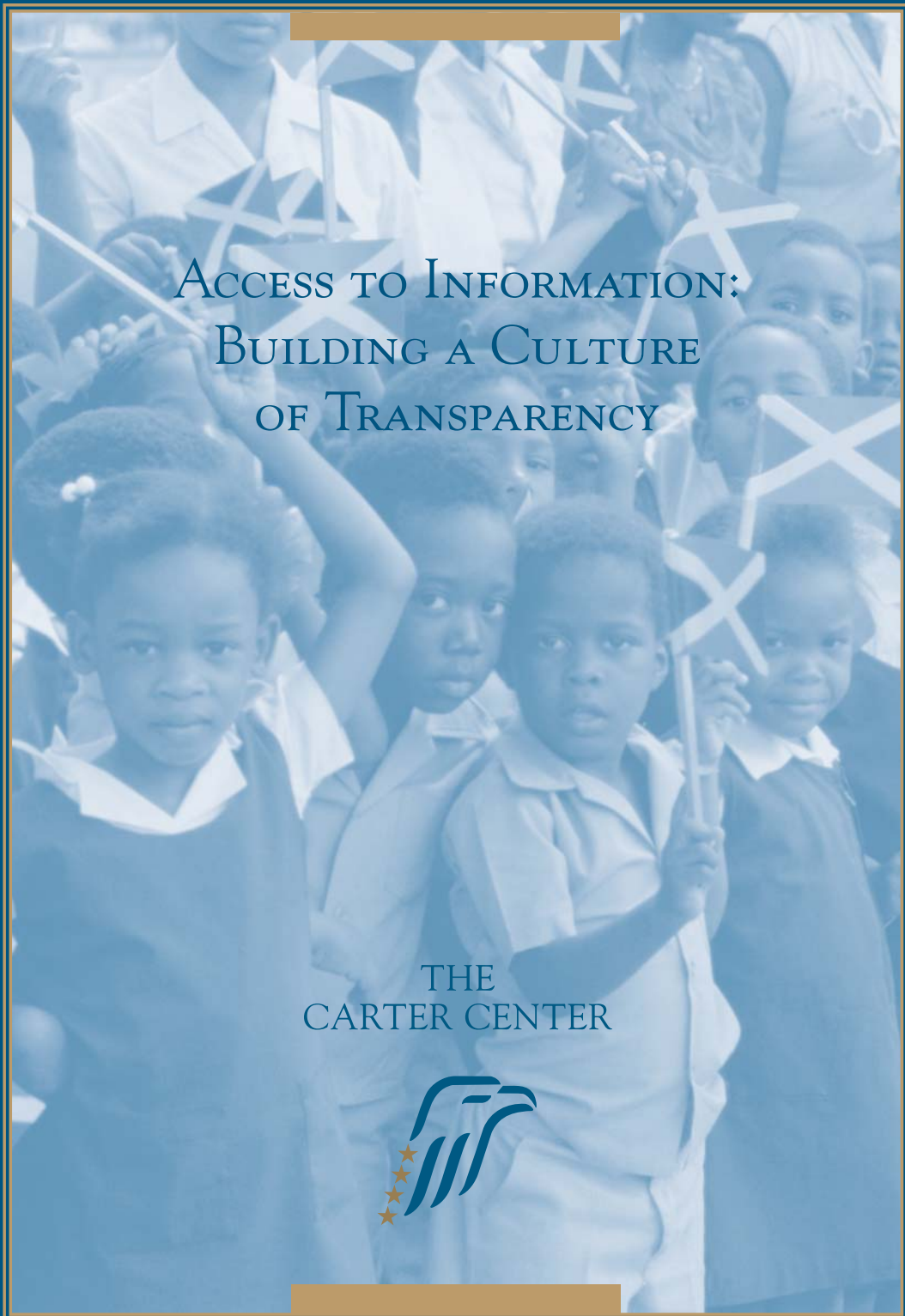


ACCESS TO INFORMATION: JAMAICA



ACCESS TO INFORMATION:
BUILDING A CULTURE
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ACCESS TO INFORMATION: BUILDING A CULTURE OF TRANSPARENCY

JAMAICA



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FOREWORD

Jamaica's remarkable efforts to establish an access to information regime have made the country a leader in the region and the world. The Jamaican government and its people have met the challenges of passing, implementing, enforcing, and exercising the right to information and have succeeded in demonstrating the law's value and its potential.

In the past decade, fifty nations have passed access to information laws, bringing the total number of countries whose citizens now count on an enforceable right to information to almost seventy. With the many competing priorities facing governments and civil society organizations, it is truly significant that access to public information remains at the forefront of the global agenda.

The Carter Center began working in Jamaica in 1999 at a time when the draft access to information law was initially being discussed. For more than three years, the Center helped inform the debate regarding the value of access to information and shared relevant international experiences. In 2002, the law was passed with the aim to reinforce the fundamental principles of democracy.

The goals of the law are admirable, but unachievable without its full implementation and enforcement and frequent submission of requests. In recognition of this, The Carter Center remained engaged in Jamaica to support and encourage the work of all sectors, and we have witnessed many advances. In striving to give meaning to the new right to information, the Jamaican civil servants dedicated time and resources to renovating the record-keeping systems and receiving training, and civil society remained a partner with government in providing inputs, raising public awareness, and in making use of the law.

As the new access to information regime continues to mature in Jamaica, other obstacles inevitably will arise. However, with sustained attention and effort, I am confident that the transformation from a culture of secrecy to one of transparency will continue to deepen. I send my personal congratulations to all Jamaicans for your commitment to the benefits and ideals of the right to information.

Jimmy Carter, Former President of the United States of America



ACKNOWLEDGEMENTS

We have many talented individuals to thank for their part in the production of this important volume. The effort of many, from both inside and outside The Carter Center, went into its creation. Specifically, we would like to thank the authors of all the chapters. Their insights, many from first hand experience, regarding the challenges and successes in establishing an access to information regime enriched this publication, and the discussion of emerging trends provides a guidepost for next steps.

Once again, Access to Information Project Manager Laura Neuman committed herself tirelessly to the production and editing of a final guidebook of the highest quality. Her own deep understanding of the issues, taken from her broad previous experience as an attorney as well as in leading The Carter Center's Access to Information Projects in Bolivia, Nicaragua, at the Hemispheric Level, Mali, and Jamaica have provided the base of knowledge from which this volume springs. And her dedication to the promotion of access to information around the world inspires us all.

The Carter Center has the good fortune of being able to count on a dedicated team of staff and interns that assist in all aspects of our work, specifically Americas Program Director Jennifer McCoy, Jane Nandy, and Assistant Director of Publications Chris Olson Becker. We also recognize the efforts of past staff Jessica Shpall and Amy Sterner in their help to launch the project. Assistant Project Coordinator Chris Hale and Michael Mirelman performed a host of duties to ensure that this publication was pulled together and published on time, and Chris has supported all aspects of the project.

Special thanks go to Carter Center Field Representative Carole Excell. Without Carole, the project would not have made the immeasurably impact that it did in Jamaica. Carole's expert knowledge and commitment to encouraging and supporting the full implementation and use of access to information to change lives and culture were the basis for our success. We are truly grateful to have been able to count on her as a colleague for the past several years.

Our work in Jamaica was enhanced by the many contributions we received from a corps of international consultants from Canada, the United Kingdom, Scotland, the United States, South Africa, and Ireland to name a few. They have provided international context and expert consultations at key moments and we wish to thank them, and Richard Calland in particular, for their involvement and commitment to the success of access to information in Jamaica.

Finally, those who deserve the most thanks are the many Jamaicans who have shown us the warmth, generosity, and commitment that have made our efforts to support a culture of transparency in Jamaica immensely rewarding. The list of persons and organizations involved in the promotion of access to information in Jamaica is long, and growing, but we would particularly like to acknowledge those who partnered most closely with The Carter Center from the Ministry of Information and the Access to Information Unit to the Media Association and Press Association of Jamaica, the IJCHR, the Bar Association, JET, and our tireless colleagues at Jamaicans for Justice, you all have taught us the meaning of dedication.



INTRODUCTION

In passing and implementing the Access to Information Act 2002, Jamaica has established a new and more open form of governance and accomplished what many other countries are still attempting. The Act, which provides citizens an enforceable right to official documents held by public authorities, is key to enhancing democracy, ensuring citizens' participation, and building greater trust in Government decision making. Access to public documents can assist citizens in exercising their other fundamental socioeconomic rights, such as the right to housing, appropriate health care, and a clean and healthy environment, and it can serve to make government more efficient and effective.

Passing an access to information law is, relatively speaking, easy in comparison to the practise of implementation, which can be challenging for any country. Successful implementation of an open information regime requires a commitment of resources (human, financial, and time), preparation of public bodies, development of procedures, change in culture and behaviours, and expertise. It is clear that the Jamaican Government and its public authorities, who entered into effect in phases with the final large group beginning in July 2005, have made great progress in the implementation of the Act including training of civil servants in the law and best practices. Many of the efforts in Jamaica serve as a model for other jurisdictions. However, as with any new regime there is the potential for constructive reform and advancement.

The Jamaica Access to Information Act includes a provision triggering an automatic review of the Act two years after it went into effect. This Parliamentary review was conducted in early 2006, with the special Committee issuing an interim report in April. This report will be considered and debated, with potential reforms to the Act. Therefore, the beginning chapters speak to the establishment of an

access to information regime in Jamaica and speak to some of the key areas addressed in the Parliamentary review, providing suggestions for strengthening the act and cautions against retreat.

Minister Colin Campbell in *Jamaica Access to Information Act 2002: Implementing the Act* mentions a number of the advances in Jamaica in encouraging citizen participation, and cites access to information as one of the most important. Minister Campbell illustrates key achievements in the act's implementation, and like many of the authors, calls for the permanent establishment and strengthening of an access to information support unit.

In Dr. Carlton Davis' *From a Tradition of Secrecy to One of Openness in the Jamaican Public Sector*, he reminds us of the evolutionary nature of such a mindshift and details some of the important milestones already reached in changing the culture of secrecy in Jamaica.

Carolyn Gomes in the next chapter *Working to Make Access to Information Work: The Role of Civil Society* writes that "no one can fail to appreciate the importance and value of civil society working together toward the common goal of an effective access to information law." With this premise in mind, she provides an important treatise on the lessons civil society organizations have learned in working with each other and with government in promoting access to information.

Key Considerations in Reforming the Jamaica Access to Information Act by Laura Neuman and Carole Excell provides general comments on the structure and functioning of the Act, in light of the international experiences, with a focus on the areas that have received the majority of attention during the Parliamentary review. These access to information experts provide a number of recommendations for consolidating the right to information in Jamaica.



BUILDING A CULTURE OF TRANSPARENCY

It has been well understood from the inception of the access to information regime in Jamaica, that implementation and enforcement would pose great challenges. From administrative aspects, such as record-keeping and establishing systems for responding to requests, to the more substantive training, drafting of rules and regulations and finally to the necessary awareness raising and shift in culture, Jamaica has met the challenges and found some great successes. The heart of this guidebook, as discussed below, concentrates on the issue of implementation and enforcement, lessons learned and areas that may merit additional focus.

The first chapter in this section provides an overview of the main models used for oversight of the implementation and enforcement of the right to information. Laura Neuman in *Mechanisms for Monitoring and Enforcing the Right to Information around the World* sets out four variations, detailing some of the main advantages and disadvantages of each model.

Following on Ms. Neuman's overview chapter are three country case studies of implementation and enforcement, two of which count on laws newly in force and the third enjoying the right to information for over 5 years. In Scotland, Information Commissioner Kevin Dunion discusses the challenges for the public administration and civil society in the first year of implementation of the law as well as the success stories. Meredith Cook and Martin Rosenbaum touch on similar issues in *Freedom of Information and the BBC*. In this country case study, the authors detail the preparatory steps taken to implement the Freedom of Information Act in the United Kingdom, and the first year's challenges and rewards. Finally, colleagues from the Open Democracy Advice Centre in South Africa remind us that issues surrounding implementation of a law are not relevant just in its infancy and that it is important to remain ever vigilant of the effect these challenges may have on the overall success of an access to information regime.

We then turn to the specific Jamaica experience in *Challenges and Successes in Implementing the Access to Information Act in Jamaica*, by Helen Rumbolt. This paper imparts first hand experience on the trials for public servants tasked with implementing the Act, requirements for administering the new norm, as well as the myriad of benefits and successes.

The last part of the section focuses on the enforcement of the right to information. Laura Neuman and Carole Excell again provide an overview of the international experience in setting the rules and procedures for effective enforcement in their chapter *Appeal Procedures for Access to Information: International Experience*. And Nancy Anderson in her chapter illustrates the mechanisms in place in Jamaica to ensure enforcement under the Jamaica Access to Information Act. Ms. Anderson details the current enforcement model, and provides illustrative cases brought before the Appeal Tribunal. She concludes with a description of some of the challenges and proposed solutions for reform.

Finally, the laudable objectives of the Jamaica Access to Information Act may not be met without the laws persistent use. The last section of the guidebook explores ways of using the law—such as for environmental information, human rights work, and to hold government accountable—as well as exploring the emerging trends in the field of access to information.

Carole Excell in her piece *The Right to Environmental Information* posits that “a right to access environmental information is a central tool to promote democratic accountability and transparency in decision-making on the environment,” and that this widespread understanding has led to a myriad of international treaties and conventions and national laws. With these norms in place, she provides ideas for advancing the use of environmental information to protect our natural resources.

Access to information is often considered one of the most powerful tools for holding government accountable for its policies and actions. This is



most evident in Alicia Althié and Tania Sánchez' paper *Using Access to Information Law to Promote Accountability*, where they provide a case study of the use of access to information to ensure that policies and resources dedicated to the prevention and treatment of HIV/AIDS are reaching this most vulnerable population.

In Richard Calland's paper *Access to Information and Human Rights: Fundamentals, Points of Emphasis and Distinctive Trends* he reminds us that "Freedom of Information is a fundamental human right and... the touchstone of all freedoms to which the UN is consecrated." In this brief treatise, Mr. Calland identifies a number of the international instruments that lay the foundation for a right to information, and some current international law. But perhaps most importantly, he places this in the critical context of serving people to exercise their most basic rights to water, health care and housing.

The final two chapters in the guidebook are dedicated to emerging trends and next steps. As Guy Dehn in his article *Whistleblowing Protection: Accompanying Access to Information in Assuring Transparency* states, "with the movement for access to information firmly entrenched around the world, increasingly the trend toward establishing complementary whistleblowing protection laws must emerge." Whistleblowing protection, he argues, is one of the other necessary pieces for a robust disclosure system. And lastly, scholar Alasdair Roberts foreshadows the next generation of issues confronting

access to information advocates and administrations in *Open Government: The Challenges Ahead*. This paper touches on three main areas for future consideration including the inherent difficulties in changing the culture of secrecy within bureaucracies, the shifts in the structures of government—such as increased privatization of services, the ever growing influence of international financial institutions, and the new national security paradigm, and the effect that new technologies will have on the right to information.

The Carter Center has been privileged to support the Jamaican Government and civil society throughout the establishment of the new information regime. We began in 1999 working to inform the debate regarding the passage of the law and have remained present, including the opening of a local field office in 2004, to provide technical support to government and civil society and to share the international experiences regarding implementation and enforcement. There are now almost 70 countries with access to information legislation, and many more considering the passage of a law. Like Jamaica, as countries work to implement these difficult acts, new lessons are being learned on the value of a well drafted law and its consequences for the executing public authorities and users. We hope that this guidebook will serve as a tool to encourage debate regarding reform of the law, increase readers' understanding of the challenges and successes in implementing and enforcing a law, and provide ideas of future use of the law and emerging trends.



JAMAICA ACCESS TO INFORMATION ACT 2002: IMPLEMENTING THE ACT

MINISTER COLIN CAMPBELL

The Access to Information Act was passed in law by Parliament in July 2002 and came into force in January 2004. The passage and subsequent enforcement of this piece of legislation underscored the Government of Jamaica's unquestionable commitment to good governance as evidenced by the observation of the principles of openness, transparency and accountability upon which the Act is predicated.

The passage of the Access to Information Act 2002 places Jamaica at the forefront of the Western Hemisphere in not only conferring a general right of access to official government documents by way of legislation, but in working systematically, to ensure that the right is understood by the implementers and is one to which there is widespread commitment.

Over the years the Government has been systematically taking steps to include the widest participation of the citizenry in the policy formulation and policy implementation process. These initiatives include but are not limited to the opening up of the legislature, in particular the Public Accounts Committee of Parliament to the public via the electronic and print media. It is in this context and against this background that the promulgation and enforcement of the Access to Information Act 2002 should be understood.

ESTABLISHMENT OF THE ACCESS TO INFORMATION UNIT

To this end, the Government established the Access to Information (ATI) Unit in August of 2002, charged with implementation and monitoring functions, and serving also, as the Secretariat for the Access to Information Appeals Tribunal, also established in that same year.

Given the signal importance of the Access to Information initiative, the Unit is being placed on the permanent establishment of the Government, in the Office of the Prime Minister.

Whilst there have been a number of challenges since the enactment of the Access To Information Act of 2002, there have been a number of milestones achieved to date, these include,

- the establishment of the Access to Information Association of Administrators
- the establishment of the Access to Information Legal Task Force
- the establishment of the Access to Information Advisory Committee of Stakeholders
- the crafting of the 'Guidelines on the discharge of functions by the public authorities under Access to Information (Jamaica) Act, 2002'
- a User's Guide
- the automatic application of the Act to all public entities as of July 5, 2005
- the promulgation of the Access to Information (Appeal Tribunal) Rules, 2005
- the first Hearings of the Access to Information Appeal Tribunal, which were heard and disposed of in September 2005
- the Access to Information Act of 2002 is currently being reviewed by the Joint Select Committee of Parliament as required by the Access to Information Act.



BUILDING A CULTURE OF TRANSPARENCY

STRENGTHENING OF THE ATI UNIT AND THE PROVISIONS OF THE ATIA 2002

Steps are currently being taken to strengthen the ATI Unit in order to ensure its ability to monitor the adherence to the Act by the various organs of the State. As part of the capacity building exercise the requisite personnel is being recruited and trained. In the months to come, the Unit will embark upon a vigorous public education islandwide campaign which will be extended beyond stakeholder clusters and will include attempts to widen the span of educational institutions which have introduced components of the Access to Information regime into their curricula.

The review of the Access to Information Act currently being undertaken by the Joint Select Committee of the Parliament will ensure that the legislation remains current and that it reflects the evolution of accountability and transparency in Government. As indicated in the last publication, the Government acknowledges the need to prioritise

concluding its deliberative processes, relative to the matter of the repeal and replacement of the Official Secrets Act and indeed other legislation which may have clauses of non-disclosure. The objective is to reconcile such legislation with the Access to Information Act of 2002 in order to ensure the efficacy of the Act.

CONCLUSION

The era of openness and transparency in the country, welcomed the Access to Information Act and celebrated the promise it holds for deepening democracy and more generally, for the empowerment that attends informed choices in the conduct of every day life. The effort we will make going forward, is to ensure that the torch lit, continues to burn an ever brightening light of enlightenment, to pave the way for future generations to come and to pay fitting tribute to those past.



FROM A TRADITION OF SECRECY TO ONE OF OPENNESS IN THE JAMAICAN PUBLIC SECTOR

CARLTON DAVIS

Secrecy has been part of the ethos of the Jamaican Public Sector. This ethos could be regarded as a ‘natural inheritance’ from the British, which ruled Jamaica for more than three hundred years, and transferred, among other things, its Whitehall/Westminster system of Government.

The most obvious manifestation of the ethos was the Official Secrets Act, enacted in Great Britain, in 1911, which has been a part of Jamaican law since shortly after that. Apart from the Official Secrets Act, the ethos of secrecy was reflected in the Staff Orders, which more or less codified the conduct of public officers. The ethos was also reflected in the practical day-to-day activities of Government, even in respect of matters that were clearly beyond a doubt, ones that could be made available to the public without offending the Act or the Staff Orders.

However, in keeping with the trends elsewhere, particularly other Commonwealth countries with which Jamaica shares the Whitehall/Westminster system of government, the Government of Jamaica has been moving quite deliberately to change this ethos of secrecy towards one of much more openness. It has been doing so, largely because of its view that on a balance of considerations, better governance, derives from more openness. It leads, *ceteris paribus*, to a reduction of corrupt practices and a more informed public.

Whilst a number of measures have been taken in Parliament and the Executive Government towards more openness, the *pièce de résistance* is The Access to Information Act which in effect makes all information accessible except those matters specifically excluded in the Act.

Whilst some members of the public and the media regard the Act as a ‘cautious one’ in that it has not gone ‘all the way’ in regard to opening up information in Government, it has already been having the effect of: forcing departments of Government to improve their data storage and retrieval capacities; making a lot of information available to the public, on request, and on a more timely basis than would otherwise have been the case; forcing the Public Service to be more meticulous about what it does because the actions of its members might “see the light of day” as the saying goes.

