparency.org/>

Government and IGO Sites

Information Commissioner of Canada. <http://www.infocom.gc.ca/menu-e.asp>

Canada [Access to Information Review Task Force](http://www.atirtf-geai.gc.ca/home-e.html). <http://www.atirtf-geai.gc.ca/home-e.html>

Council of Europe Media Division. <http://www.coe.int/media/>

European Union Ombudsman <http://www.euro-ombudsman.eu.int/>

France Commission d'accès aux documents administratifs <http://www.cada.fr/>

Hungary - Parliamentary Commissioner for Data Protection and Freedom of Information
<http://abiweb.obh.hu/adatved/indexek/index.htm>

Ireland FOI Central Policy Unit <http://www.foi.gov.ie/>

Ireland Office of the Information Commissioner <http://www.oic.gov.ie/>

Jamaica Access to Information Unit http://www.jis.gov.jm/special_sections/ATI/default.html

Mexico Instituto Federal de Acceso a la Información Pública <http://www.ifai.org.mx/>

Organization of American States Special Rapporteur for Freedom of Expression
<http://www.cidh.org/Relatoria/default.htm>

Organisation for Economic Co-operation and Development, Directorate for Public Governance and Territorial Development
http://www.oecd.org/departement/0,2688,en_2649_34275_1_1_1_1_1,00.html

Scottish Executive FOI Pages <http://www.scotland.gov.uk/Topics/?pageID=198>

UK Department of Constitutional Affairs <http://www.lcd.gov.uk/foi/foidpunit.htm>

UK Office of the Information Commissioner <http://www.informationcommissioner.gov.uk/>

United Nations Special Rapporteur of the Commission on Human Rights on the promotion and protection of the right to freedom of opinion and expression <http://www.unhchr.ch/html/menu2/7/b/mfro.htm>

Endnotes

1. See Article 19, “Freedom of Information: An Internationally Protected Human Right” in *Global Trends on the Right to Information: A Survey of South Asia*, 2002. Available at <http://www.article19.org/docimages/1116.htm>.
2. Resolution 59(1), 14 December 1946.
3. See Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on the work of its first to seventh sessions, 7 October 2003. http://www.unodc.org/unodc/en/crime_convention_corruption_reports.html.
4. Principle 10, Rio Declaration on the Environment and Development. <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>
5. UNECE. <http://www.unece.org/env/pp/>
6. Council of Europe, Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents, 2002. http://cm.coe.int/stat/E/Public/2002/adopted_texts/recommendations/2002r2.htm
7. Commonwealth Secretariat, Freedom of Information Act, May 2003. <http://www.thecommonwealth.org/law/docs/Freedom%20of%20Information%20-%20revised%20on%207%20May%202003.doc>
8. Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment; Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment.
9. Union of India v. Association For Democratic Reforms. Civil Appeal No 7178 of 2001. <http://www.privacyinternational.org/countries/india/india-v-adr-foia-502.pdf>
10. See David Banisar, Freedom of Information Acts around the World, September 2003. Available at <http://www.freedominfo.org/survey/>
11. Roumeen Islam, Do more transparent governments govern better? (World Bank 2003). http://econ.worldbank.org/files/27369_wps3077.pdf
12. Law Commission, Review of the Official Information Act 1982, Report 40. October 1997.
13. See Transparency International, Global Corruption Report 2003. <http://www.globalcorruptionreport.org>.
14. See Harsh Mander & Abba Singhal Joshi, *The Movement for Right to Information in India: People’s Power for the Control of Corruption* (CHRI, 1999).
15. See Mary Graham, Regulation by Shaming, *The Atlantic Monthly*, April 2000. <http://www.theatlantic.com/issues/2000/04/graham.htm>; Mark A. Cohen and V. Santhakumar, Information Disclosure as Environmental Regulation: A Theoretical Analysis. <http://www.vanderbilt.edu/vcems/papers/informationdisclosure.pdf>
16. See Gary Bass and Sean Moulton, The Public’s Right to Know: A Case Study from the United States, in Calland and Tilley, *The Right to Know, the Right to Live* (ODAC, South Africa, 2002); OECD PRTR pages: <http://www.oecd.org/env/prtr>
17. See Guardian Freedom of Information page: <http://www.guardian.co.uk/freedom/0,2759,178243,00.html>
18. See European Union, Public Sector Information Policy. http://www.cordis.lu/econtent/psi/psi_policy.htm
19. See Gerry Kearney and Aine Stapleton, Developing Freedom of Information Legislation in Ireland in A. McDonald and G. Terrill (ed) *Open Government: Freedom of Information and Privacy*. (Macmillan Press Ltd 1998).
20. See FOI Advocates Network. <http://www.foiadvocates.net/>; The Carter Center, <http://www.cartercenter.org/>, Article XIX, <http://www.article19.org>, Open Society Justice Initiative, <http://www.justiceinitiative.org/activities/foioe>
21. See Publish What You Pay Coalition. <http://www.publishwhatyoupay.org/index.html>
22. See the International Right to Know Campaign. <http://www.irtk.org/>
23. See IFTI Watch. <http://www.freedominfo.org/ifti.htm>
24. Promotion of Access to Information Act, §46 “Mandatory disclosure in public interest”
25. FOI Central Policy Unit, Manual for FOI Decision Makers, <http://www.foi.gov.ie/foi.nsf/DecisionGuide?OpenFrameSet>
26. These countries include Belgium, Canada, Estonia, France, Hungary, Ireland, Latvia, Mexico, Portugal, Slovenia, Thailand, United Kingdom and on the regional level in Canada, Mexico, and Germany.
27. RFE/RL NEWSLINE Vol. 7, No. 115, Part II, 19 June 2003.
28. See National Assembly for Wales. <http://www.wales.gov.uk/keypub/index.htm>

33. <http://www.cpsc.gov/cpscpub/prereel/category/toy.html>. See also the Consumer Federation of America's SafeChild site for a more advanced search. <http://www.safechild.net/toyrecalldatabase/index.cfm>
34. See Rhode Island Doc Finder. <http://www.docboard.org/ri/df/search.htm>
35. See US Department of Health and Human Services, Research-based Web Design and Usability Guidelines. <http://usability.gov/pdfs/guidelines.html>
36. <http://www.informacionpublica.gob.mx/>
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43. See e.g., Queensland Freedom of Information Act 1992, §108; US Department of Justice, Guidelines for Agency Preparation and Submission of Annual FOIA Reports, Spring 1997. http://www.usdoj.gov/oip/foia_updates/Vol_XVIII_3/page2.htm and Supplemental Guidance on Annual FOIA Reports, 2001. <http://www.usdoj.gov/oip/foiapost/2001foiapost13.htm>
44. UK Department of Constitutional Affairs, Information Rights Division, Implementation of Freedom of Information Act High Level Project Initiation Document, September 2003.
45. See Access to Information Review Task Force. <http://www.atirtf-geai.gc.ca/>
46. Homepage: <http://www.oppnasverige.nu/html/>