One disappointing aspect, so far, has been how little information has been sought for research purposes. One would have thought for example, that there would have been a lot more interest in the period of the 1970s in which a number of domestic and international issues were in the fore.

All in all, though, the evolution from secrecy to more openness has been an important step in the right direction. This, in addition to the other reform measures will undoubtedly result in an improvement in the quality of governance of the country.



WORKING TO MAKE ACCESS TO INFORMATION WORK: THE ROLE OF CIVIL SOCIETY

CAROLYN GOMES

In 2001, Jamaicans For Justice got involved with lobbying for a strong and effective Access to Information Act. Working with other civil society groups, including the Jamaica Civil Service Association, which is somewhat unique based on other jurisdiction's campaigns for access to information, the Jamaica campaign for an effective Act resulted in a number of changes to the draft Bill that had been brought to the Parliament for debate. These changes had the effect of strengthening the act, which was ultimately passed in 2002, and which was, while not by any means ideal, potentially an effective piece of legislation.

Recognizing that the international experience has demonstrated the necessity of making requests to ensure the Acts effectiveness, and bearing in mind the experience of Belize where the law has languished, Jamaicans For Justice decided to continue working on Access to Information with a view to encouraging its broad based use. Excited about the possibilities inherent in an enforceable right of access to information to enhance the enjoyment of all other rights, we nevertheless realized that effective civil society engagement in the establishment of a user friendly access regime would require strategic thinking and resources. The organization developed a strategy based on three main goals: ensuring that the public was aware of the Act; encouraging the public and civil society groups to use the Act; and data gathering on the response of government agencies to requests for information in preparation for the review of the Act due two years after the implementation date. The strategies to be employed included:

- a mass media public education campaign;
- targeted workshops with civil society groups to encourage the use of the Act in their specific areas of focus;
- assisting interested persons in making requests;
- development of a special database to allow for efficient data gathering; and
- the development of a network or consortium of users of the Act to strengthen the breadth of interest and to enable a sharing of experiences.

It also was decided that we would aim to work as closely and cooperatively with government as possible, both to improve information sharing and as a way to ensure that misunderstandings, which would inevitably arise in any enterprise as radical as a complete transformation of a governmental culture of secrecy to one of openness, could be worked through rather than form stumbling blocks to effective implementation.

With the goals and strategies defined, attempts to identify the financial and personnel resources to implement the programme began and were eventually successful with the receipt of grant funding from the Canadian International Development Agency (CIDA), which allowed us to employ an additional staff member dedicated to our ATI work, and the development of a memorandum of understanding with the Carter Center, which saw close cooperation on certain aspects of the programme, while avoiding overlap on other areas of focus.



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CIVIL SOCIETY ENGAGEMENT

No one can fail to appreciate the importance and value of civil society working together toward the common goal of an effective access to information law. It is through these partnerships that single voices are magnified, and changes are effectuated.

Nevertheless, coordination is often challenging and the impact of the law not immediately appreciated. Discussed below are a number of lessons that we learned through our focus on access to information in Jamaica, and themes that may merit additional considerations.

Networking Takes Energy

Building a network of persons knowledgeable about ATI and how to use it, and then actually making the requests, proved more difficult than first envisioned. Workshops with groups and individuals served to stimulate interest and generate requests, often built around topical rather than targeted information, but difficulties in getting information from Ministries and agencies led rapidly to loss of interest and some increase in cynicism. These difficulties were in large measure due to the phased implementation of the Act. Requests made to agencies under the Act were often transferred to agencies not yet under the Act, which were not obliged to provide the information or even to acknowledge receipt of a request. Many important agencies (or their associated companies) were not brought under the Act until 18 months after the start of the implementation process, and requestors who were making requests on topical issues, often became frustrated and cynical about the utility of the Act.

Another complexity which surfaced in the building of the ATI users network was the amount of commitment required from civil society groups, which were

often struggling to cope with the demands of their primary areas of interest. Levels of involvement varied across the network and organizations needed frequent encouragement and help from those most dedicated to the issue. The network eventually did become a more cohesive group of NGO's and CBO's

knowledgeable about the act, interested in developments related to the act and willing to advocate for the act. Moreover, through the network's outreach activities, NGO's who might otherwise not have become involved developed a deep

commitment to the use of ATI. Nevertheless, there remained within the network of users a general need for leadership and guidance.

Using the Law

Requests for information were made in the several different ways permitted by the Act, including telephone requests, using the prescribed form, making e-mail requests and sending in letters. A number of procedural issues immediately surfaced including:

- Reluctance of some agencies to act on telephone requests,
- Insistence of some agencies on requests being made on a prescribed form and signed by the requestor,
- Uncertainty as to whether thirty days meant 30 working or calendar days, and
- Reluctance of some agencies to process e-mail requests.

As these difficulties are yet to be satisfactorily resolved after two years, many of the civil society submissions to the Parliamentary Committee reviewing the Act included implementation aspects and sugges-

No one can fail to appreciate the importance and value of civil society working together toward the common goal of an effective access to information law.



tions for improving the application of the Act. The Parliamentary Committee has made a series of recommendations, including some that in practice may detract from the intent of the Act, such as the requirement for receipt of a signed application before the clock starts ticking on the days allowed to satisfy the request.

ATI Advisory Stakeholders Committee

At the invitation of the Access to Information Unit of the Ministry of Information, representatives of the Private Sector Organization of Jamaica, the Media Association of Jamaica, the Caribbean Examinations Council, the Jamaican Bar Association, the Jamaica Civil Service Association, Jamaicans For Justice, the Joint Committee for Tertiary Education, the Press Association of Jamaica, CARIMAC, Farquharson Institute of Public Affairs, the Independent Jamaica Council for Human Rights and others, met and agreed to form a voluntary body of stakeholders to oversee the implementation of ATI. The committee developed terms of reference, agreed by the Minister of Information, and in February 2004 the Access to Information Advisory Stakeholders Committee began meeting monthly to:

- receive reports on the implementation and administration of the ATI Act;
- interact with the Minister responsible for Information and the ATI Unit on matters pertaining to the administration of the Access to Information Act;
- identify such aspects of the administration of the ATI Act as may be in need of strengthening and/or modification; and
- provide recommendations on/and support for an Access to Information Public Education Programme.

The ATI Advisory Stakeholders Committee provided a significant contribution from civil society and its work will be considered in greater detail below.

Monitoring the Implementation and Compliance

The monitoring of requests provided its own challenge for civil society. The designing of the database, in partnership with The Carter Center, stretched the technological competence of our consultant who worked hard to ensure that the database captured illogical but plausible situations, such as the fact that one request could simultaneously be transferred to another agency while also the subject of a request for internal review on the very same transfer decision. Capturing the several fates that could befall a single request took longer than expected and was a learning process for all concerned, but was finally resolved through experience, time and modifications. The database now works well and serves to document the outcome of individual requests and provide alerts to time lapses and situations that require further action.

The human resources necessary to accurately track requests and keep individual requestors updated also proved quite formidable. It takes a dedicated assistant to overcome the cynicism of many requestors and keep them updated and interested in the outcome of their requests, this was particularly challenging with requestors who were requesting information on topical rather than personal interest issues. Since the communication was directly between Ministries or Agencies and the requestors, difficulties arose in ensuring that the database was updated on the outcome of requests. This follow-up relied heavily on Jamaicans For Justice's human resources, as the requestors did not always notify us of receipt of documents, notices or denials.

Moreover, the assistance and monitoring project led to the perverse result of a strain in relationships between Jamaicans For Justice and the public bodies Access Officers. As many of the early requests came via Jamaicans For Justice's offices, initially there was confusion as to the requestor and access officers were replying to JFJ rather than to the individual seeking the documents. Some resentment built among access officers because information requested was sometimes not collected, and documents which took time to prepare were abandoned and left to collect dust on the



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desks of the Officers. A number of reasons could account for requestors failure to collect their documents, including that some requestors were simply testing the Act in the initial stages and that there was no practical provision for persons outside of Kingston to pay the costs of reproduction and receive their requested information.

Despite the difficulties—and the resources, both human and financial, required, Jamaicans For Justice’s database monitored approximately one third of the requests made to government and provided the only statistical analysis of performance of various agencies and ministries responding to ATI requests available to the Parliamentary Committee reviewing the Act in February of 2006.

Enforcing the Act

The prolonged delay in getting the Appeals Tribunal up and running profoundly affected the process of civil society engagement in the entrenchment of the right to access to information. The Act calls for the formation of an Appeals Tribunal but contains no provisions for a Tribunal secretariat, and all of the members who were appointed to that body were employed full-time elsewhere. The practical effect was that the process of drafting and consultation on the rules took the Appeals Tribunal and Government of Jamaica more than 18 months.

In the end the rules that were finally placed in the Official Gazette bore little resemblance to what had been discussed between civil society and the Tribunal. The ultimate product was legalistic, cumbersome and intimidating for the ordinary requestor. Appeals sat for more than a year and a half without a date for consideration, and when the Tribunal finally set the date for their first hearing in September 2005, the



appellants were given less than three weeks notice. The lawyers who had agreed to represent these first cases pro bono as part of their membership on the Volunteer Attorney’s Panel created by The Carter Center, the Jamaican Bar Association and the Independent Jamaica Council for Human Rights, were unavailable on such short notice. The ATI Advisory Stakeholders Committee, among others, protested on behalf of the appellants and brought the deficiencies to the attention of the media. The first hearings were postponed until October 2005.

Unfortunately, with each succeeding month that the Tribunal did not function, the public’s cynicism as to government’s commitment to greater openness and accountability was reinforced. Moreover, the rules that the Tribunal eventually adopted further contributed to the skepticism and intimidation of members of the public. When hearings did eventually get off the ground in October 2006, in the face of the battery of lawyers representing the government agencies, the assistance of the Volunteer Attorney’s Panel was absolutely irreplaceable and without their work and support it is likely that all of the appeals would have failed. Regrettably, the proceedings of the



Tribunal to this point have remained quite legalistic and the hopes that the Tribunal would be serve a less formal, intermediary function between the citizen and the government have been stymied.

That the difficulties with the Tribunal formed part of virtually all the civil society submissions to the Parliamentary Review of the Act is perhaps instructive of the difficulties with enforcement. Also enlightening is the fact that one civil society group was able to complete a Judicial Review in the courts, and get a ruling, in less time than it took to get a hearing and ruling from the ATI Tribunal on a related matter. The issue of enforcing this progressive Act needs the urgent attention of the Government if gains made in transparency and accountability are not to be lost through ineffective mechanisms.

WORKING WITH GOVERNMENT

After the passage of the Act in June 2002, the government established an Access to Information Unit to oversee implementation activities across the spectrum of government bodies, and to ensure education of the Government and the general public about the Act. Under the leadership of Attorney Aylair Livingstone a great deal of progress was made, both in the preparation of the Government and in involving civil society in the tasks necessary for implementation. Several meetings were held and the cooperation culminated in a marathon session during which the draft regulations to govern the Act were extensively revised with major inputs from civil society groups, the Parliamentary opposition working with the Minister of Information, the head of the ATI Unit and the Parliamentary drafters. All this was conducted in an atmosphere of consultation and cordiality, which was a welcome respite from the oftentimes adversarial relationship between

Government and Civil Society. It seemed a hopeful beginning that acknowledged mutual interest in seeing implementation of an effective access regime.

The ATI Unit had also been instrumental in the coming together of the Access to Information Advisory Stakeholders Committee. Initial communication with that unit and the Committee was excellent and joint goals and projects to ensure effective implementation agreed upon and implemented.

Among the several collaborative activities undertaken by civil society and government around access to information were:

- A day long series of activities on International Right to Know Day 2004, starting with a Press Conference at which the Minister of Information was the main speaker, and which included presentations by representatives of the Carter Center, the ATI Advisory Stakeholders Committee and the ATI Administrators Association;
- The ATI Students Challenge Competition sponsored by the Gleaner Company which saw students and teachers from across the island using the Act and winning prizes for their efforts. The presentation lunch was attended by the Minister of Information.

... this was conducted in an atmosphere of consultation and cordiality, which was a welcome respite from the oftentimes adversarial relationship between Government and Civil Society.

These activities helped to foster public awareness about the Act and its provisions and show Government and Civil Society working together.

The initial interaction between government and civil society, as represented by the consultations and activities outlined

above, was excellent and should have set the stage for increasing cooperation and collaboration. The ATI Unit interfacing with stakeholders was able to form a bridge between the two groups; issues that arose during the early stages of implementation had a forum



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for discussion, communication and mutual understanding (if not always resolution). Though there were hiccups, short deadlines for meetings and late sharing of information among them, these were not so great as to discourage participation or frustrate understanding.

While no one was naïve enough to expect the relationship between government and civil society to be entirely conciliatory, it was unexpected how fast the relationship deteriorated once the communication link provided by the ATI unit was disrupted. With the term of contracts of the head of the Unit and the unit's Public Relations officer ending in July 2005 and their decision not to continue, the departure left the unit with one administrative officer who was quite unable to cope with the volume and complexity of the work. The unit's responsibilities were transferred to the Ministry of Information and Office of the Prime Minister, but without staff dedicated solely to the administration of the Act, civil society and government were left with no clear channel for communication and dialogue. Misunderstanding and miscommunications abounded, and the collaboration enjoyed in the beginning of the Act's implementation suffered. These communication difficulties resulted in the Government proceeding with a review of the functioning of the Act by the Parliament, without fully informing stakeholders of the timing or the plans. This in turn resulted in civil society having to scramble to meet short deadlines for submissions to be accepted and in some cases an inability to satisfy the abbreviated timeframe.

The results of the breakdown of the communication link served by the ATI Unit and Stakeholders Advisory Committee were unfortunate as opportunities for public education, offered by the Media Association to the Jamaica Government, were lost and the earlier consensual approaches to difficulties forsaken. It also threw into stark relief the difficulties of changing entrenched paradigms of government operations and the important role of enlightened leadership in that cultural shift.

CONCLUSION

Our experiences over the past 4 years with Access to Information have proved one thing conclusively—"the devil lies in the details." Having a workable access to information regime is dependent on more than a well-crafted Act with limited exemptions. With every aspect of the work, whether it was networking, using, monitoring (including developing a functional database), enforcing and interacting with Government, it was the nitty gritty details that caused the most difficulties and required the most attention and resources.

It is not enough to tell civil society groups that the Act can help them in their work, and show them how to make requests, it proved necessary to work closely with key members of organizations, to encourage challenges to denials, to keep the interest alive until people saw information actually coming back which they could use. It is not enough to build a good database, it proved crucial to keep it updated and to do that required the devotion of significant resources to following up and encouraging requestors. It is not enough to have a Tribunal of 'good men and true,' they need support and encouragement from civil society and the government. It is not enough to have a good working relationship with Government; there is the need for constant dialogue and communication to avoid misunderstandings and personality clashes, and the need for more than one champion for access, at more than one level of the State.

It is however extremely hopeful that despite ingrained paradigms of secrecy and privilege throughout the Government, and entrenched cynicism in the populace, that in the first two years of the coming into force of an access to information regime, more than 600 requests were made, just under 50% were granted either full or partial access and an increasingly aware and assertive NGO community is beginning to use the Act to further their own work. It is a lot of work to make access work but it may be beginning to pay off.



KEY CONSIDERATIONS IN REFORMING THE JAMAICA ACCESS TO INFORMATION ACT

Laura Neuman and Carole Excell

The Jamaica Access to Information Act is unique in providing for an automatic Parliamentary review of the law two years after its implementation began. This is a positive provision as it allows for reflection as to both the terms of the Act as well as its impact for the Jamaican administration and its users. In general, Jamaica's Access to Information law meets the emerging international norms with a sound structure and provisions to promote openness. But as experience has shown, there are a few provisions that could benefit from renewed consideration and debate. As with the passage of the law, the starting point for any review should be a dedication to strengthening the Act's ability to promote transparency and openness while taking into account the necessities of its implementers and users.

This paper seeks to provide general comments on the structure and functioning of the Act, in light of the international experiences, as Jamaica seeks to ensure the broad exercise of this fundamental human right. These observations are not exhaustive, but rather general ideas that can serve as an additional input for consideration and debate.

SCOPE

The scope section of access to information legislation provides the extent to which public and private entities are covered under its provisions. For the most part, the definition of public authority within the Jamaica Access to Information Act 2002 meets the international standards.

In addition to all agencies of government and statutory bodies and authorities, it provides the possibility for including some relevant private sector

bodies, such as those wholly owned by the government or an agency of government and those companies that provide "services of a public nature which are essential to the welfare of the Jamaican society."¹ This is consistent with the trend that increasingly incorporates more private sector entities within the scope of the legislation. Modern laws vary from applying to those organizations that receive some public funding, such as in the Mexican law, to those bodies which provide public services, as is found in the Jamaican act, to the South African case which covers all private bodies when the information requested is "necessary to protect or exercise a right."

The rationale for including all public bodies under the provisions of the act, as well as extending coverage to some private sector bodies, is that through access to information those in power may be held accountable for their decisions. For most citizens, it does not matter whether the government is responsible for their electricity supply or a private entity, what is of concern is that it is accessible, consistent and affordable. "It seems unwise and unfair to create duties for the public sector to provide a right to access to information while exempting powerful private interests. Nevertheless, with private sector information it is appropriate to include a caveat to ensure that there is not an unjustified intrusion on privacy. As with publicly held information, a right to private bodies' information also can be limited with appropriate exemptions, such as for commercial confidentiality or trade secrets. But where a private company is clearly providing a public service, such as

¹ The Jamaica Access to Information Act 2002, sec. 5(3).



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after a privatization process, its information should be defined in the law as ‘public information’ and covered under the Act.”²

Although, as stated above, the definition of public authority is well-drafted, the provision allowing for certain public entities to be exempt from the act may serve to frustrate the broad definition and undermine the law’s objectives. International best practice dictates that all public institutions should fall within the scope of the law, but that specific documents that meet the clearly drafted legally prescribed exemptions may be properly withheld from disclosure. With the multitude of safeguards provided by the exemptions section, it is difficult to imagine a rationale that

would justify the wholesale exclusion of agencies or public bodies from the scope of an access to information act.

Therefore, section 6 of the Jamaican Act may warrant additional consideration as to whether it is necessary given the exemptions section and whether it in fact advances the objectives of the law. Moreover, for the private sector companies listed within the act to be covered, there is the necessity for an affirmative resolution, which in practice has not occurred. Deletion of this additional step for inclusion within the scope of the Act would be a positive reform of the law, and serve to ensure that all relevant bodies holding critical “public information” are covered by the legislation.

Summary

- Definition of public authority is well-drafted and meets international norms
- Provision allowing certain public entities to be exempt from act may frustrate law’s objective

- Potential for inclusion of certain private sector companies in the act is positive, but may consider streamlining means in which they become covered

IMPLEMENTATION ISSUES

As Jamaica has experienced over the past two years, the full and effective implementation of an access to information act is challenging and resource intensive. In the United Kingdom, a recent report of the Information Commissioner’s Office found that in surveying 500 persons responsible with the day-to-day operation of the act, 31% found that

the introduction of the act was either fairly or very difficult.³ Problems tend to revolve around outdated or disregarded record-keeping systems, overburdened and untrained personnel, under-resourced public agencies, and a prevailing culture of secrecy. Many of these issues cannot be resolved

through legislative amendments, but rather practice and time. Often, it is more important to consider the way in which the law is being interpreted or applied than it is to alter the legislation. However, there are a few areas where reforms in the Act could serve to further implementation efforts and support public servants and the users of the Act.

Need for a Legislated Oversight Body

An oversight body with the responsibility of coordinating implementation efforts across government agencies, promoting training of functionaries and

International best practice dictates that all public institutions should fall within the scope of the law, but that specific documents that meet the clearly drafted legally prescribed exemptions may be properly withheld from disclosure.

² “Access to Information Laws: Pieces of the Puzzle,” *The Promotion of Democracy Through Access to Information*, L. Neuman, The Carter Center, 2004.

³ Freedom of Information: One Year On, Information Commissioner’s Office, United Kingdom, January 2006.



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public education, responding to agencies questions, and ensuring consistency and sustainability is critical to the success of any access to information regime.⁴ The benefit of the voluntarily established Access to Information Unit in Jamaica is well-known. This Unit served as a link between the implementers and the users, established guidelines and responded to public authority concerns. International experience supports these findings, demonstrating that without a dedicated and specialized oversight body, such as the Jamaica Unit, “the compliance rate is lower, the number of requests more limited, and the right to information eroded.”⁵

A number of countries have created a statutory oversight body, with powers and responsibilities clearly outlined within their legislation. By mandating the oversight body within the law, rather than rely on the good will of the Parliament or responsible Minister, jurisdictions have sought to overcome the problem of changing administrations and scarce resources being drawn away from the entity.⁶

Jamaica’s Access to Information Act would benefit from a specifically legislated specialized access to information oversight body. As is found in the most advanced laws, the Act could make provision for an implementing agency or individual to be in charge of reviewing the manner in which records are maintained and managed by public authorities; monitoring implementation efforts and the automatic publication of documents by the public authorities; receiving monthly reports and assisting in the annual report to Parliament, and training of public servants and material development. In implementing the Act, thus far, one of the greatest concerns raised has been the lack of a diverse requester base and applications arriving to the wrong public body, incomplete or confused. Greater public education will address many of these complaints. Thus, this body could also assume the responsibility for public education and promotion campaigns, including raising awareness about the functioning of the Act and the government’s successes.

Summary

- Consider amending the Act to include a statutorily mandated oversight body
- The body could assume responsibility for coordinating and supporting implementation efforts, as well as training and public education

Costs

The Jamaica Access to Information Act as presently written fully conforms to emerging international standards and experiences. The general principle with relation to costs is that there should be no fee for the request, search and compilation of information, but that minimal payments should be applied to offset the reproduction costs. There are a number of reasons to limit the fees to reproduction costs only. First, fees for submitting a request for information can serve as an obstacle for many users. For example, when Ireland amended their freedom of information law to include a flat £10 charge for information requests the number of request dropped by almost a third. Second, it is costly for the government to process the fees and they do not recoup the actual costs. In Canada there is a C\$5 dollar charge, but it costs the administration significantly more just to process the fee. The Canadian Information Commissioner in his annual report of 2004 stated that “At their current levels and as currently administered, fees for requests under the Act seem designed to accomplish one purpose—and one purpose only: to discourage frivolous or abusive access requests. The fee system is not designed to generate revenue for governments or even as a means of recovering the costs of processing access requests. That is not an acceptable premise on which to build a right of access.” Moreover, many experts argue that the

⁴ For a more in-depth discussion of the issue and international experiences see “Mechanisms for Monitoring and Enforcing the Right to Information around the World,” *Access to Information: Building a Culture of Transparency*, L. Neuman., The Carter Center, 2006.

⁵ *Id.*

⁶ For jurisdictions with statutory oversight bodies, see, South African Promotion of Access to Information Act, the United Kingdom Freedom of Information Act, Mexico Transparency and Access to Information Act, and Canada Access to Information Act.



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provision of information is a fundamental government service, much like the police department, libraries or public education and as such should not extract an additional cost.

In addition, it may be unfair to charge requesters for the actual time public officers spend processing and searching for documents. In many countries with recently enacted access to information laws, the archiving and recordkeeping systems are often in disarray. What might take minutes to find under well-ordered systematized record-keeping systems, may take days or weeks when records are unorganized and dispersed. In these cases, to charge the requester for the time it takes to find a document is patently unfair as the citizen will bear the burden of the state's poor administration of records. Finally, fees can inequitably limit the number of requests from persons outside of the capital when there is no process for paying locally.

As written, the Jamaica law provides that a fee may be charged for reproduction costs only, and that this may be waived, reduced or remitted. In practice, presently there is not a systematic mechanism for remitting payment for photocopying, other than in person. Should additional fees apply for submission of requests or search for documents, this problem would be amplified. Fees for search add a dimension of discretionality to the process, as the time that it takes to find documents depends greatly on the information officer and the organization of information. Consequently, the trend is away from including such fees and rather finding other cost-saving means of providing information such as automatic publication (discussed below). Therefore, we would encourage the retention of the fee schedule as presently exists.

Summary

- The Jamaica Act's provision mandating cost recovery for reproduction with the potential for waiver or reduction conforms with best international practice

Automatic Publication

The "right to know" approach, whereby governments automatically publish as much information as possible, is important in increasing transparency, reducing costs for both the state and the requester, and making the law more convenient. As discussed above, governments are often faced with resource limitations and the need to seek mechanisms to reduce bureaucratic costs while continuing to meet all of their obliga-

In many countries with recently enacted access to information laws, the archiving and recordkeeping systems are often in disarray ... to charge the requester for the time it takes to find a document is patently unfair as the citizen will bear the burden of the state's poor administration of records.

tions. One way in which this can be accomplished is through automatic publication. The more information that is made available, without the need for individualized decision-making related to each request, the less costly for the state.

Thus, most modern laws include provisions for automatic publication of certain official documents by each public authority. Unfortunately, if these provisions are not clear or are too difficult to implement they will not encourage public authorities to publish and widely disseminate documents of significant public interest. Thus, the automatic publication scheme must be well-defined and mandated within the law.

A number of jurisdictions including India, South Africa, and the United Kingdom have, within their access to information laws, unambiguously spelled-out provisions governing the automatic publication of information. This has provided clear guidance to the public authorities on their duties, and in many cases had a great impact on the public sector and accounta-



bility to the public. In Trinidad and Tobago, the law requires that each public authority publish three statements, and where a statement has not been published, the Minister under the Act is required to give reasons, published in the Gazette, for the failure. Broadly, the statements must contain the purpose, structure and functions of the authority, type of information they hold and how members of the public may participate in the decision making processes of the authority; a description of those documents that guide the employees of the public authority in doing their work; and a complete list of certain types of documents created after the commencement of the Act. The Act itself sets out clear guidelines and lists the types of documents that must be contained in the statement, as well as where and when it must be published.

The Jamaica Access to Information Act of 2002 provides for a “roadmap,” supported by the First Schedule, i.e. statement of the public authorities’ organization and functions and documents held. But it is not clear within the law that these documents will be automatically published, even the most benign. Moreover, in practice, it appears that the majority of public authorities in Jamaica have not complied with even this more limited mandate. Perhaps additional details, such as the lists included within the Mexico, India, and Trinidad legislation, with relation to the types of documents that must be made available automatically, where these must be published (such as on each agency’s Web site) and frequency with which these publications must be made current would help to ensure better understanding and compliance with this cost-saving and transparency promoting mandate.

Summary

- Automatic Publication provides cost-savings for government and makes information more accessible for citizens
- More clearly define the requirements for automatic publication in the Act, with clarifying details

Reasonableness of Request

A denial based on “reasonableness” is discretionary, and one that is ripe for abuse. Nevertheless, it is important that the public authorities have some mechanism for addressing voluminous requests, such as extending time limits or direct contact with the applicant to reformulate their request. When a provision is made to address “the reasonableness of a request,” the standards for applying such powers must be exacting and establish affirmative duties on the public officials prior to its invocation. If utilized, these provisions must be carefully drawn and executed to preserve the international tenet that a request for information may be made regardless of the reason or personal interest in the document.

In ARTICLE 19’s Principles on Freedom of Information they suggest that before any request is denied based on reasonableness, the public authorities and access officers should be required to “assist applicants whose requests are unclear, excessively broad or otherwise in need of reformulation.” In both the New Zealand Official Information Act and the Trinidad and Tobago Act there is a mandate to assist the applicant prior to a refusal on the grounds of reasonableness, stating that “before refusing to provide information on [these] grounds the authority has taken reasonable steps to assist the applicant to reformulate the application so as to avoid causing such interference.”⁷

Similarly, the Australian Freedom of Information Act allows a request to be refused when the “Agency or Minister is satisfied that the work involved in processing the request: (a) in the case of an agency—would substantially and unreasonably divert the resources of the agency from its other operations; or (b) in the case of a Minister—would substantially and unreasonably interfere with the performance of the Minister’s functions.”⁸ Once again, there are a number of conditions which must be met before such a decision is taken, including written notice and identification of an officer of the agency or member of

7 The Freedom of Information Act, 1999 sec. 21(1), Trinidad and Tobago.

8 Freedom of Information Act, 1982, sec. 24, Australia.



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staff with whom the requester may consult in order to remove this ground for refusal. There is even a specific provision that states that refusal may not be based on the costs of copying or reason for the request, and this decision is appealable.

This section of the Act has been criticized by the Australian Law Reform Commission (ALRC) on the grounds that the power to refuse a request without processing it is potent and that every attempt should be first made to assist the applicant. In addition, the ALRC notes that agencies should not be able to use this section simply because their information management systems are poorly organised and documents take an unusually long time to identify and retrieve. In other words, the decision should be based on the reasonableness of the request itself, not on the agencies ability to satisfy the request.

Thus, many jurisdictions have found other mechanisms for addressing voluminous requests, such as extending the time period for processing. The Canadian Access to Information Act allows the authority to extend the time limit for a reasonable time when the request is for “a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution or when consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit,” and notice is provided to the requester.⁹

Currently the Jamaican Access to Information Act does not include provisions for dealing with voluminous or broad requests nor is there any affirmative duty to assist applicants. The Act provides that assistance be made available when requested and that applicants should have an opportunity for consultation, but these place the duty on the requester of information rather than the responsible information officer. Should there be contemplation of reforming the act to address the issue of reasonable requests, we would urge consideration of allowing the extension of time period rather than outright denials and that all safeguards be established, such as an affirmative duty

for the information officer to assist the applicant. Finally, automatic publication of large bodies of documents again may serve to reduce the number of voluminous requests, and increased public education assists applicants in submitting more carefully crafted requests.

Summary

- Public authorities should have mechanisms for dealing with voluminous requests
- If the Act is reformed to address voluminous requests, there should also be an affirmative duty to assist applicants
- Moreover, consideration should be given to allow the extension of time period for responses rather permit outright denials

PUBLIC INTEREST TEST

All access to information laws include exemptions for release of information when such disclosure would cause a specified harm to the public interest. In the best access to information laws, exemptions to the right to access information are narrowly and clearly drafted and explicitly define the public interest that is being protected (and harm avoided) by the disclosure denial. Nonetheless, in ultimately determining whether a document is exempt from disclosure, the best international practice dictates that a second “public interest” test be administered. Under this public interest test, a balancing exercise is undertaken that weighs the potential harm in releasing the document against the public good in the document’s disclosure.

The more modern access to information laws, such as South Africa, the UK, and most Canadian Provinces, include a general statutory provision for a “public interest test” prior to a denial based on one of the listed exemptions. In the Trinidad law there is a comprehensive public interest test, which states that:

⁹ Access to Information Act, 1985, sec. 9, Canada.



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S. 35. Notwithstanding any law to the contrary a public authority shall give access to an exempt document where there is reasonable evidence that significant—

- (a) Abuse of authority or neglect in the performance of official duty;
- (b) Injustice to an individual;
- (c) Danger to the health or safety of an individual or of the public; or
- (d) Unauthorised use of public funds, has or is likely to have occurred and if in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so.

In the UK's Freedom of Information Act 2000, the public interest test applies to any exempt information, and mandates that the public authority must consider if "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".¹⁰ A similar public interest test is included in New Zealand's Official Information Act Section 9(1) whereby consideration must be given as to whether, "in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available."

In Part III of the Jamaica Access to Information Act there are a number of exemptions listed, however only two are subject to the critical public interest test.¹¹ Undoubtedly, as witnessed in similar legislation, if the Jamaica Act added an effective public interest override that applies to all it would help ensure an appropriate balance between the application of

exemptions and release of information in the public interest.

Summary

- A public interest test allows the harm that disclosure may cause to be weighed against the public interest's in the information, thus assuring an appropriate balance
- Consider including a public interest override test for all exemptions

ENFORCEMENT

The enforcement mechanisms of any access to information law are crucial to the ultimate success of the new transparency regime. If enforcement mechanisms are weak or ineffectual it can lead to

arbitrary denials of information or ignoring of requests. And if applicants believe that there is not an effective mechanism for review, they will lose confidence in their right to access to information. Thus, some independent external

review mechanism is critical to the law's overall effectiveness.¹²

At present, the Jamaica Access to Information Act provides a number of appeal mechanisms, including an Appeals Tribunal. However, in practice this has proven difficult for users and burdensome for the pub-

... in ultimately determining whether a document is exempt from disclosure, the best international practice dictates that a second "public interest" test be administered.

¹⁰ Sections 2(2) and (3), Freedom of Information Act (United Kingdom). In the United Kingdom the public interest test does not apply to a number of areas including information already available, court records, personal information, information relating to security matters, information related to Parliamentary Privilege and information given in confidence

¹¹ See, sec. 19 Documents Revealing Government Deliberations and sec. 21 Documents Relating to Heritage Sites.

¹² For a more in-depth discussion of the issue and international experiences see "Mechanisms for Monitoring and Enforcing the Right to Information around the World," *Access to Information: Building a Culture of Transparency*, L. Neuman., The Carter Center, 2006.



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lic authority. In our observations, there have been very few appeals thus far. Although one reason for this may be positive, i.e. agencies are making correct decisions so that there is no basis for appeal, there may be a number of other reasons that applicants are not seeking appeals. It may be that there is a lack of awareness as to the right to appeal, the regulations relating to appeals may be too burdensome, or the requirements for appeal unclear or weak. Therefore, consideration may be due for methods of strengthening the appeal provisions to ensure that in practice they more fully meet the five criteria above.

The Jamaica Access to Information Appeals Tribunal is a body of five persons appointed by the Governor-General after consultation with the Prime Minister and Leader of the Opposition. The members serve part-time with no specific legislative guidance as to their duties or the resources available to them to comply with their mandate. The Appeal Tribunal has the power to make binding decisions in relation to appeals against public authorities for refusal of access, deferment, or related to fees for access to information. Additional guidance and powers may be needed to enable the Tribunal to carry out its mandate in a way that is more accessible to member of the public and ensures greater timeliness of both hearings and decisions to appellants.¹³

Powers and Orders

Currently s.32 of the Jamaica Act states that the Appeal Tribunal may make any decision which could have been made on the original application. This provision is more limiting and a broader right, such as found in the Connecticut Freedom of Information Act, may allow greater latitude to address the concerns on appeal. In the Connecticut law, the Information Commission may “provide any relief that the Commission, at its own discretion, believes appropriate to rectify the denial of any right conferred by the Freedom of Information Act.”¹⁴ Moreover, there are a number of decisions by the public authorities which appear exempt from review or it is unclear, such as the issuance of a certificate of exemption or

transfer of a request.

As with most jurisdictions that have an interim body with binding order powers, the Appeal Tribunal could be vested with the specific power to uphold the decision under review (affirm); reverse the decision and make their own order (vary and set-aside); remand to the agency for further action; find that the information is not exempt, or that on balance release of the information is in the public’s interest. The law could further detail such powers as the right to issue a decision when the statutory period has elapsed, the ability to recommend sanctions, and the ability to review and reverse a certificate of exemptions.

Summary

- Consider expanding the power of the Appeal Tribunal to issue decisions related to transfer of requests, exemption certificates, and to levy sanctions

Power to Carry Out Inquiries and Investigations

Most access to information laws provide extensive powers for the decision-maker to carry out formal inquiries and investigations as to how and why a document was created or destroyed and investigate allegations of altering of records and refusal of access. In the Jamaica Access to Information Act there is only provision to inspect exempt documents but no power to carry out investigations. The Access to Information (Appeal Tribunal) Rules 2004 passed in August 2005 also does not address in any detail the power of the tribunal to carry out investigations and inquiries. In the Ontario Freedom of Information and Privacy Act, in the course of an inquiry, the Commissioner is empowered to summon and examine on oath any person to the same extent as a superior court, when there is a belief that he or she may have information relating to the inquiry.

¹³ For a more in-depth discussion of the issue and the international experiences see “Appeal Procedures for ATI: International Experience,” *Access to Information: Building a Culture of Transparency*, L. Neuman. and C. Excell, The Carter Center, 2006.

¹⁴ The Connecticut Freedom of Information Act, sec. 1-206(2).



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The Tribunal would benefit from a specific power to serve the public authority with a notice (sometimes called an “information notice”) requiring it to furnish the Tribunal with specific data or documents within a specified time period.¹⁵ The Irish Freedom of Information Act contains useful language as it provides that the Information Commissioner has the power to require the head of the Authority concerned to furnish additional justifications within 3 weeks. Provisions could also be added to ensure the power to carry out an inquiry to the same extent as a superior court of record, i.e. to summon and examine on oath any person who, in the Tribunal’s opinion, may have information relating to the hearing.

Summary

- Consider expanding the power of the Appeal Tribunal’s ability to carry-out investigations, such as power to serve notice and summon witnesses

Power to Mediate

The trend in administration of justice is to provide options for alternative dispute resolution, and access to information laws are no exception. In many of the more recently passed or amended laws, there are specific provisions in the Act for mediation prior to litigation. Hearing all appeals cases, whether orally or on the record, is costly, time consuming and depending on the size of the administration, not realistic. It can also be more cumbersome and intimidating for the appellant if hearings are extremely formal akin to a court and can make the process adversarial in nature. Mediation, on the other hand, “can succeed in settling some or all of the issues, reducing the number of records in dispute, clarifying the issues and helping the parties to better understand the Acts.”¹⁶

Therefore, in many jurisdictions, the enforcement body is vested with the power to mediate claims before they move to the hearing stage. The January 2006 report of the UK Information Commissioner indicates that since the Act came into force at the end of 2005, the Information Commissioner’s Office has received over 2300 complaints about public

authorities not releasing information. Of these, almost half of them have been resolved either by negotiation or informal resolution. This is also true of the Ontario Information Commissioner where in their 2003 report notes that sixty percent (60%) of the appeals were mediated in full and that mediation has been the preferred method of dispute resolution since the inception of the Information Commissioners Office.¹⁷

In the Jamaica Access to Information Act and in the Appeals Tribunal Regulations there are no provisions for mediation, even though mediation is recognised and used in the Jamaican Supreme Court and Resident Magistrate Courts. Of course, safeguards must be considered to ensure the integrity of the mediation and adjudication process and avoid any inherent conflict of interests. Provisions could be considered to make specific allowances for mediation of a disputed access to information decision when all parties agree.¹⁸ Binding mediation efforts could be undertaken at any stage of the hearing process, and if the matter is not resolved through mediation, it would then proceed to a hearing.

Summary

- Alternative dispute resolution mechanisms reduce the cost and time of hearings
- Consider vesting the Appeal Tribunal with mediation powers

Appeal Tribunal Conformation and Procedures

Experience has shown, in countries such as Canada, the UK, and Mexico, that for intermediary appeal bodies to be successful they must be endowed with appropriate resources, including full-time personnel

15 Freedom of Information Act 2000, United Kingdom.

16 The Appeals Process and Ontario’s Information and Privacy Commissioner, September 2000.

17 For a more in-depth discussion of the issue and the international experiences see “Appeal Procedures for ATI: International Experience,” *Access to Information: Building a Culture of Transparency*, L. Neuman and C. Excell, The Carter Center, 2006.

18 See Freedom of Information and Privacy Act, Ontario Canada, Freedom of Information Act 1992, Western Australia.



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that can become expert on the intricacies of applying the access to information law and support the Tribunal in their investigations, mediations, and hearings. Unlike other jurisdictions, the Jamaican Access to Information Appeal Tribunal does not meet on a regular basis, nor does it count on an independent secretariat, with a staff and a budget dedicated solely to the support of its proper functioning. A secretariat is helpful in assisting claimants, particularly when the rules for appeal are quite formalistic. In practice, resolution of appeals in Jamaica has taken many months thus adversely affecting the realization of law's objectives, and this may be linked to a lack of human resources and full-time members of the Tribunal.

For the Tribunal to embody the authoritative weight found in other like bodies, reform of the system and regulations may be necessary. Consideration could be given to creating an independent, full-time professional secretariat to support the Tribunal, providing greater procedural guidance within the statute and reviewing the internal rules to assure they more closely conform to the principles listed above.

Summary

- Consider establishing a dedicated, independent secretariat for the Appeal Tribunal

AUTHORITATIVE WEIGHT OF ACCESS TO INFORMATION LEGISLATION

The Jamaica Access to Information Act specifically states in s.35 that, "nothing in the Access to Information Act shall affect any other Act other than the Official Secrets Act." The report of the Joint Select Committee on access to information, March 2002, in commenting on submissions in relation to

this section of the law stated, "There were a number of Acts that would be affected by the ATI Act... all other related Acts should be reviewed as early as possible to ensure there is uniformity." The effect of s. 35 of the ATI Act is to require the Government to complete the task of reviewing large numbers of sections of legislation and amending each individually over a number of years. This is often difficult for any government to complete as demonstrated by the

examples of the UK, Australia and Canada where the review of such laws has on average taken more than 3 years to complete.¹⁹

The modern practice is to ensure that the ATI law is the umbrella,

primary law governing all issues relating to access to information. This ensures that all other legislation is interpreted, as far as possible, in a manner consistent with the objective of transparency and openness. When well drafted, the exemption section of an Access to Information law will cover all documents that should legitimately be withheld from disclosure, thus obviating the need for other duplicative or potentially inconsistent and conflictive laws.

In the United Kingdom a specific provision was added to ensure the power to bring the existing legislative regime into conformance with their Freedom of Information Act. Section 75 of the UK Freedom of Information Act vests the Secretary of State with the authority to order repeal or amend the enactment of any provision that prohibits disclosure of information "for the purpose of removing or relaxing the prohibition," so that these other laws become consistent with the new information regime.

A secretariat is helpful in assisting claimants, particularly when the rules for appeal are quite formalistic.

¹⁹ UK Government identified nearly 250 statutory restrictions on the disclosure of information in 1993. They are listed in the 'Open Government' white paper, Cm 2290, Annex B and to be found at <http://www.dca.gov.uk/statbarsrep2005sm1.pdf>



KEY CONSIDERATIONS IN REFORMING THE ACT

The difficulty with the current approach taken in the Jamaican ATI Act is that it allows any other statutory provisions to take precedence over the Act, which may prevent access to information in all circumstances including those where there may be an overriding public interest in disclosure. Moreover, it creates a greater burden on public authorities and responsible officers to review all potentially determinative legislation and regulations, rather than just the Access to Information Act. To ensure greatest consistency with the principles of transparency, and aide the public servant in fulfilling its tenets, a specific provision such as found in the UK law may be considered.

Summary

- The modern practice is to establish the specialized ATI law as paramount over other acts that mention information, thus facilitating government administrators and alleviating conflicts of law

- Consider including a specific provision to bring existing legislation under the Act

CONCLUSION

The Jamaican government and public administration has shown great commitment to instituting a more open and transparent regime. Through the use of the Access to Information Act, civil society applicants have demonstrated their interest in the success of the Act and the benefits that information can provide as they strive to more fully participate in public life and more effectively exercise their fundamental human rights. In reflecting on the tenets of the law and the experiences in implementing and enforcing the Access to Information Act of 2002, Jamaicans have an opportunity to further advance their right to information



**COMPARATIVE CHART: SELECT ACCESS TO INFORMATION LAWS
AND THE JAMAICA ACCESS TO INFORMATION ACT OF 2002**

ISSUE	JAMAICA *	MEXICO	TRINIDAD AND TOBAGO	SOUTH AFRICA	ONTARIO, CANADA
Which entities are obligated by law to disclose information?	<p>All public authorities, including companies in which the government holds more than 50% of the shares or is in a position to influence the policy;*</p> <p>Any other body which provides services of a public nature that are essential to the welfare of the Jamaican society, as declared by the minister responsible for that public authority.</p> <p>*This act does not apply to Governor-General when acting in official capacity; to the courts; to security or intelligence services related to intelligence-gathering activities; or to any body by order of minister and affirmative resolution.</p>	<p>Those indicated in the constitutional federal public administration law, including the president of the republic, and decentralized administrative institutions, such as the Office of the Attorney General of the Republic, etc; any other federal body, federal executive branch, the federal legislative branch, federal judicial branch, the constitutional bodies, the federal administrative tribunals, and administrative units.</p>	<p>Public authorities, which is defined as Parliament, a Joint Select Committee of Parliament or committee of either houses; Court of Appeal, High Court, Industrial Court, the Tax Board or court of summary jurisdiction; Cabinet; a Ministry, department or division; Tobago House of Assembly; Executive Council or a division; municipal corporation; regional health authority; statutory body, responsibility for which is assigned to a Minister of Government; a company owned or controlled by the State; a Service Commission; a body corporate or unincorporated entity in relation to any function it exercises on behalf of the State, which is established by virtue of President's prerogative, by a Minister or by another public authority, or which is supported, directly or indirectly, by Government funds and over which Government is in position of control.</p> <p>The Act does not apply to President, commission of inquiry issued by President, or such public authority or function of a public authority as the President may by Order subject to negative resolution by Parliament, determine.</p>	<p>Public bodies, meaning any department of state or administration in the national, provincial, or sphere of government or any municipality in the local sphere of government or any other functionary or institution exercising a power or duty of the Constitution or provisional constitution exercising a public power or performing a public function in terms of any legislation; and private bodies, meaning any natural person or partnership which carries or has carried on any trade, business, or profession, or any former or existing juristic person.</p>	<p>The Act applies to the Assembly, ministry of the Government of Ontario, any agency, board, commission, corporation or other body designated as an institution in the regulations, as well as community colleges and district health councils.</p>
Who has the right to request information?	Any person.	Any person or their representative, including other government agencies. However, only citizens may request from the Federal Election Institute information related to the use of public resources by political parties.	Any person.	Any person. Public entities may also request access to the records of private entities on the grounds of public interest, such as when the record is required for the exercise or protection of any rights.	Every person has a right of access to a record or a part of a record in the custody or under the control of an institution.

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BUILDING A CULTURE OF TRANSPARENCY

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ISSUE	JAMAICA*	MÉXICO	TRINIDAD AND TOBAGO	SOUTH AFRICA	ONTARIO, CANADA
<p>Which documents are subject to automatic publication?</p> <p>P U B L I C A T I O N</p>	<p>An initial statement of its organization and functions containing the information specified in the First Schedule, including: a description of the subject area of the public authority; a list of the departments and agencies of the public authority; the title and business address of the principal officer; a statement of the manuals or other documents containing interpretations, rules, precedents, etc., that are provided by the public authority for the use of the authority or its officers in making decisions or recommendations with respect to rights, privileges, or benefits or to obligations, penalties, or other detriments to or for which persons are or may be entitled or subject.</p>	<p>The principle of publicity of information must be favored. With the exception of reserved or confidential information as provided in this law, the subjects compelled by the law must put at the public's disposition and keep up to date the following information: their structure, the powers of each administrative unit; a directory of public servants; the monthly remuneration received for each position, including the system of compensation as established in the corresponding dispositions; the address of the liaison section; their aims and objectives; services they offer; assigned budget, concessions, permits, or authorizations granted; contracts granted under the terms of the applicable legislation; etc.</p> <p>They must publish information on the amounts and persons to whom the public funds have been granted, the use of these funds, etc. Access to information requests and responses will be available to the public.</p>	<p>The Public Authority shall publish a statement setting out: particulars of the organization and functions, indicating decision-making powers and other powers affecting the public; categories of documents in possession of the public authority; material prepared for publication and places where persons may inspect or obtain material; the literature available by way of subscription services; procedure for requesting access to documents; the officer responsible within each public authority for the initial receipt of and action upon requests for access to documents; all bodies that are established to advise the public authority and whose meetings are open to the public or the minutes of meetings available for public inspection; if the public authority maintains a library available for public use. Those provided by a public authority for use or guidance of its officers in making decisions, or in providing advice to persons outside the public authority with respect to rights, privileges, benefits, obligations, penalties or other detriments being documents containing interpretations of written laws or schemes; manual, rules of procedures, statements of policy, records of decisions, letters of advice to persons outside the public authority; documents regarding enforcement of laws and schemes. Also statement of possession of documents: reports or statements containing advice or recommendations of a body or entity established within public authority, body established outside public authority by written law or Minister of Government, interdepartmental or Ministry committee, scientific expert, paid consultant etc., a report on performance of public authority, a report containing final plans or proposals for new policy, program, environmental impact statement, etc.</p>	<p>PUBLIC BODIES: description of its structure and functions; address, phone, fax, and e-mail of all information officers and deputy information officers; sufficient detail to facilitate a request for access to a record; a guide to information in every official language; latest notice of records available without having to request access; description of categories of information held by the entity; description of the services the entity provides to the public and how to access services; description of any arrangement for a person who formulates policy or performs duties by consultation or otherwise; description of all remedies available in respect of an act or failure to act by the body and any other information.</p> <p>PRIVATE BODIES: All of the above except the first and penultimate subsections and documents made available by other legislation..</p>	<p>Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public. In addition, the responsible minister shall cause to be published annually, an indexed compilation containing a description of the organization and responsibilities of each institution including details of the programs and functions of each division or branch of each institution; a list of the general classes or types of records prepared by or in the custody or control of each institution; the title, business telephone number and business address of the head of each institution; as well as manuals, directives or guidelines prepared by the institution, issued to its officers and containing interpretations of the provisions of any enactment or scheme administered by the institution; instructions to, and guidelines for, officers of the institution on the procedures to be followed, the methods to be employed or the objectives to be pursued in their administration or enforcement of the provisions of any enactment or scheme.</p>

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ISSUE	JAMAICA*	MEXICO	TRINIDAD AND TOBAGO	SOUTH AFRICA	ONTARIO, CANADA
In what format should the information be published?	The principal officer of the authority shall cause copies of such documents to be made available for inspection and for purchase by members of the public and published at least annually in the <i>Gazette</i> .	The information must be made available to the public by remote and local electronic means. The subjects compelled by the law must place computer equipment at the disposal of interested persons.	Statements should be published in the <i>Gazette</i> and in a daily newspaper circulating in Trinidad and Tobago, updated every 12 months. In addition certain specified documents made available for inspection or purchase.	Published in a manual updated annually, if necessary, and available in at least three (3) official languages. With approval of the minister, if the information of two public bodies is connected, only one manual should be made.	The responsible minister shall cause the materials, other than those revealing grave environmental, health and safety hazard, to be made generally available for inspection and copying by the public in the reading room, library or office designated by each institution for this purpose.
How should requests for access to information that has already been published be handled?	Where an official document is open to access by the public as part of a public register or otherwise or available for purchase by the public in accordance with administrative procedures, access to that document shall be obtained in accordance with those procedures.	The liaison units will not be obligated to process requests when the information is publicly available, but they must notify the requester in writing the source, place, and manner in which he can consult, reproduce, or obtain the information.	A person is not entitled to obtain a document through the request procedures for a document that contains information open to public access, as part of a public registry, available for purchase etc.	If access to a record is granted, but that record is to be published within ninety (90) days of the request; is required by law to be published but is yet to be published, or has been prepared for submission to any legislature or a particular person but is yet to be submitted, the information officer may defer giving access to the record for a reasonable period. The information officer must notify within 30 days.	A head may refuse to disclose a record where the record or the information contained in the record has been published or is currently available to the public; or the head believes on reasonable grounds that the record or the information contained in the record will be published by an institution within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it.

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BUILDING A CULTURE OF TRANSPARENCY

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ISSUE	JAMAICA*	MEXICO	TRINIDAD AND TOBAGO	SOUTH AFRICA	ONTARIO, CANADA
How does one request information from an entity covered under the law?	<p>A person who wishes to obtain access to an official document shall make an application to the public authority that holds the document. The application may be made in writing, by telephone, or by other electronic means and shall provide such information concerning the document as is reasonably necessary to enable the public authority to identify it.</p> <p>An applicant shall not be required to give any reason for requesting access to that document.</p>	<p>Any person or his representative may submit a request for access to information either by writing a letter or using the forms approved by the institute (through paper or Internet). The request must contain:</p> <ul style="list-style-type: none"> the name of the person making the request and the means by which he can be contacted a clear and precise description of the documents being requested any other facts that may make the information easier to locate in order to facilitate the search <p>optionally, the form in which he prefers access to the information be granted; it may be verbally, as long as it is needed for the purpose giving guidance to the requester, simple or certified copies, or other means.</p> <p>In no case will the delivery of information be conditioned on a motive or justification for its use.</p>	<p>A person who wishes to obtain access to an official document shall make a request in the form set out in the Schedule to the relevant public authority, identifying the official document or provide sufficient information to identify the document with reasonable effort. A request may specify in which of the forms applicant wishes access.</p>	<p>A request must be made in the prescribed form to the information officer of the public body concerned at his or her address, fax number, or e-mail address. The form must at least require the requester to identify himself and sufficient particulars to identify the record requested. The requester must also specify the form and language in which access is requested and the address or fax number of the requester.</p> <p>An individual who, because of illiteracy or disability, is unable to make a request as described above may make that request orally.</p> <p>An applicant is not required to give any reason for requesting access to the document.</p>	<p>A person seeking access to a record shall make a request in writing to the institution that the person believes has custody or control of the record; provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and at the time of making the request, pay the fee prescribed by the regulations.</p>

INFORMATION REQUESTS

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ISSUE	JAMAICA*	MEXICO	TRINIDAD AND TOBAGO	SOUTH AFRICA	ONTARIO, CANADA
<p>What procedure must public servants follow in responding to an access to information request?</p>	<p>A public authority to which an application is made shall, upon request, assist the applicant in identifying the documents to which the application relates, acknowledge receipt of every application in the prescribed manner, and grant to the applicant access to the document specified in the application if it is not an exempt document.</p>	<p>The liaison section will be the link between the requester and the entity. When the liaison unit receives a request, they will turn it over to the administrative unit that may have the information. The obligation to provide access to information will be understood as discharged when the documents are placed at the disposition of the person making the request for his consultation in the site where they were found or simple copies, certified copies, or by any other means.</p>	<p>Not mentioned in the law.</p>	<p>The information officer who receives the request must decide whether it is his responsibility to grant the request and advise the requester of the decision in the manner requested by the requester, as indicated in his/her request, if reasonably possible. If the request is made orally, the information officer must reduce oral request to writing. If the request is granted, a notice must state the access fee to be paid, the form in which access will be given, and information on mechanisms for lodging an internal or court appeal against the access fee to be paid. If not granted, the information officer must notify the applicant.</p>	<p>Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred the head of the institution to which it is forwarded or transferred, shall within thirty days after the request is received, give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced.</p>
<p>What is the time limit for responding to requests?</p>	<p>A public authority shall respond in not more than thirty (30) days after the date of receipt of the application, with a possible extension of another thirty (30) days in any case where there is reasonable cause for such extension. In the case of an application transfer, an authority shall respond no later than thirty (30) days after the application is transferred to the appropriate agency.</p>	<p>The entity must notify the requester of the response as soon as possible and in no case more than twenty (20) working days, counted from the date of the presentation of the request. This time limit may be extended for a period of up to equal length when justifiable reasons exist and the requester is notified. Once the requester is notified that the information is available, it must be delivered within ten (10) working days</p>	<p>A public authority shall take reasonable steps to enable an applicant to be notified of approval or refusal of request as soon as practicable but in any case not later than thirty days after the day on which request is duly made.</p>	<p>A public authority shall respond in not more than thirty (30) days after receiving the request application, with a possible extension of another thirty (30) days in any case where there is reasonable cause.</p>	<p>The time limit is 30 days, but a head may extend the time limit for a period of time that is reasonable in the circumstances, where the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution, or consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit. Head must provide written notice with length of extension, reasons, and rights for review.</p>

A D M I N I S T R A T I V E R E S P O N S E S

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BUILDING A CULTURE OF TRANSPARENCY

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ISSUE	JAMAICA*	MEXICO	TRINIDAD AND TOBAGO	SOUTH AFRICA	ONTARIO, CANADA
<p>In what format should the requested information be provided?</p>	<p>Access may be granted in one or more of the following forms: inspection; document copy; arrangements to hear the sounds or view visual images; transcript of the data, words, sounds, and images, when possible.</p> <p>The document shall be given in the form requested, except when doing so would be detrimental to the preservation of document or infringe on copyright laws.</p>	<p>Access will be granted only in the form permitted by the document in question, but it will be provided in whole or in part at the request of the person seeking access</p>	<p>Access shall be given in the form requested, including inspection, printed copies, tape, disk, film, printed transcript etc. unless it would interfere unreasonably with the operations of the public authority; would be detrimental to the preservation of the document or having regard to the physical nature of the document would not be appropriate; or would involve an infringement if copyright subsisting in person other than the State.</p>	<p>The document must be given in the manner requested unless to do so interferes unreasonably with the effective administration of the public body concerned, is detrimental to the preservation of the record, or amounts to infringement of copyright.</p> <p>If the document exists in the language that the requester prefers, access must be given in that language. If it does not exist in the preferred language or if no preference was indicated, access must be given in any language in which the record exists.</p>	<p>Record means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution etc. A person who is given access to a record or a part thereof under this Act shall be given a copy unless it would not be reasonably practicable to reproduce the record or part thereof by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part thereof in accordance with the regulations.</p>
<p>What are the processes for transferring a request to another agency?</p>	<p>When the document is held by another entity or the subject matter is more closely connected with functions of another public authority, the entity shall transfer the application and immediately inform the applicant. Transfer should occur as soon as possible but no later than fourteen (14) days..</p>	<p>When the information sought does not fall within the purview of the entity or agency to which the request for information was presented, the liaison section must duly orient the individual as to which entity or agency is responsible. In some cases, the entity has the duty to transfer the request to the agency that holds the information.</p>	<p>Not mentioned in the law.</p>	<p>If a requested record is not under the control of the body from which it was requested, the officer who received the request must, within fourteen (14) days, relevant public body. That body must prioritize the transferred request. The information officer must explain in writing the reason for the transfer.</p>	<p>Where an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request. Where a request is forwarded or transferred, the request shall be deemed to have been made to the institution to which it is forwarded or transferred on the day the institution to which the request was originally made received</p>

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A D M I N I S T R A T I V E R E S P O N S E S



COMPARATIVE CHART: SELECT ACCESS TO INFORMATION LAWS AND THE JAMAICA ACCESS TO INFORMATION ACT OF 2002

ISSUE	JAMAICA*	MEXICO	TRINIDAD AND TOBAGO	SOUTH AFRICA	ONTARIO, CANADA
Does the law require an explanation of the reason for denying a request?	Yes. A denial or time extension response from a public authority shall state on the application the reasons and the appeal options available to an aggrieved applicant.	Yes. When the entity's committee has made a negative decision, it must provide the reasons for the denial and indicate to the requester the procedure that he may use to lodge an appeal.	Yes. Where there is a denial or deferment of request or document does not exist, the Public Authority must notify requester in writing and state the findings and reasons for the decision; the name and designation of the person giving the decision; if exempt matter severed state that some parts deleted; inform of right to appeal; and where claim document does not exist or cannot be found inform of right to complain to the Ombudsman.	Yes. A denial notice must state adequate reason, including the provision of the act that indicates refusal; exclude any reference to the contents of the record; and state that the requester may lodge an appeal and the procedure for doing so.	Notice of refusal to give access to a record or a part thereof shall set out in writing where there is no such record, that there is no such record, and that the person who made the request may appeal to the Commissioner the question of whether such a record exists; or where there is such a record, the specific provision of this Act under which access is refused, the reason the provision applies to the record, the name and position of the person responsible for making the decision, and that the person who made the request may appeal to the Commissioner for a review of the decision.
Under what other circumstances may a request for information be denied or deferred?	No other reasons for denial are mentioned in the law, other than exemptions. Request for access may be deferred if publication of document required within specified time period, document prepared for Parliament, or premature release would be contrary to public interest.	In cases where the information cannot be found, the committee will draw up a resolution that confirms the nonexistence of the requested document and notify the person making the request. The liaison sections will not be obliged to process offensive requests for access when they have delivered information that is substantively identical in response to a request from the same person, etc.	A request may be deferred if the document has been prepared for presentation to Parliament; for release to the media; or solely for inclusion in a document to be prepared for Parliament or the media and the document is yet to be presented or released. Where request is deferred the public authority shall indicate, as far as practicable, the period for which the deferment will operate. A public authority may refuse to grant access without processing the request, if satisfied that the work involved in processing the request would substantially and unreasonably divert the resources of the public authority from its other operations and if before refusing to provide information on these grounds the authority has taken reasonable steps to assist the applicant to reformulate the application so as to avoid causing such interference. Where request is in writing, the public authority shall not refuse to comply on ground that did not sufficiently name or identify the document without first giving the applicant reasonable opportunity of consultation with a view to making a request in a form that does comply.	If all reasonable steps have been taken to find a document and it is believed that the record cannot be found or does not exist, the information officer must, by way of affidavit, notify the requester. An information officer may defer access when a document is to be published within 90 days, is required to be published but has not happened yet, or has been prepared for submission to any legislature or person but has yet to be submitted.	If the head of the institution is of the opinion on reasonable grounds that the request is frivolous or vexatious, he may deny the request and shall state in written notice that the request is refused because the head is of the opinion that the request is frivolous or vexatious; the reasons for the opinion; and right to request appeal to the Commissioner.

D E N I A L S

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ISSUE	JAMAICA*	MÉXICO	TRINIDAD AND TOBAGO	SOUTH AFRICA	ONTARIO, CANADA
D E N I A L S	<p>Is there a provision for deemed denials?</p> <p>Yes. A failure to give a decision within the time required by the act shall be considered</p>	<p>No, on the contrary. The failure to respond to a request for information within the specified time period will result in an affirmative decision for access, and the entity will be required to provide access to the information with 10 days, covering all costs.</p>	<p>Yes. The Act provides that a "decision of a public authority" includes the failure to take reasonable steps to enable an applicant to be notified of the approval or refusal of his request as soon as practicable but in any case not later than thirty days and failure to provide access to documents when requested, not exempt and prescribed fee paid.</p>	<p>Yes. If an information officer fails to give the decision on a request for access to the requester within the time period contemplated in the act, the information officer is regarded as having refused the request.</p>	<p>Yes. A head who fails to give the notice required concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given</p>
RESPONSIBILITIES & SANCTIONS	<p>Is an information officer identified?</p> <p>No. The law does not identify the requirement for an information officer.</p>	<p>Yes. The law requires that every agency designate a liaison entity responsible for automatic publication; receiving information requests; assisting requesters, etc. In addition, each agency will have an Information Committee responsible for coordinating and supervising the provision of information; confirming, modifying, or revoking classifications; establishing mechanisms for satisfying disclosure criteria, etc.</p>	<p>No. The law does not require the identification of an Information Officer.</p>	<p>Yes. Every public entity must designate an information officer and deputy information officers.</p>	<p>Ambiguous. A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.</p>
<p>Is it required to publish a road map of information held by government?</p>	<p>Yes. A public authority shall publish a list of subjects handled by each department and agency at least annually in the <i>Gazette</i>.</p>	<p>Not mentioned in the law beyond the automatic publication.</p>	<p>Yes. A public authority shall publish in the <i>Gazette</i> and a locally circulated newspaper a statement of the categories of documents that are maintained in its possession.</p>	<p>Yes. The information officer must compile, in at least three official languages, a manual containing a description of subjects and issues on which the body holds records.</p>	<p>Yes. The responsible minister shall publish annually a compilation listing all institutions where a request for a record should be made; the name and office of the head; where the material that must be published has been made available; and whether the institution has a library or reading, and if so, its address.</p>

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COMPARATIVE CHART: SELECT ACCESS TO INFORMATION LAWS AND THE JAMAICA ACCESS TO INFORMATION ACT OF 2002

ISSUE	JAMAICA*	MÉXICO	TRINIDAD AND TOBAGO	SOUTH AFRICA	ONTARIO, CANADA
Does the law establish a requirement to help requesters?	Upon request, a public authority shall assist an applicant in identifying the documents to which the application relates.	The liaison unit must assist in the completion of information requests, in particular in cases where the requester does not know how to read or write.	A public authority shall take reasonable steps to assist any person in exercise of their rights under the Act.	Information officer must render reasonable assistance free of charge as necessary to enable the requester to comply with provision for form of request.	Yes. If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection.
What sanctions will be used against civil servants who fail to uphold the law?	Altering, defacing, blocking, erasing, destroying, or concealing accessible documents are punishable with a maximum J\$5,000 fine and/or up to six months imprisonment. In case of a <i>bona fide</i> belief that the grant of access is required by the act, no action for defamation or breach of confidence may be taken.	Civil servants will be held administratively liable for failure to comply; using, removing, altering, destroying, concealing, failing to use, disclosing, fraudulently classifying as confidential, etc. in an illegal manner information in their custody; intentionally denying information that is not classified, etc.; handing over information considered reserved or confidential, etc.	A person who willfully destroys or damages a record or document required to be maintained and preserved or knowingly destroys or damages a record or document while a request for access is pending commits an offence and is liable on summary conviction to a fine and imprisonment. Where access to a document has been given in accordance with the requirements of this Act or in good faith no action for defamation, breach of confidence or infringement of copyright may be brought.	No person is criminally or civilly liable for anything done in good faith in the exercise of this act. A person who, with intent to deny access, destroys, damages or alters, conceals, or falsifies a record commits an offence and is liable on conviction to a fine or imprisonment not exceeding two (2) years.	A head or person acting on behalf of a head may be liable in respect of a tort.

RESPONSABILITIES & SANCTIONS

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BUILDING A CULTURE OF TRANSPARENCY

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<p>What costs must the requester pay?</p>	<p>The costs of reproducing any documents shall be borne by the applicant.</p>	<p>The costs of obtaining information may not be greater than the sum of: the cost of the materials used in reproducing the information, and the cost of sending it. The subjects compelled by the law must make an effort to reduce the costs of delivering the information.</p>	<p>No fee shall be charged for the making of a request for access to an official document but where access is to be given in the form of printed copies, or copies in some other form, such as on tape, disk, film or other material, the applicant shall pay the prescribed fee. The fees payable by the applicant shall be commensurate with the cost incurred in making documents available.</p>	<p>The requester must pay a prescribed fee for making a copy of the record or transcription; postal fee, if applicable; and the time reasonably required to search for the record and search and preparation would require more hours than prescribed for this purpose, the information officer must, by notice, require a deposit. When a deposit is required, it must be repaid if access is denied. The information officer or head of the private body notifies the requester of the fee before executing the request.</p>	<p>A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for the costs of every hour of manual search required to locate a record; the costs of preparing the record for disclosure; computer and other costs incurred in locating, retrieving, processing and copying a record; shipping costs; and any other costs incurred in responding to a request for access to a record. The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under this Act that is over \$25.</p>
<p>Can a fee waiver be issued?</p>	<p>The responsible minister may waive, reduce, or remit the cost of reproducing documents where he is satisfied that such waiver, reduction, or remission is justifiable.</p>	<p>Yes, by appealing. The requester may lodge an appeal for review submitted to the Federal Institute of Access to Public Information when he is not in agreement with the cost of accessing the requested information.</p>	<p>There are no specific waiver provisions. However the law does provide that where a public authority fails to comply with the time periods any access to official documents to which the applicant is entitled shall be provided free of charge.</p>	<p>Yes. The minister may, by notice in the <i>Gazette</i>, exempt any person or category of people from paying the fees listed above, determine fee calculation methods, set fee limits, exempt categories of documents from certain fees, and limit excess collecting fees for requests of both public and private bodies.</p>	<p>A head shall waive the payment of all or any part of an amount required to be paid if, in the head's opinion, it is fair and equitable to do so after considering the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required; whether the payment will cause a financial hardship for the person requesting the record; whether dissemination of the record will benefit public health or safety; and any other matter prescribed in the regulations.</p>

C O S T S

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<p>How often should reports be made and what should they contain?</p> <p>R E P O R T S</p>	<p>The minister shall prepare an annual report on the operation of the act during the year to be laid on table of Parliament, containing: the number of applications for access received, granted, deferred, refused, or granted subject to deletions; the categories of exemptions claimed and the numbers of each category; the number of applications received for amendment or annotation of personal records; the number of applications for internal review of relevant decisions and appeals against relevant decisions and the rate of success or failure thereof; other matters as are considered relevant. Each public authority shall submit to the minister quarterly reports containing the above information.</p>	<p>The Federal Access to Information Agency must submit a report to Congress on an annual basis based on data received from the entities described in Article 29 Section VII, including, at least, the number and types of information requests submitted to each entity and their resolution, including those in which it was not possible to locate the information in the files; the response time for different requests; the status of complaints that the institute presented to internal control mechanisms; and the observed difficulties of compliance with the law.</p>	<p>The Minister shall prepare an annual report to be laid before each House of the Parliament including the number of requests made to each public authority; the number of decisions that an applicant was not entitled to access to a document pursuant to a request, the provisions of this Act under which these decisions were made and the number of times each provision was invoked; the number of applications for judicial review; the number of complaints made to the Ombudsman; the number of notices and adverse decisions made regarding completeness of published statement of documents; particulars of any disciplinary action taken against any officer in respect of the administration of this Act; amount of charges collected; particulars of any reading room; and any other facts which indicate an effort by public authorities to administer and implement the spirit and intention of this Act.</p>	<p>The Human Rights Commission must include in its annual report to the National Assembly, referred to in the Constitution, among others: any recommendation for improvement of the act; the number of requests for access received, granted in full, granted under a public interest disclosure, or granted in part; the number of times each provision of the act was relied on to refuse access; the number of cases in which time periods were extended; the number of internal appeals lodged and their grounds; the number of applications made to every court and their outcome; the number of complaints lodged with the public protector.</p> <p>The information officer of each public body must annually submit report to the Human Rights Commission on the above information.</p>	<p>A head shall make an annual report to the Commissioner specifying the number of requests under this Act for access to records made to the institution; the number of refusals by the head to disclose a record; the provisions of this Act under which disclosure was refused and the number of occasions on which each provision was invoked; the number of uses or purposes for which personal information is disclosed; the amount of fees collected by the institution; and any other information indicating an effort by the institution to put into practice the purposes of this Act.</p> <p>The Commissioner shall make an annual report to the Speaker of the Assembly, providing a comprehensive review of the effectiveness of this Act including a summary of the nature and ultimate resolutions of appeals carried out, an assessment of the extent to which institutions are complying with this Act, and the Commissioner's recommendations with respect to the practices of particular institutions and with respect to proposed revisions to this Act. The Speaker shall cause the annual report to be laid before the Assembly; if it is in session or shall deposit the report with the Clerk of the Assembly if the Assembly is not in session.</p>

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What exemptions does the law specify?	The following official documents are exempt from disclosure:	Information is categorized as classified if its disclosure could:	A document is an exempt document if:	The information officer may refuse a request for access if the record's disclosure would:	A document is an exempt document if:
Is there an exemption in the law with respect to national security/military	Information whose disclosure would prejudice security and defense.	Is there an exemption in the law with respect to national security/military	It contains information, the disclosure of which would be likely to prejudice the defense of the Republic of Trinidad and Tobago.	Records that could reasonably be expected to cause prejudice to defense or security of the republic; or a record that contains information relating to military tactics or strategy or military exercise or operations undertaken in preparation of hostilities or in connection with the detection, prevention, or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council	A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defense of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council

E X E M P T I O N S

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<p>Is there an exemption in the law with respect to personal or private information?</p> <p style="text-align: center;">E X E M P T I O N S</p>	<p>Documents involving the unreasonable disclosure of information relating to the personal affairs of any person, whether living or dead.</p>	<p>The subjects compelled by the law may not disclose, distribute, or commercialize the personal information held in the information systems they have developed unless the individuals to whom the information refers have given express consent in writing or by similar authenticated means. The consent of individuals will not be required to supply personal information in the following cases: if necessary for scientific or statistical reasons and when name is not associated; when a judicial order to this effect exists; when a third party is contracted to provide a service which involves dealing with personal information; and in other cases established by the law, etc.</p>	<p>If its disclosure would involve the unreasonable disclosure of personal information of any individual (including a deceased individual), except in relation to documents related to the requestor.</p>	<p>Records that would involve the unreasonable disclosure of personal information about a third party, including a deceased individual.</p>	<p>A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except under specified exceptions.</p>

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Is there an exemption in the law with respect to international relations?	Documents containing information communicated in confidence to the government by or on behalf of a foreign government or by an international organization, and documents that would prejudice international relations.	Information that would impair ongoing negotiations or international relations, including that information which other states or international organisms give as confidential to the Mexican state.	Disclosure under this Act would be contrary to the public interest and disclosure would prejudice relations between the Government of the Republic of Trinidad and Tobago and the government of any other State, States or a body thereof; would divulge any information or matter communicated in confidence by or on behalf of the government of another State, or communicated in confidence by or on behalf of an international organization of states or a body thereof.	Records that could reasonably be expected to cause a prejudice to the international relations of the republic or would reveal information supplied in confidence by another state or an international organization, supplied by or on behalf of the republic to another state or international agreement that requires information to be held in confidence, or required to be held in confidence by international agreement or customary international law.	A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution; reveal information received in confidence from another government or its agencies by an institution; or reveal information received in confidence from an international organization of states or a body thereof by an institution and shall not disclose any such record without the prior approval of the Executive Council.
Is there an exemption in the law with respect to the national economy?	Documents whose disclosure could have a substantial adverse effect on the Jamaican economy or the government's ability to manage the Jamaican economy, including but not limited to taxes, duties, interest rates, monetary policy and exchange rate policy, or currency rates, etc.	Information that would damage the country's financial, economic, or monetary stability.	Its premature disclosure would be contrary to the public interest by reason that the disclosure would be reasonably likely to have a substantial adverse effect on the economy of Trinidad and Tobago, including but not limited to, the premature disclosure of proposed introduction, abolition or variation of any tax, duty, interest rate, exchange rate or instrument of economic management; its disclosure would be contrary to the financial interests of the public authority, reveal information to a competitor of the public authority, would be likely to prejudice the lawful commercial activities of the public authority, would be contrary to the public interest by reason that it would disclose instructions issued or criteria applied in negotiations etc.	Records whose disclosure would be likely to materially jeopardize the economic interests or the financial well-being of the republic or the ability of the government to manage the economy of the republic effectively in the best interest of the republic.	A head may refuse to disclose a record that contains trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario and has monetary value or potential monetary value; information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication; information where the disclosure could reasonably be expected to prejudice the economic interests or the competitive position of an institution; information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or its ability to manage the economy; positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on by an institution or the Government of Ontario etc.

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<p>Is there an exemption in the law with respect to police/ domestic security?</p> <p>E X E M P T I O N S</p>	<p>Official documents relating to law enforcement are exempt from disclosure if their disclosure would, or could reasonably be expected to, endanger any person's life or safety, prejudice an investigation or trial, disclose the existence or identity of a confidential source of information, reveal lawful methods for preventing or investigating crimes, facilitate the escape of a person from lawful detention, or jeopardize the security of any correctional facilities.</p>	<p>Information that would seriously prejudice the verification of observance of the laws, the imparting of justice, the collection of taxes, and immigration control operations. Also, that which puts at risk the life, security, or health of any person.</p>	<p>It contains information, the disclosure of which would be likely to prejudice the lawful activities of the security or intelligence services. If its disclosure would, or would be reasonably likely to prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance; disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law; disclose methods or procedures for preventing, detecting, investigating, or endangering the lives or physical safety of persons engaged in or in connection with law enforcement or persons who have provided confidential information in relation to the enforcement or administration of the law.</p>	<p>Records whose disclosure could reasonably be expected to prejudice investigation of a contravention or possible contravention of the law; to reveal identity of a confidential source of information in relation to enforcement or administration of the law; result in intimidation or coercion of a witness; facilitate commission of contravention of law; or prejudice or impair security of building structure or system, means of transport, or any other property. Methods, systems, plans, or procedures for the protection of a witness. Must refuse a request for access to a record if its disclosure could reasonably be expected to endanger the life or physical safety of an individual.</p>	<p>A head may refuse to disclose a record where the disclosure could reasonably be expected to interfere with a law enforcement matter; interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result; reveal investigative techniques and procedures currently in use or likely to be used in law enforcement; disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source; endanger the life or physical safety of a law enforcement officer or any other person; interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons; reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation; endanger the security of a building or the security of a vehicle carrying items, facilitate the escape from custody of a person who is under lawful detention; jeopardize the security of a centre for lawful detention; or facilitate the commission of an unlawful act or hamper the control of crime etc.</p>

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Is there an exemption in the law with respect to the judicial process?	Not mentioned in the law.	<ul style="list-style-type: none"> Procedural strategies in judicial processes that are ongoing; Judicial files or administrative procedures that have taken the form of a trial, where there has been no ruling. 	If its disclosure Act would, or would be reasonably likely to prejudice the fair trial of a person or the impartial adjudication of a particular case;	Records prohibited in terms of s. 60(14) in Criminal Procedures Act, if disclosure could reasonably be expected to prejudice effectiveness of methods, techniques, etc., of prosecution; or reveal lists of alleged offenders; impede prosecution; or reveal lists of pending bail proceedings. If record is privileged from production in legal proceedings, unless waived. A record may not be refused insofar as it consists of information about the general conditions of detention of people in custody.	A head may refuse to disclose a record where the disclosure could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication.
Is there an exemption in the law with respect to the deliberative process?	Documents which contain opinions, advice, or recommendations prepared for Cabinet or those documents for deliberations arising in course of Cabinet proceedings, but not when purely factual in nature or for study, tests, etc.	That which contains the opinions, recommendations, or points of view that are part of a public servant's deliberative process, until that time when a final decision is adopted, which itself must be documented.	It would disclose matter in the nature of opinion, advice or recommendation prepared by an officer of Government, or consultation or deliberation that has taken between officers, in the course of, or for the purpose of, the deliberative processes involved in the functions of a public authority; and would be contrary to the public interest. It is the official record of any deliberation or decision of Cabinet; prepared by a Minister of Government or on his behalf or by a public authority for the purpose of submission for consideration by Cabinet or a document which has been considered by Cabinet and which is related to issues that are or have been before Cabinet; prepared for the purpose of briefing a Minister of Government in relation to issues to be considered by Cabinet; a document that is a copy or draft of a document referred to above; a document the disclosure of which would involve the disclosure of any deliberation or decision of Cabinet, other than a document by which a decision of Cabinet was officially published.	Records that contain an opinion, advice, report, or recommendation obtained or prepared or an account for a consultation, discussion, or deliberation that has occurred for the purpose of assisting to formulate a policy or take a decision in exercise of power or performance of duty conferred or imposed by law if the disclosure could reasonably be expected to frustrate deliberative process by or between public bodies by inhibiting candid communication of opinion, advice, etc. or conduct of consultation, discussion, etc.	A head shall refuse to disclose a record where would reveal the deliberations of the Executive Council or its committees; containing policy options/recommendations submitted or prepared for submission to the Executive Council or its committees including; record contains background or analyses of problems, prepared for consideration in making decisions; record regarding consultation among ministers on matters relating to gov't decisions or policy; prepared to brief a minister regarding matters before or proposed to be brought to the Exec Council or committees, or are subject of consultations among ministers relating to gov't decisions or policy; and draft legislation or regs. or reveal advice/recommendations of public servant or consultant. Etc.

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Is there an exemption in the law with respect to banking/ commercial secrets?	Documents which would reveal trade secrets or any other information of a commercial value whose disclosure would diminish or destroy its value.	Commercial, industrial, bank, and fiduciary secrets or others considered as such by legal provisions.	Its disclosure would disclose information acquired by a public authority from a business, commercial or financial undertaking, and the information relates to trade secrets or other matters of a business, commercial or financial nature; or the disclosure of the information would be likely to expose the undertaking to disadvantage. It contains a trade secret of a public authority; or in the case of a public authority engaged in trade or commerce, information of a business, commercial or financial nature, if disclosed be likely to expose the public authority to disadvantage; it contains the results of scientific or technical research undertaken by a public authority, and the research could lead to a patentable invention; the disclosure of the results of an incomplete state under this Act would be reasonably likely to expose a business, commercial or financial undertaking unreasonably to disadvantage; the disclosure of the results before the completion of the research would be reasonably likely to expose the public authority unreasonably to disadvantage.	Information about decision of regulation or supervision of financial institutions; trade secrets; financial, commercial, scientific, or technical information likely to cause harm to a third party or to a state or public body that could reasonably be expected to put third party or the public body at disadvantage at negotiations or prejudice in commercial competition.	A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, or where the disclosure could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization; result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied; result in undue loss or gain to any person, group, committee or financial institution or agency.
Is there an exemption in the law with respect to reserved/ confidential information?	Not mentioned in the law	That which by a law's express provision is considered confidential, restricted, commercially restricted, or governmentally restricted.	Its disclosure would divulge any information or matter communicated in confidence by or on behalf of a person or a government to a public authority, and the information would be exempt information if it were generated by a public authority; or the disclosure of the information would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of a public authority to obtain similar information in the future.	Must refuse request to access to record if the disclosure would constitute a breach of a duty of confidence owed to a third party in terms of an agreement or may refuse access to request if record consists of information supplied in confidence by third party, the disclosure of which could reasonably be expected to prejudice future supply of information, and it is in the public interest.	A head shall refuse to disclose a record that reveals financial information supplied in confidence implicitly or explicitly.

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Is there an exemption in the law with respect to legal privilege?	Documents privileged from production in legal proceedings or those whose disclosure would constitute an actionable breach of confidence, be in contempt of court, or infringe the privileges of Parliament.	Not mentioned in the law.	If it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.	Information officer must refuse request for access to a record if privileged from production in legal proceedings, unless privilege waived.	A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.
What other exemptions does the law specify?	A document whose disclosure could result in damage to a resource that is historical, archeological, anthropological; anything declared national monument; any species of plant or animal life in danger of extinction, threatened, or vulnerable; or any other rare or endangered living resource	Liability proceedings against public servants, as long as no administrative resolution or definitive jurisdictional ruling has been made.	It is an examination paper, a paper submitted by a student in the course of an examination, an examiner's report or similar document and the use or uses for which the document was prepared have not been completed. A document is an exempt document if there is in force a written law applying specifically to information of a kind contained in the document and prohibiting persons referred to in the written law from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.	<ul style="list-style-type: none"> Information obtained by or in possession of the South African Revenue Service with the purpose of enforcing legislation concerning the collection of revenue. Computer programs that are property of the state. 	A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual; where disclosure could reasonably be expected to lead to the killing, capturing, injuring or harassment of fish or wildlife that belong to a species at risk or to interference with the habitat of fish or wildlife that belong to a species at risk; a record that reveals information supplied to or the report of a conciliation officer, mediator, labor relations officer or other person appointed to resolve a labor relations dispute; a record that reveals questions that are to be used in an examination or test for an educational purpose
Does a determination of "public interest" exist that overrides exemption?	A public interest exists for some exemptions, including deliberative process and heritage sites, etc., but does not exist for all exemptions.	Not mentioned in the law.	Yes. Notwithstanding any law to the contrary a public authority shall give access to an exempt document where there is reasonable evidence that significant abuse of authority or neglect in the performance of official duty; injustice to an individual; danger to the health or safety of an individual or of the public; or unauthorized use of public funds has or is likely to have occurred and if in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so. In addition under the deliberative process exemption, notice of exemption shall state the public interest considerations on which the decision is based.	For several sections of the exemptions, the information officer must grant a request for access if the disclosure of the record would reveal evidence of a substantial contravention or failure to comply with the law or an imminent serious public safety or environmental risk and the public interest in the disclosure clearly outweighs the harm contemplated in the provision in question.	An exemption from disclosure of a record under sections related to advice to government/deliberative process, relations with other governments, third party information, economic and other interests of Ontario, danger to safety or health, personal privacy, and fish and wildlife species at risk does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption

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Are there any other provisions in law that provide access regardless of exemption?	Not mentioned in the law.	Information may not be classified when the investigation of grave violations of fundamental rights or crimes against humanity is at stake.	Not mentioned in the law.	Not mentioned in the law.	Not mentioned in the law.
Does the law stipulate a period of declassification?	Yes. The exemption of an official document or a part thereof from disclosure shall not apply after the document has been in existence for twenty (20) years, or such shorter or longer period as the minister may specify by order subject to affirmative resolution.	Yes. Information classified as restricted may remain as such for a period of up to twelve (12) years and may be declassified when the causes from which its classified status originated cease to exist or when the period of classification is over. Exceptionally, subjects compelled by the law may request extension of the period of classification as long as the causes that gave rise to its classification persist.	Only with relation to exemption of Cabinet and deliberative process, which ceases to exist 10 years after came into existence.	Yes. A document may not be denied if it originated more than twenty (20) years before the request was made.	For documents related to deliberative process exemptions or advice and recommendations, the head should not refuse to disclose when the document is more than 20 years old.
Is it possible to separate information and grant that part which does not qualify as exempt?	Yes. Where an application is made to a public authority for an official document that contains exempt matter, the authority shall grant access to a copy of the document with the exempt matter deleted therefrom.	Yes. Administrative units may provide documents that contain information classified as restricted or confidential, as long as the documents in which the information appears permit the elimination of those parts or sections. In such cases, the parts or sections which have been withheld must be indicated.	Yes. Where it is practicable for the public authority to grant access to a copy of the document with such deletions as to make the copy not an exempt document; and it appears from the request, or the applicant subsequently indicates, that the applicant would wish to have access to such a copy, the public authority shall give the applicant access to such a copy of the document.	Yes. If a request for access is made to a public or private body containing information that may or must be refused in terms of exemptions, every part of the record that does not contain, and may reasonably be severed from any part that contains, exempt information must be disclosed.	Yes. If an institution receives a request for access to a record that contains information that falls within one of the exemptions and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions

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AND THE JAMAICA ACCESS TO INFORMATION ACT OF 2002**

ISSUE	JAMAICA*	MÉXICO	TRINIDAD AND TOBAGO	SOUTH AFRICA	ONTARIO, CANADA
<p>C O M P L I A N</p> <p>Does the law provide for an internal appeal/ review of decision?</p>	<p>Yes. An application for internal review must be presented within thirty (30) days of the date of notification of the decision or expiration of the request. The entity receiving the internal review may take any decision that could have been taken on an original application.</p>	<p>Yes. The head of the agency that classified the documents as restricted shall immediately refer the application, with the elements necessary to establish and motivate said classification, to the committee of the organization in order to confirm or revoke the classification.</p> <p>In the case of a negative decision the reasons for classification must be given and appeal mechanism before IPAI should be indicated</p>	<p>No. But a person aggrieved by the refusal of a public authority to grant access to an official document, may, within twenty-one days of receiving notice complain in writing to the Ombudsman and the Ombudsman shall, after examining the document if it exists, make such recommendations with respect to the granting of access to the document as he thinks fit. A public authority is required to consider the recommendations of the Ombudsman and, to such extent as it thinks fit, exercise its discretion in giving effect to the recommendations.</p>	<p>Yes. An internal appeal must be lodged in the prescribed form within sixty (60) days and notice to third party within thirty (30) days. Request for appeal must be delivered or sent to the information officer of the corresponding public agency, identifying the subject matter and the reason for the appeal. The internal review shall be accompanied by payment of the prescribed appeal fee.</p>	<p>Not mentioned in the law.</p>
<p>C E</p> <p>Does the law establish a process of appeal, following the internal appeal/ review, to another enforcement body that is not a court of law?</p>	<p>Yes. An appeal against the internal review decision may be lodged in the Appeal Tribunal within sixty (60) days after notification of the decision.</p>	<p>Yes. The applicant or his representative may lodge an appeal before the institute which dealt with the request or the liaison section for a review of the classification within fifteen (15) working days of the date of notice.</p>	<p>A person aggrieved by a decision of a public authority under this Act may apply to the High Court for judicial review of the decision. The application shall be heard and determined by a Judge in Chambers, unless the Court, with the consent of the parties, directs otherwise</p>	<p>No. Once the internal review process has been exhausted, the applicant or a third party may initiate proceedings before a court. There is no intermediary body.</p>	<p>Yes. A person who has made a request for access to a record may appeal any decision of a head under this Act to the Commissioner within 30 days after notice of decision given.</p>

* This chart was done based on the Jamaica Access to Information Act of 2002. Information contained herein may change should any of these laws be amended.



**COMPARATIVE CHART: SELECT ACCESS TO INFORMATION LAWS
AND THE JAMAICA ACCESS TO INFORMATION ACT OF 2002**

ISSUE	JAMAICA*	MÉXICO	TRINIDAD AND TOBAGO	SOUTH AFRICA	ONTARIO, CANADA
What authority does the enforcement body have?	On the hearing of an appeal, the onus of justifying the decision of the internal review lies on the public authority. The Appeal Tribunal may make any decision that could have been made on the original application but shall not nullify a decision made by a minister.	The Federal Institute of Access to Information is an organ of the federal public administration with operative autonomy. For the purposes of its determinations, the institute shall not be subordinated to any authority and shall adopt its decisions with full independence.	Not mentioned in the law.	The court hearing an application may grant any order that is just and equitable, including orders confirming, amending, or setting aside the decision which is the subject of the application concerned; requiring action or to refrain from action; granting specific relief, etc. The burden of proof that the decision complies with the act rests with the party that claims it so complies.	The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal; may conduct an inquiry to review the head's decision if the Commissioner has not authorized a mediator to conduct an investigation or has authorized a mediator to conduct an investigation but no settlement has been effected. In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution. The Commissioner may summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry, and for that purpose the Commissioner may administer an oath. After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.
Does the law require the designation of a coordinating entity?	Not mentioned in the law.	The law requires the designation of a public Federal Institute of Access to Information, made up of five commissioners. It is independent in its operations, budget, and decision-making and charged with promoting and publicizing the exercise of the right of access to information, ruling on the denial of requests for access to information and protecting personal information held by agencies and entities.	Not mentioned in the law.	Not mentioned in the law, although Human Rights Commission is responsible for monitoring implementation of act, making recommendations, and public education.	Not mentioned in the law, although the Information and Privacy Commission of Ontario has taken on a public education and oversight role.
C O M P L I A N C E					
OTHER PROVISIONS					

* This chart was done based on the Jamaica Access to Information Act of 2002. Information contained herein may change should any of these laws be amended.



BUILDING A CULTURE OF TRANSPARENCY

**COMPARATIVE CHART: SELECT ACCESS TO INFORMATION LAWS
AND THE JAMAICA ACCESS TO INFORMATION ACT OF 2002**

ISSUE	JAMAICA*	MÉXICO	TRINIDAD AND TOBAGO	SOUTH AFRICA	ONTARIO, CANADA
When does the law come into force?	Comes into operation on the day indicated by the minister by notice in the <i>Gazette</i> . This was originally one year but was later extended, and the law has gone into effect in a phased-in basis.	The law will take effect the day after its publication in the Official Diary of the Federation. The making public of information referred to in the law must be complete one year after the law takes effect. The heads of the agencies shall designate the liaison section and appoint the members of the committees to begin functioning no later than six months after the law has come into effect.	This Act comes into force on such date as fixed by the President by Proclamation. The Act was passed in 1999, and certain parts went into effect April 30 2001 and the rest on June 30 th .	Minister must introduce a bill within 12 months after commencement of transitional agreements. For the first twelve (12) months from the date that the law takes effect, the maximum period of thirty (30) days to provide information shall be extended to ninety (90) days; and for the second twelve (12) months, the period of thirty (30) days shall be extended to sixty (60) days, except in cases where the period was already extended, in which case the 30-day provision shall remain in effect.	Not mentioned in the law.
O T H E R P R O V I S I O N S					

* This chart was done based on the Jamaica Access to Information Act of 2002. Information contained herein may change should any of these laws be amended.



MECHANISMS FOR MONITORING AND ENFORCING THE RIGHT TO INFORMATION AROUND THE WORLD¹

LAURA NEUMAN

Laws that only threaten, and are not kept, become like the log that was given to the frogs to be their king, which they feared at first, but soon scorned and trampled on.

— *Miguel de Cervantes, Don Quixote, 1605-15*

The execution of laws is more important than the making of them.

— *Thomas Jefferson, letter to Abbé Arnold, May 27, 1789*

Many countries around the world have signed onto international treaties and declarations committing themselves to access to information, they have a right to information included in their constitution, or have passed legislation to give the right effect. However, without the full implementation and effective enforcement these rights, and the legislation that embodies them, may quickly become meaningless.

As I have previously posited, one may consider the establishment of an access to information regime to contain three distinct phases: passage; implementation; and enforcement. The first, the passage of the law, is relatively speaking perhaps the easiest phase. There now exist emerging international norms as to the content of such laws, as well as an awakening civil society dedicated to promoting the passage of such acts. The second phase, the implementation of the law, often proves to be the most challenging premise for government and its functionaries. During this phase, the public administration must set up systems to organize and manage documents, establish procedures and processes for the request, retrieval and

provision of information, train public servants, and commence the shift in institutional culture from secrecy to openness. As will be discussed below, experience has demonstrated a clear need for technical support, dedicated expertise and monitoring throughout the implementation stage.

The third period, and in my mind the most critical for the ultimate success of a new transparency regime, is the enforcement phase. It is at this stage that persons can seek to enforce their right to information when a request is ignored or denied. Without an independent review procedure of decisions, the right to information will quickly become discretionary and based on the whims and desires of the persons receiving the request. If the enforcement mechanisms are weak or ineffectual it can lead to arbitrary denials, or it can foment the “ostrich effect”, whereby there is no explicit denial but rather the government agencies put their heads in the sand and pretend that the law does not exist. Thus, some independent external review mechanism is critical to the law’s overall effectiveness.

The institutional framework and apparatus developed for application and oversight of the right to information vary. Models for monitoring and enforcement range from an absence of statutorily authorized oversight and intermediary enforcement mechanisms to those whereby the bodies are mandated and vested with wide-ranging powers and responsibilities. The decision regarding which model will function best depends greatly on the specific political, economic and social context and needs of the jurisdiction. However, what is increasingly clear is that in order to

¹ This article is largely excerpted from “Models for Oversight and Enforcement of the Right to Information,” *The Path Toward the Right to Information in Bolivia*, L. Neuman, Carter Center, 2006.



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ensure full and continuing compliance with the law, there is a need for instruments dedicated to the promotion, monitoring and enforcement of the access to information regime.

NO OVERSIGHT OR INTERMEDIARY ENFORCEMENT BODY

In some jurisdictions, there is neither a national oversight agency to monitor and support implementation of access to information legislation nor is there an intermediary enforcement body to facilitate appeals. The most notable example of such a regime is the Freedom of Information Act of the United States. Under FOIA, there is no mention of a Commission or Commissioner to oversee the imple-

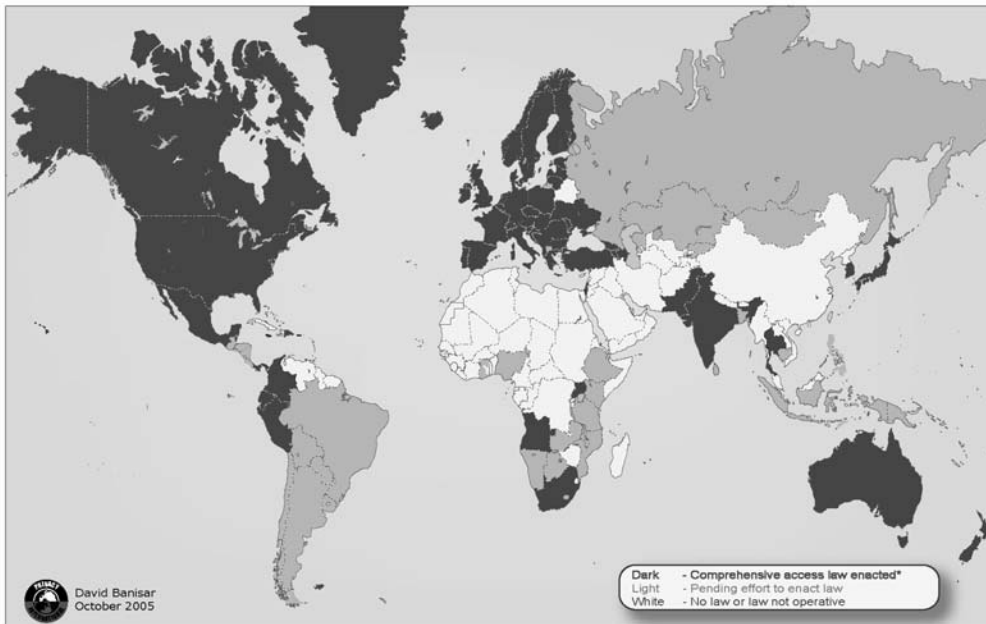
they must wait years for a decision.

In practice, each agency is responsible for its own compliance with FOIA. Each entity periodically issues reports, but there is little uniformity in the data contained and presentation of the report, or is there a compilation or collation of reports for an overall picture of the health of the law.² Moreover, agencies are vested with the authority to set their own procedures and rules for application of the act, within the bounds of the broad FOIA legislation. This has led to vastly different experiences among government agencies.

Without continual oversight of the implementation of the law, agencies may over-classify documents as secret or regularly fail to meet the statutory timelines for response to requests, as is commonplace in the United States. For example, in March 2006, the

New York Times disclosed a “secret policy” to remove previously available documents from the public realm and “reclassify them as confidential.” Since 1999, thousands of historical documents have been removed from public access and without an oversight mechanism the only way this was discovered was through a user noticing that pages he had copied some years ago were now classified as “confidential.”³

National Freedom of Information Laws



*Not all national laws have been implemented or are effective. See www.privacyinternational.org/foi for updates and an analysis of the laws and practices

mentation efforts, provide coordination and ensure compliance with the law of the various executive branch administrative bodies. Likewise, there is no provision to establish an intermediary enforcement body. Rather, dissatisfied requesters must go directly to the costly and burdensome Federal Court, where

2 There does exist an Information Security Oversight Office in the National Archives and Records Administration, which appears to limit its activities to agencies that handle “security” issues. In addition, the Government Accounting Office periodically has been tasked with reviewing the implementation of the FOIA.

3 US Reclassifies Many Documents in Secret Review, The New York Times, Feb 21, 2006.



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A recent report on the state of secrecy in the United States, led by a coalition of civil society organizations, consumers and journalists under the heading “openthegovernment” found that the executive branch of the US government is using the state secrecy exception to the FOIA act 33% more now than was used during the Cold War and that in 2004 the federal government created 81% more secrets than it did in the year prior to the terrorist attacks on September 11, 2001.⁴

And with relation to processing times, a study by the National Security Archives in 2003, indicated that, based on the reports provided to Congress, the agencies claimed a “median processing times ranging from a low of 2 business days at the Small Business Administration to 905 business days at the Department of Agriculture and a high of 1113 business days at the Environmental Protection Agency.” Well beyond the 20 working days provided by the law. The authors further argue that “These reported statistics, however, mask the true extent of the FOIA backlog problem, which in some cases leaves FOIA requesters waiting for over a decade for substantive responses to FOIA requests.”⁵

Without an implementation monitoring and coordinating body, users are forced to navigate the systems on their own and public servants are burdened with additional responsibilities, but often less training and resources.

The problems associated with poor implementation are exacerbated by the lack of an intermediary body. In the United States and South Africa, for instance, persons must go directly to the Federal or High Court to appeal a negative decision. This may serve as a tremendous obstacle for the requester to enforce their right to information.

In the past, experts have put forward to proposition that effective enforcement models are based on the following five principles:

- **Accessible:** Any aggrieved person can seek enforcement without excessive formality
- **Affordable:** For the user and for the state to administer
- **Timely:** Cases heard and decided quickly
- **Independent**
- **Specialist:** Access to Information laws are complex, particularly in terms of balancing the public interest in release over withholding. For that reason, many consider the need for a body that specializes in this area.

Most experts agree that a model dependent solely on the Courts to enforce the access to information law is insufficient, and does not meet the principles described above.

Although there are benefits to such a model, for example the courts have the power to order the release of information if inappropriately denied and do not have to abide by the agency decision, there are many drawbacks.

For most citizens, the courts are neither accessible nor affordable. For success in this model, the information requestor may need to hire an attorney or advocate and pay the many court costs. And because courts are often overburdened, it can take months or years to hear the cases, thus sometimes making moot the need for the

Without continual oversight of the implementation of the law, agencies may over-classify documents as secret or regularly fail to meet the statutory timelines for response to requests, as is commonplace in the United States.

⁴ Secrecy Report Card 2005, A Report by OpenTheGovernment.org.

⁵ Justice Delayed Is Justice Denied, National Security Archives, November, 2003.



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information. Moreover, this model is more costly for the government and burdensome on the court system. In a recent case in South Africa that went to the High Court, the Auditor-General theorized that they had spent over \$300,000 Rand (close to \$30,000 US) in defending their decision to deny information.⁶ Moreover, in some countries there is often a deep lack of trust in the independence of the judiciary, in these cases, an enforcement model that is not dependent on judicial involvement in the first instance may be best.

NON-STATUTORY OVERSIGHT BODY

A second model can be described as a non-statutory, or voluntarily established, oversight body. In these cases, the legislature failed to mandate a national coordinating body as part of the law or regulations, but practice dictated the need. As mentioned above, implementation of an access to information law is complex and incredibly challenging for governments. Common implementation challenges may include:

- The difficulty of adjusting “old”, secretive “mindsets” amidst the bureaucracy/holders of information;
- A lack of commitment to compliance from the bureaucracy/holders of information; and a tendency to ignore difficult requests for information and generally to breach time-limits;
- A lack of capacity in relation to record-keeping and insecurities in relation to older records;
- Insufficient funding for implementation—both in terms of human resources and procedural infrastructure;
- Inadequate staffing, in terms of training, specialization and seniority;
- Lack of training for public servants; and
- Inconsistent implementation efforts.⁷

Monitoring of implementation by the various entities (public and in some cases private bodies) is important to assure consistency and sustainability of the right to information. International experience demonstrates that without a dedicated and specialized oversight body, the compliance rate is lower, the number of requests more limited, and the right to information eroded.⁸ Without a continuous oversight body, government efforts are dispersed and diluted with no clarity in responsibilities or guidelines and reduced ability to conduct long-term planning and to promote best practices, thus costing government’s more in terms of human and financial resources. For those jurisdictions without an oversight body, there is no one for the agencies to contact for support or with questions and concerns, and the weight of implementation and public education falls squarely on their already overburdened shoulders. In Queensland State Australia, a study recently found that an independent enforcement body was not enough and that they also needed a “new monitoring/promotion function.”⁹ The 2001 report recommended the creation of a freedom of information oversight entity designed to promote public awareness, provide advice and assistance to applicants, and monitor public agencies’ compliance.

Thus, in some jurisdictions as public servants began the task of administering and applying the law, an awareness of the need for a coordinating and oversight body crystallized. This has been the case in a number of Caribbean nations, such as Jamaica where an Access to Information Unit housed with the Minister of Information was voluntarily established,

6 “The Promotion of Access to Information Act: Commissioned Research on the Feasibility of the Establishment of an Information Commissioner’s Office,” The Open Democracy Advice Centre, Cape Town 2003.

7 Id.

8 Excerpts from “Observations of the Access to Information Act 2002 in Jamaica,” Laura Neuman and Carole Excell, Carter Center, March 2006.

9 Report of the Queensland Legal, Constitutional and Administrative Review Committee, December 2001. See also Hodgson D., and Snell, R. Freedom of Information in Queensland—A Preliminary analysis of the Report of the Queensland Legal, Constitutional and Review Committee.



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following the passage of the Act, to support implementation efforts. This Unit served as a link between the implementers and the users, established guidelines and responded to public authority concerns. In recent months, the Unit has lost some of its staff to changes in employment. During this transition period, both implementers and users of the law have expressed difficulties. For the implementers, there is no agency to contact for support, to ensure consistency across government, and to track reports. For the civil society users, there is no official entity to contact with questions or problems.

In Trinidad and Tobago, the Freedom of Information Law does not provide for a statutorily mandated oversight mechanism, although there does exist a requirement for periodic reporting. For the first two years of implementation from 2001-2003, the Cabinet of the Republic of Trinidad and Tobago voluntarily established an Access to Information Unit. During these years, the Unit supported the public functionaries, received and monitored agency implementation reports, and conducted training and public education campaigns. After two years, there was an administrative reduction in staff and then finally the Unit was eliminated from the budget; their responsibilities moved to a division under the Ministry of Public Administration and Information. According to accounts, when the Unit disbanded the agencies almost completely stopped fulfilling their reporting requirements and the number of requests declined dramatically. For example, in the first quarter of 2001, 52% of the agencies completed their reports and in 2002 during the same period there was a compliance rate of 45%. In 2003, when the Unit no longer existed, during the same reporting quarter the

number of reports completed had dropped to 7%. Total requests received in Trinidad have continued to be low, and an 80% decline in requests in 2003 following the disbanding of the Trinidadian Access to Information Unit.¹⁰ In addition, without dedicated responsible personnel, the submission of Trinidad's annual report to Parliament for 2001-2003 was delayed a number of years.

A similar experience has been demonstrated in Belize, where the lack of a specifically legislated oversight body in the Freedom of Information Act has resulted in a corresponding low awareness of the law, no tracking or monitoring of implementation, and a dismally low request rate.

STATUTORY OVERSIGHT AND ENFORCEMENT: RECOMMENDATION POWERS

In many of the most recent laws, there are statutorily mandated oversight bodies. "Experience with FOI

legislation in Australia at both Commonwealth and State levels, as well as in overseas jurisdictions such as New Zealand and Canada, strongly indicates that an external review body is a crucial design feature."¹¹ This helps to ensure sustainability in funding, and to avoid the reduction or elimi-

nation of the units, as was seen in Trinidad. One distinction within the newer bodies that are emerging relates more to their enforcement powers than to their oversight role.

Without a continuous oversight body, government efforts are dispersed and diluted with no clarity in responsibilities or guidelines and reduced ability to conduct long-term planning and to promote best practices, thus costing government's more in terms of human and financial resources.

¹⁰ From 2001-2003 there were 489 requests. In 2004, there were 1,202 requests, of which 926 were made to the service commission. This number of requests was exceptionally high and the trend reportedly has not continued in 2005 and thus far in 2006. It is unclear what caused the spike in requests.

¹¹ Snell, R. and Tyson, N. "Back to the Drawing Board: Preliminary musings on redesigning Australian Freedom of Information." *Freedom of Information Review*: Number 85, February 2000, page 4.



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For some of these bodies, they are vested solely with the power to provide recommendations to the relevant administrative agency or public functionary. In this model, there is an interim body that has the power to hear appeals and to make recommendations to the agency or Ministry regarding the release of information. This is the case in jurisdictions as varied as Canada, Hungary, Sweden and some US States. These Information Commissions, or as in the case of Sweden, the Ombudsman, are competent to investigate, review reports, and issue opinions, but they cannot force the agency to release information. Rather, they often use forms of conciliation or mediation and rely on the good will of the agency (or fear of public criticism) to get them to follow recommendations.

In Canada where this model is used at the federal level, they wanted to create a body that was both informal and non-adversarial. A Commission with more limited powers may allow for a speedier resolution, are often free to the person submitting the appeal, cost less for the government, and they are specialist as they focus only on the access to information law. In Hungary in 2001, for example, the Information Commissioner received 828 petitions for investigation and took an average of only 52.6 days to fully process the cases and issue a recommendation.

Over time, however, even an enforcement body with these more limited powers may become increasingly formalistic, contentious and slow. Moreover, without some power to order or sanction inappropriate denials, the enforcement body may be ignored. In a major review conducted in 2002 of the Canadian Access to Information Act, the task force found that “giving the Commissioner power to make binding recommendations may well provide more incentive to departments to respect the negotiated undertaking to respond within a certain time-frame ... it is more

rules-based and less ad hoc ... this results in a consistent body of jurisprudence that assists both institutions and requesters in determining how the Act should be interpreted and applied.”¹²

STATUTORY OVERSIGHT AND ENFORCEMENT: ORDER POWERS

In line with the recommendations of the Canadian Task Force and in many experts’ opinions, the most effective model for oversight and enforcement is that

found in jurisdictions like Mexico, Ireland, and some US States and Canadian Provinces.¹³

In this model there is an independent Commission or Commissioner vested with the power to:

oversee the agencies and Ministries; to investigate claims; to set guidelines; to hear cases and subpoena evidence; to make recommendations; and to issue binding orders. This model satisfies the principle of timeliness. For example, in Western Australia, they responded to most written inquiries in a matter of days and in Ireland over 50% of the cases were resolved within 3 months (although in the State of Connecticut where the Commission has order powers the time from the date the complaint is filed until the final decision is made averages 328.4 days). This model is accessible, affordable as there are no costs to the appellant, and specialists in the area of access to information. Finally, with the power to order agencies or apply sanctions this model serves as a deterrent to the government and can alleviate the need for further appeals to the Courts.

... without some power to order or sanction inappropriate denials, the enforcement body may be ignored.

¹² “Access to Information: Making It Work for Canadians,” Report of the Access to Information Review Task Force, Chapter 6, Ensuring Compliance: The Redress Process.

¹³ Note: This paper does not address “hybrid models” for enforcement such as the Japanese Tribunal or the Jamaican Appeals Tribunal (which is detailed in other chapters).



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However, one major drawback to these enforcement models is the limited scope. These bodies, similar to other administrative courts, are binding only on the Executive Branch. Without a constitutional provision establishing these bodies as autonomous, there is the necessity for bi-furcated systems: one for the executive and another for the legislative and judicial branches. Pragmatically, the majority of information often lies with the executive.¹⁴ Nevertheless, the need for disparate enforcement models has been an area for discussion in recent country debates.

In addition to the power to issue binding orders or recommendations, these Commissions may be authorized to promote the access to information law within government and civil society; to mediate claims; and to provide training for civil servants. But perhaps most critical for the Commission(er) to meet its objectives, regardless of the breadth of responsibility, it must be considered independent. In considering the independence of the body, one might explore the

mechanism for choosing the members, the length of their term, to whom they report and how the Commissioners can be removed from office.

Other issues related to each model include the number of staff, the annual budgets and from where the money comes, for without sufficient resources, even the best enforcement and oversight model will fail, to whom they report, and process for removal.

CONCLUSION

Without appropriately designed and sufficiently funded oversight and enforcement mechanisms, the effectiveness of an access to information regime will be compromised. As more countries and states pass legislation embodying the right to information, experience is dictating the necessity for entities vested with the power to monitor the administration and compliance of the law, and to take action when necessary.

¹⁴ Juan Pablo Guerrero, Commissioner of the Mexican Federal Institute for Access to Information recently opined that 95% of the information requested in Mexico is held by the Executive Branch.



NEW FREEDOM OF INFORMATION RIGHTS: THE FIRST-YEAR EXPERIENCE IN SCOTLAND

KEVIN DUNION

The Freedom of Information (Scotland) Act came into effect fully on 1 January 2005. The law applies to 10,000 public authorities across Scotland, ranging from the Scottish Government, local government, and police authorities to individual National Health Service general practitioners. The Scottish legislation has many features of benefit to the public. For example, any written request for information is treated as a freedom of information request. Moreover, there is no charge for

being withheld. If there is a refusal to provide information, then the applicant has a right to require the authority to review its decision and if not satisfied can appeal to the Scottish Information Commissioner. There is no charge for making an appeal.

STRUCTURE OF THE ACT

The progressive nature of the Scottish Act can be gauged by benchmarking the legislative provisions against the standards set by the Special Rapporteur to the UN Commission on Human rights in his January 2000 report “The Public’s Right to Know: Principles on Freedom of Information Legislation.” The Special Rapporteur report developed nine principles necessary for the full and effective application of the right to information.

As with the Principle 1 of the UN report, in Scotland the aim is maximum disclosure with all persons having a right to know and, unlike some nations, this right is not confined to those living in or being citizens of Scotland, but rather applies to anyone anywhere in the world. Principle 2 states that public bodies should be obligated to publish key information.

This principle is codified in the Scotland Act, whereby each authority has to maintain a publication scheme describing information which it proactively will publish and has to have that scheme approved by the Scottish Information Commissioner. The Commissioner is statutorily responsible for promoting access to information, although it is not so clear that authorities must actively promote open government as directed by Principle 3 of the UN report. In



making a request and the fee structure for charging for information supplied is generous. No fee is chargeable for the first £100 of costs incurred by the authority and thereafter the authority can charge only 10% of additional costs. However, the authority does not need to provide any information if the total cost to the authority would exceed £600. Additionally, the authority must supply the requested information within 20 days or provide a reason under the Act why it is



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accordance with Principle 5, which states that Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available, in the Scotland legislative schema requests for information must be processed fully within 20 days and any refusal to provide information can be appealed to the Scottish information Commissioner. The fee regime is relatively generous in providing information free up to a reasonable threshold. There is no means test, so applicants do not have to prove low income or hardship to benefit from this free element. Individuals are not deterred from making requests for information by excessive costs. (Principle 6)

There are a couple of areas where the Scottish legislation perhaps falls short of the UN principles. In particular, the Special Rapporteur recommends that exceptions to disclosure should be clearly and narrowly drawn and subject to strict harm and public interest tests. There are 17 express provisions for exempt information under Part 2 of the Scottish FOI Act and not all are subject to the harm of public interest tests. Some are absolute exemptions, such as where there is a prohibition on disclosure or where the information is otherwise accessible or where the release would constitute an actionable breach of confidence. Other absolute exemptions are in respect of court records, or where the information is personal information of which the applicant is the data subject. These are neither subject to a harm test nor a public interest test.

Most other exemptions are subject to such tests and indeed the Scottish legislation requires that the level of harm be substantial before the exemption can apply. So, for example, information is exempt if its disclosure would or would be likely to prejudice substantially the commercial interests of any person. It would also be exempt if it would or would be likely to prejudice substantially the prevention or detection of crime, the apprehension or prosecution of offenders, the administration of justice and so on.

However, there are exceptions where contrary to the requirements of the Special Rapporteur's

Principles there is a single class of information which qualifies for exemption, such as the formulation of Scottish administration policy, which includes Ministerial communications, the provision of advice by any of the law officers or the operation of any Ministerial private office. These are not subject to a harm test, although the consideration of the public interest must be considered.

So much for the architecture of the legislation. How has it worked in practice?

FOI ACT IN ACTION

The following is a snapshot of experience of the first year of the new legislation.

Public Awareness

Public awareness of the new right to Freedom of Information has markedly increased. In September 2004, my office commissioned an opinion polling company to carry out research which established that, at that time, only 30% of the population had definitely heard of the Freedom of Information Act. A year later the same polling found that now 57% had definitely heard of the Act. In the same period, there had been a doubling of those who were aware of the Scottish Information Commissioner. Partly, this is due to the impact of a campaign of public information advertisements which I ran on Scottish television channels in the months following the introduction of the Act. It is also, however, undoubtedly due to the number of stories running in the national and local newspapers as a result of journalists making use of the Act.

Volume of Requests

The volume of requests made to Scottish authorities is not known. Unlike many other regimes around the world, individuals making requests are not required to cite the Freedom of Information Act, nor are authorities obliged to keep records of how many requests they receive. (They are, however, required to keep a record of how many requests they have refused and how often they have charged for the provision of



information). Nevertheless, the indications are that the volume of requests has been greater than expected.

Volume and Resolution of Appeals

Unlike the volume of requests, the volume of appeals to the Scottish Information Commissioner is a well known figure. In the first year, 570 appeals were received and the rate of appeals in 2006 is running at a similarly high level. Research conducted prior to the legislation coming into effect had projected that in the first year the total number of appeals for the UK as a whole would be between 1500 and 3000. On a population pro-rata basis it was assumed, therefore, that Scotland may receive between 150 and 300 appeals. The reason as to why the actual figure is almost double the highest previous estimate is not entirely clear. However, it seems to be related more to the relatively high public awareness of the new rights to information, and the ease with which requests for information can be made, thus generating high volumes of requests rather than any systematic refusal to provide information in response to requests.

More than half of the appeals to my office come from individuals across Scotland who want information particular to their own circumstances or the interests of their local community, such as planning, education, health or public spending. On several occasions I have ordered the release of information; many other times I have not. The important thing is that people can turn to an independent person to adjudicate upon whether an authority is right to withhold information.

In dealing with such appeals one bread and butter concern bothers me. Too often authorities are failing to respond to requests for information. These are known as mute or deemed refusals. We do not know how many requests go unanswered in Scotland, but

17% of all FoI appeals and 27% of all environmental information appeals to my office are for mute and deemed refusals. Often when I contact the public authority about the appeal they then release the information that had been requested. But this may be months after the original request was submitted. Mute or deemed refusals happen in all countries with freedom of information regimes, and are a concern to all Commissioners. Whilst it is perhaps not unexpected

in the first year that there will be such failings, especially where we have an enviable regime which does not require applicants to cite the legislation when making their request, nevertheless I would like to see improvements in Scottish performance.

More than half of the appeals to my office come from individuals across Scotland who want information particular to their own circumstances or the interests of their local community ...

KEY CONCERNS IN OPERATION OF THE ACT

Generally authorities are well aware of their obligations under the Freedom of Information Act and are responding appropriately. Nevertheless, a number of issues have been raised by them as part of a consultation carried out by the Scottish Executive (the Scottish Government) into the operation of the Act in its first year. The key concerns raised by the authorities appear to be as follows.

Requests by Journalists and Companies

A significant number of the requests being made to authorities are coming from journalists or on behalf of businesses rather than from “ordinary members of the public.” This is seen by some authorities as not being the intention of the legislation although it should be noted, however, that the Act clearly is available to be used by any person in Scotland.

Multiple Requests

Related to this is that certain journalists and particular lawyers (on behalf of clients) are making multiple



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requests to the same authority, often for voluminous material. The requests are frequently for information about the same subject matter, but each is distinctly submitted to avoid incurring charges which would apply if the request was made as one.

Timescales for Response

The 20 working day timescale for responding to the initial request is challenging. Some authorities are having difficulties in making the transition from a “business as usual” response when dealing with general enquiries to recognising that an applicant is invoking statutory rights to information. However, most authorities are strenuously trying to meet the 20 day deadline and achieve it in the vast majority of cases. As Commissioner I have not yet had to issue any Practice Recommendations to Scottish Public Authorities on the grounds that they have systematically failed to meet the target or have clearly disregarded the requirement to provide the information within 20 working days.

Fees

In reviewing the application over the first year, it appears that very few authorities are actually issuing fees notices to applicants. The reason for this is that, firstly, most information requested can readily be provided for less than the £100, which means the information should be provided for free. Secondly, even where a charge may be levied the cost of collecting the fee often exceeds the amount which would be received in return from the applicant.

Despite these concerns the Act is working well and is causing information which previously would have been withheld to be put into the public domain. Many authorities maintain a disclosure log of information they have released as a result of the Act. So for example, the public can now see information regarding the rate of bullying in their schools, the incidence of infection in wards of their local hospitals, the spending by the local authority on new roads contracts and so on.

Of course authorities are not always willing to release some information and do so only as a result of

a decision that I have taken. Some of these decisions have attracted prominent national coverage and have had political consequences. For example, a request by a Sunday newspaper for details of the travel expenses for the leader of Conservative Party in the Scottish Parliament resulted in that MSP resigning from his party leadership role when it was clear that some expenses had been wrongly claimed.

Another newspaper asked for details of the surgical mortality rates for every surgeon in Scotland. This was initially refused by the public authority, but as Commissioner I ruled that the material should be disclosed. I was aware of the concern that the information may be used to unfairly target an individual surgeon over their surgical performance. I was aware too that the information is likely to be incomplete and difficult to compare given the wide variety of surgical procedures being carried out. However, my view was that the information had been routinely gathered by hospital administrators and that such material put into the public domain in a limited form in the past for cardio-thoracic surgery had been responsibly reported by the press. Eventually, the material was placed upon a website of the Information Statistics Division for the National Health Service of Scotland and, to my mind, was also responsibly reported and fairly interpreted by the media and commentators. So far as is known, this is the first time that such comprehensive surgical mortality data has been published anywhere in the world.

CONCLUSION

The Freedom of Information (Scotland) Act 2002 has been a success story in its first year. It has presented challenges to authorities, not just in administrative terms in recovering information from records but also culturally in recognising that the capacity to unilaterally decide whether or not information should be released has passed from them. The intention of the legislation to move Scotland to a progressive position where public authorities are open, accountable and responsive is well underway.



FREEDOM OF INFORMATION AND THE BBC

MEREDITH COOK AND MARTIN ROSENBAUM

The United Kingdom's Freedom of Information Act 2000 applies to all information held by public authorities in England, Wales and Northern Ireland. Over 100,000 public authorities are covered under this law, including central and local government, the police, the National Health Service, schools and local education authorities, Universities and publicly owned companies. Although the law was passed in 2000, it did not come fully into force until 1 January 2005.

Under the terms of the Act, anyone, anywhere in the world requesting information in writing, unless an exemption applies, has the right to be informed in writing whether the public authority holds the information and to be provided with access to the information within 20 working days. These rights are enforced by the Information Commissioner, who is independent of government. The Commissioner also has jurisdiction over the Data Protection Act 1998 and the Environmental Information Regulations 2004. Under the UK schematic, the Department of Constitutional Affairs has policy responsibility for the legislation, including oversight of two statutory codes of practice. The codes prescribe best practice for public authorities on records management and discharge of their functions under FOIA.

Moreover, the legislation is fully retrospective. It covers all documents irrespective of age. There are 22 specified exemptions, 15 of which are subject to a statutory public interest test. There also are provisions for dealing with vexatious or repeated requests.

FOIA AND PUBLIC SERVICE BROADCASTERS

The BBC is one of the most significant public service broadcasters in the world. Its purpose is to enrich people's lives with programmes and services

that inform, educate and entertain. The BBC is funded by the licence fee. Across the UK the BBC operates eight television channels, ten radio networks, 46 local and national radio stations and the online site bbc.co.uk. The BBC employs 22,000 staff across more than 40 offices worldwide. The Executive Board of the BBC is responsible for day-to-day management and the Board of Governors ensures accountability to licence payers both directly and via Parliament.

One of the BBC's objectives is to deliver greater transparency and accountability to licence fee payers. FOIA presents an opportunity to strengthen delivery of this objective and the BBC takes its responsibilities under FOIA seriously. As public service broadcasters, the BBC, Channel 4 and S4C, and the Gaelic Media Service are in a unique position under FOIA. They are only subject to FOIA in respect of certain information. Schedule 1 to FOIA provides that the legislation applies to the public service broadcasters, only in "respect of information held for the purposes other than those of journalism, art, or literature." Moreover, the BBC's commercial subsidiaries are specifically excluded from FOIA under section 6(2)(1)(ii) although FOIA does apply to information held on behalf of the BBC by the subsidiaries or any contractor. The Environmental Information Regulations 2004 do not apply to the BBC.

The fact that some information is not covered by FOIA, does not undermined the BBC's objective to be open and transparent. The BBC makes a huge amount of information about content production, scheduling and commissioning across all platforms available to the public. For example, bbc.co.uk is the largest content website in Europe, offering more than a million pages of quality public service content. BBC



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Information call centres handle 2.5 million contacts per year from the public in three offices around the UK. This and other provisions of information are on a voluntary basis, rather than through a prescriptive statutory process.

PREPARING FOR 1 JANUARY 2005

In March 2003, a project board was established to implement FOIA and to make recommendations for long term management of FOIA at the BBC. The implementation plan focused on six key areas: the publication scheme, leadership and policy; training and awareness; information management; customers and stakeholders; systems and procedures.

The first task of the project board was to prepare the BBC's Publication Scheme. The UK FOIA requires all public authorities to adopt and maintain a Publication Scheme, which lists and describes the categories of information that are available. Most schemes also include a "disclosure log" of information that has recently been disclosed. All publication schemes require approval by the Information Commissioner.

Prior to 1 January 2005, the BBC prepared and delivered FOIA training to approximately 300 staff across the BBC. The training included scenario based workshops and tailored learning exercises. The internal communications campaign used eye-catching artwork to deliver key messages to over 20,000 staff. We delivered short presentations to senior managers and focused on risks of non compliance and positive benefits. Additionally, we published guidance for suppliers and contractors, and wrote to key suppliers, purchased case management software to track FOIA requests, and developed templates and guidance for staff on how to handle requests.

The Information Policy and Compliance Team was established in 2004 and now co-ordinates FOIA requests and provides policy advice on FOIA and Data Protection. The team reports to the Director of Strategy who sits on the BBC's Executive Board, and to the General Legal Counsel. The team works closely with BBC's Regulatory Legal Department and a net-

work of divisional representatives across 13 Divisions and the Nations and Regions. This structure works well, as it enables central control and oversight of process and policy while at the same time ensuring that FOIA requests are handled by those who are best placed to analyse the information in question.

THE FIRST YEAR

The first year of FOIA has been a challenging but rewarding experience. The Board of Governors objectives include delivering greater accountability and transparency to licence fee payers. FOIA has strengthened the BBC's ability to achieve this objective. It also has provided further opportunities for the BBC to interact with audiences. However, FOIA has been resource intensive for the BBC and time-consuming for all staff involved in handling requests.

In 2005, the BBC received 971 requests for information that were treated as FOIA requests. 96% were handled within 20 working days or legitimately extended, in compliance with section 10 of FOIA. The BBC disclosed the information requested either fully or partially in 64% of cases. 69 (14%) cases were reviewed internally and 28 cases (2.9%) were appealed to the Information Commissioner.

Positive Benefits

One of the primary purposes of the UK-Freedom of Information Act is to make public authorities more transparent and accountable for the way in which they expend public money. There is some evidence that FOIA is already contributing to a more transparent and accountable BBC. Although, it is too early to draw firm conclusions and success is difficult to measure, some of the positive benefits include:

1. The BBC has disclosed a significant amount of information that would not previously have been made available. The more significant disclosures include; the diaries of the Chairman and the Director General, expenses for Directors and Governors; over 200 documents surrounding the decisions on the BBC corporate change programme; spending on management consultants;



background information on high value procurement and spending on public art.

2. On the disclosure log, we publish information that is of public interest. This currently includes approximately 900 documents that were not previously in the public domain. In 2005, 367,912 documents were downloaded from the BBC's publication scheme. (See bbc.co.uk/foi)

3. In May 2005, the Board of Governors agreed to publish minutes of its meetings on the internet. The first minutes to be published were of the June Board meeting. The Board's decision reflected its stated commitment to greater accountability and transparency and took into account FOIA requests received by the BBC. Where information is withheld from the published version, this is consistent with the exemptions in FOIA.

4. FOIA has raised the profile of information management issues. Traditionally, records management has not been given the priority it deserves. Now that information management is underpinned by statutory obligations, it has a renewed focus and an authoritative voice. Guidance now includes the Information Management Best Practice Guide for staff which explains what is required by FOIA and the section 46 Code of Practice. Staff at the BBC who deal with FOIA requests experience first hand the practical significance of information management policies and procedures. They are becoming more aware of the importance of managing emails appropriately, considering how long information should be kept, and keeping track of versions and drafts. Good information management is essential for compliance with FOIA.

Costs of Compliance

It is important to recognise that to comply with FOIA is resource intensive. The BBC spent £867,000 preparing for implementation, including delivering staff training, a staff awareness campaign, and preparing the publication scheme. It is difficult to measure the annual cost of compliance accurately because staff time across the BBC is the biggest cost. In 2005 the central cost of FOIA was approx £500, 000.

Most requests are handled with relatively little cost. However, some requests involve complex issues or a large number of staff or huge volumes of information and these are very expensive to handle.

The BBC tries to minimise the costs of compliance in a number of ways. For example, by engaging with requesters and seeking clarification wherever necessary. We see the statutory obligation to give advice and

assistance to requesters as a tool for public authorities as well as a duty. Staff education also is important in reducing the costs of compliance, because a base understanding of principles and approach encourages more efficient handling of requests. Finally, we are continuously improving internal procedures so that handling of FOIA requests is more efficient.

Meeting Deadlines

The time limit for responding to FOIA requests is 20 working days. As stated above, in 2005, 93% of FOIA requests were handled by the BBC within 20 working days, 3% were extended legitimately under section 10 to consider the public interest test, and in 4% of the cases the response was late.

Staff training, a management endorsed awareness campaign, and the dedication of staff across the whole BBC, have all contributed to this good record. Tight central control over the process is essential. All requests received by the IPC team are acknowledged

The Board of Governors objectives include delivering greater accountability and transparency to license fee payers. FOIA has strengthened the BBC's ability to meet this objective.



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within one working day and allocated a unique reference number. Progress of current requests is monitored on a daily basis. FOIA requests received across the BBC are ideally forwarded to the IPC team, although there is sometimes delay particularly when the request is incorporated into “business as usual” correspondence.

Many requests involve consultation with a wide range of people and approval by senior managers. This consultation is sometimes for the purpose of considering exemptions, but more often it is simply to ensure the preparation of an accurate, full and helpful response. A significant number of requests have involved consideration of complex issues or consultation with third parties. In these cases, compliance with the deadline is therefore often very challenging. Complying with requests “promptly” is an area in which we are continuously trying to improve our record. Notably, for all BBC staff other than the IPC team, compliance with FOIA is in addition to their other usual workload.

Fees and Charges

The Fees Regime is prescribed by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. It is free to make a FOIA request in the UK. Public authorities cannot charge for time taken to retrieve information but can charge for photocopying. They also are entitled to refuse a request if it would cost more than £600 (central government) or £450 (other agencies) to retrieve the information.

In the BBC's experience, many requesters have unrealistic expectations of FOIA. We always advise and assist the requester and where possible narrow the request/s to within manageable limits, as defined in the Fees Regulations, so that it is unusual for the BBC to not provide any information at all. In 2005, only twenty requests (0.02%) were refused in full under section 12(1) on the grounds that compliance would cost more than £450. Moreover, the BBC does not charge for photocopying unless the request is for an exceptional volume of material. For example, we

charged one academic researcher for photocopying 1000 pages of material about arrangements for wartime broadcasting.

A TOOL FOR JOURNALISTS?

Usually, the BBC is both a provider of information as well as a user of the new Freedom of Information Act. Since January 2005, numerous journalists and programme-makers from across different parts of the BBC have sought to make use of the Freedom of Information Act and the Environmental Information Regulations to research material for broadcast. The information obtained has led to a wide range of investigative reports. At the national network level this includes the following:

- Many English secondary schools with apparently improving GCSE results are actually doing worse in English and Maths (BBC Radio 4 documentary)
- The House of Lords Appointments Commission weakened the requirements large party donors have to satisfy for it to approve their nominations as Peers (Politics Show, BBC1)
- Surgeons and other hospital staff disciplined over alcohol and drug-related incidents (Real Story, BBC1)
- Internal Police guidelines advise against breaking up illegal hunts and making arrests (Ten O'Clock News, BBC1)
- The Metropolitan Police Special Branch infiltrated and monitored the Anti-Apartheid Movement in Britain for 25 years (BBC Radio 4 documentary)
- Vaccines for TB were manufactured under-strength (Money Programme, BBC2)
- The Foreign Office tried to hide the assistance it gave Israel in the 1950s with setting up a nuclear weapons programme (Newsnight, BBC2)



FREEDOM OF INFORMATION AND THE BBC

- A growing number of women from overseas are travelling to Britain to give birth in NHS hospitals (BBC News Online)
- The airline catering company Gate Gourmet was criticised by food hygiene inspectors (BBC Radio 4 documentary)
- Allegations of abuse and torture by British intelligence officers in the years after World War 2 (Document, BBC Radio 4)
- Emails within a primary care trust expressing concern that decisions were being overturned for political reasons (Panorama, BBC1)
- Reports in Scotland, Wales, Northern Ireland and the English regions include: nine suspected homicides involving people in the care of the Welsh NHS in under two years (BBC Wales); warnings over the future of the lake which is the main source of Northern Ireland's drinking water (BBC Northern Ireland); very high hourly rates paid to Scottish GPs for out-of-hours working (BBC Scotland); children as young as seven caught carrying knives in school (BBC East Midlands); and the Nuclear Installations Inspectorate expressed worries about the state of the graphite core at Oldbury nuclear power station (BBC West).

The BBC believes that these reports are in the public interest. They would have been much more difficult to identify and investigate, and in many cases impossible, without FOIA and/or the EIR. To that extent freedom of information has proved a useful tool enabling our journalists to put into the public domain material which should indeed be there.

However, this is only part of the story. The BBC's overall impression of how public authorities are implementing FOI is that there is less uniformity and much "patchiness." For instance, some authorities are efficient, cooperative and happy to provide 'advice and assistance' in accordance with the Act, while others have been slow and in some cases obstructive.

Some of the problems which our journalists have encountered include:

1. Cases where public authorities have taken months to assess the public interest test (repeatedly extending their own self-imposed deadlines).
2. Cases where public authorities have taken months to conduct internal reviews.
3. Authorities which retain all material covered by the request until they have decided on the public interest test, when only some of the material is potentially relevant to the exemption involved and the rest of it could have been supplied much more quickly.
4. Clearly unnecessary redactions (in extreme cases, for example, where redactions of names have included the names of prominent politicians, press officers and long dead authors). Such redactions must add to the time and effort involved in preparing the papers for release, and thus adds to the workload quite unnecessarily.
5. On occasions FOI officers in government departments have complained informally to BBC journalists that referring requests to the DCA's central clearing house has caused substantial delays (for which the department itself is then blamed), and in some cases the clearing house has stopped them from releasing information which they themselves would be happy to disclose.

Overall, the experience of BBC journalists and programme-makers who have tried to use FOI is that the response of public authorities is patchy and inconsistent, ranging from those who are highly efficient and cooperative to those who are neither. Nevertheless, there are indications that some of the problems are being tackled. More generally, from the journalistic point of view it is only possible to make a preliminary assessment of the consequences of FOI.



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Until there are more decisions from the Information Commissioner and the Information Tribunal, and we know which refusals are being upheld and which are being over-ruled, it is too early to assess the real impact of freedom of information.

Notwithstanding some of the difficulties encountered, there are signs that some aspects are improving. As everyone learns from experience in the first year of FOIA application, implementation issues slowly are being resolved. In the first few months of 2005, it was common to receive refusal notices which were simply a blanket refusal to release certain categories of information covered by qualified exemptions, without any attempt made to fulfil the legal duty of assessing the public interest test. This is now much rarer. Also, in some cases the problem of delay is diminishing. Certainly there are examples of public authorities which initially seemed to have problems adapting to the Act but are now much better organised and prompter in dealing with requests. Moreover, it is fairly common on internal review to receive more information than originally supplied. Perhaps this is a sign that in some cases excessively cautious officials are withholding information at the initial stage that should readily have been supplied, or alternatively and more positively, it could be an indication that the internal review system is working.

FURTHER READING

UK

Information Commissioner

www.informationcommissioner.gov.uk

Information Tribunal

www.informationtribunal.gov.uk

Department of Constitutional Affairs

www.foi.gov.uk

Scottish Executive

www.scotland.gov.uk/Topics/Government/FOI

Scottish Information Commissioner

www.itspublicknowledge.info/

House of Commons, Constitutional Affairs

Select Committee

www.parliament.uk/parliamentary_committees/conaffcom.cfm

Campaign for Freedom of Information

www.cfoi.org.uk

Constitution Unit, UCL

www.ucl.ac.uk/constitution-unit

BBC

BBC

www.bbc.co.uk

FOIA at the BBC

www.bbc.co.uk/foi

News Stories

www.bbc.co.uk/foinews

Guide to FOIA

www.bbc.co.uk/dna/actionnetwork/A2515790



IMPLEMENTATION OF THE PROMOTION OF ACCESS TO INFORMATION ACT: SOUTH AFRICA¹

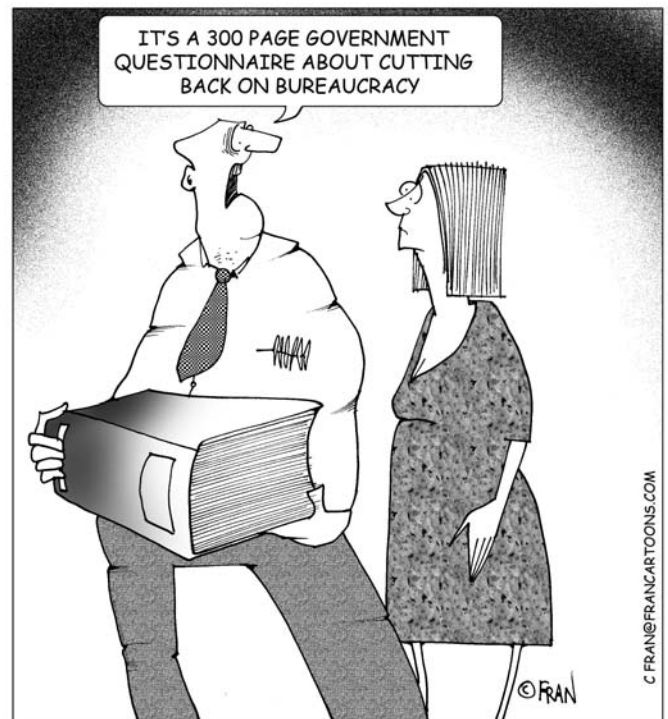
OPEN DEMOCRACY ADVICE CENTRE

“Five years after the “right-to-know” laws came into effect, it is clear that South Africa has a mountain to climb. Changing a culture of secrecy is proving to be an immense challenge. The “default position” remains one of secrecy; shifting the presumption to one of openness remains an unfulfilled aspiration.”²

BACKGROUND OF THE ACT

Throughout the apartheid era, South Africa’s increasingly paranoid white minority government suppressed access to information—on social, economic, and security matters—in an effort to stifle opposition to its policies of racial supremacy. Security operations were shrouded in secrecy. Government officials frequently responded to queries either with hostility or with misinformation. Press freedom was habitually compromised, either through prior censorship of stories or through the banning and confiscation of publications. Information became a crucial resource for the country’s liberation forces and their allies in international solidarity movements as they sought to expose the brutality of the apartheid regime and hasten its collapse. Consequently, opposition groups came to see unrestricted access to information as a cornerstone of transparent, participatory and accountable governance.³

This determination for greater freedom of information was ultimately captured in South Africa’s new constitution. A democratic parliament then gave further shape to the right of access to information by enacting enabling legislation—a process in which civil society organisations played an unusually influential role.⁴ In 1993, the interim South African constitution was agreed upon and promulgated, with the clear mandate to require the creation of open and



1 This paper largely is adapted from “South Africa Going Backwards in Enforcing Access to Information law,” published in *Five Years On The Right to Know In South Africa*, ODAC, 2006.

2 “Implementation—Facing the New Frontier,” Calland, R., *Five Years On the Right to Know in South Africa*, ODAC, 2006.

3 “Freedom of Information Law in South Africa: A Country Study,” Calland, R. and Dimba, M., Commissioned and Prepared for www.freedom.org, 2002.

4 Id. Constitution of the Republic of South Africa, Act 200 of 1993 (the “Interim Constitution”). Section 8(2) of the interim constitution stated: ‘No person shall be unfairly discriminated against, directly or indirectly ... on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.’ The final constitution added pregnancy, marital status and birth to the list of grounds [section 9(3)].



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accountable political institutions and the election of a new government on the basis of universal suffrage.⁵ One of the most important aspects of the interim constitution was the introduction of a Bill of Rights designed to ensure equal protection of a broad range of human, socio-economic and civil rights, irrespective of race, gender, sexual orientation, disability, belief, and other factors.⁶ Among the rights upheld was that of access to publicly held information.⁷

The final constitution, enacted in 1996, expanded the right to information to guarantee ‘everyone... the 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.’⁸ The enacting legislation for this constitutional right, under the name of the Promotion of Access to Information Bill and the Protected Disclosures Bill, ultimately was passed in 2000 and went into effect one year later.

MONITORING IMPLEMENTATION OF THE ACT

In passing the Promotion of Access to Information Act (PAIA), South Africa took the first step in codifying a general right to public, and in some cases private, documents. However, as warned by prescient colleagues from around the world, the struggle had only just begun. In 2002, the Open Democracy Advice Centre conducted a survey to track the progress of the PAIA’s implementation in the public and private sector one year after it was passed, and to establish a list of the various obstacles encountered in its implementation.⁹ In their research report Tilley & Meyer (2002) stated that: “the initial results of the survey indicated that on the whole the PAIA had not been properly or consistently implemented, not only because of the newness of the act, but because of low levels of awareness and information of the require-

ments set out in the act. Where implementation has taken place it has been partial and inconsistent.”¹⁰

One year later, as part of the Open Society Institute Justice Initiative project, ODAC again undertook a study to monitor and assess the state of implementation and application of the PAIA in South Africa. This study, conducted initially in five pilot countries in 2003, including South Africa, and then expanded to 14 countries in 2004 represents the

first concerted attempt to measure compliance and is especially useful not just because it offers a comparative methodology with a diagnostic purpose, but because the majority of the countries in the study

were middle-income or developing and so problems and solutions can be shared.”¹¹

OSI Country Study: South Africa¹²

The report demonstrates clearly that the South African law may be held up as the regional gold

“The “default position” remains one of secrecy; shifting the presumption to one of openness remains an unfulfilled aspiration.”

5 Constitution of the Republic of South Africa, Act 200 of 1993 (the “Interim Constitution”).

6 Section 8(2) of the interim constitution stated: ‘No person shall be unfairly discriminated against, directly or indirectly ... on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.’

7 “Freedom of Information Law in South Africa: A Country Study,” Calland, R. and Dimba, M., Commissioned and Prepared for www.freedom.org, 2002.

8 Constitution of the Republic of South Africa, Act 108 of 1996.

9 “Freedom of Information Law in South Africa: A Country Study,” Calland, R. and Dimba, M., Commissioned and Prepared for www.freedom.org, 2002.

10 Meyer, V, Tilley, A. “Access to Information Law and the Challenge of Effective Implementation: The South African Case” in *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice* by Richard Calland & Alison Tilley (eds.). Open Democracy Advice Centre, Cape Town, 2002.

11 “Implementation—Facing the New Frontier,” Calland, R., *Five Years On the Right to Know in South Africa*, ODAC, 2006.

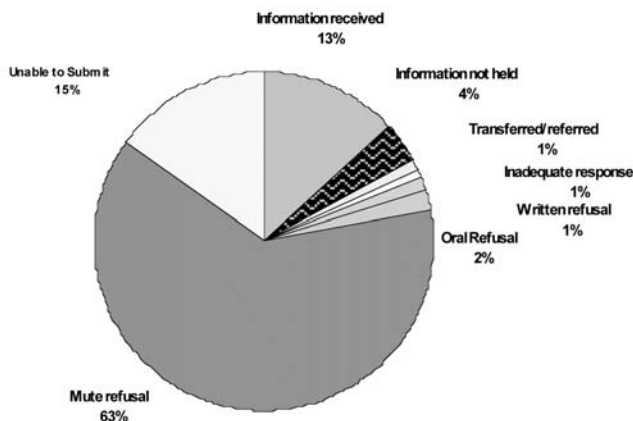
12 The remainder of this paper is extracted from “South Africa Going Backwards in Enforcing Access to Information law”, published in *Five Years On The Right to Know In South Africa*, ODAC, 2006.



IMPLEMENTATION OF THE ACT: SOUTH AFRICA

standard, but the implementation of that law certainly cannot. In the country study, which was conducted over six months, 140 requests for information were submitted to 18 public institutions by seven requestors from different spheres of civil society.

The study found that only 13% of the requests received a reply within the 30-day limit set in the PAIA. A total of 63% of the requests were ignored. In all, 4% of the requests received responses that the information was not held by the appropriate agency and 1% was transferred or the responses were insufficient. Only 1% of the responses culminated in a written refusal and 2% met with oral refusals. Out of the 140 requests formulated, the requestors were unable to submit 15%.



The 2004 South African results confirmed previous surveys, including the 2003 Justice Initiative five-country study. South Africa performed worse in the 2004 survey than in the previous 2003 pilot project, with the number of mute refusals in 2004 up from 52%, despite the access to information law.

Under the PAIA, bodies covered by the law have 30 days to answer requests for information, and another 30 days, if more time is needed, to respond to complex requests. Section 74 provides for the right to internal appeal against a decision of the information officer within 60 days of the decision. The decision on an internal appeal must be made and conveyed to the requestor within 30 days of the filing of the notice of internal appeal. An aggrieved requestor can take

an appeal decision to the High Court, but only once the local remedies of internal appeal have been exhausted. Anyway, this route is lengthy, expensive and therefore inaccessible to many South Africans.

Despite the provision in Section 26 that an agency can request a further 30 days to deal with a request, none of them used this provision during the 2004 monitoring study. Out of the submitted requests, only five—two routine, one difficult and two sensitive—received a late response. This implies that the type of request did not make a difference to the response period.

With the international average response period under freedom of information legislation being 14 days, the PAIA provides generous time frames. Yet, South Africa's high percentage of mute refusals shows that it is difficult to get information even with such generous time frames. Late responses where no extensions were sought were counted as mute refusals, but they only accounted for 4% of the mute refusals which means that they did not have any major effect on the overall results.

Requesting Information

The overall results show that submitting written requests is relatively straightforward but submitting oral requests is difficult. All the requests that could not be submitted were oral requests, which were attempted in person or by telephone. The “unable to submit” outcome can be divided into two categories: “refusal to accept” and “unable to submit.” The “refusal to accept” category (3% of all requests) are the requestors who attempted to submit oral requests but were not referred to the information officer or an official who could take down their request. This first contact with frontline staff is critical to the success of the oral request. If the frontline staff does not know about the right to request information they cannot assist requestors who submit oral requests. All the requests in the category of “unable to submit” were filed by an illiterate, elderly, black woman, who was unable to write the requests herself and was not given the help due to her under the law. In cases where a



BUILDING A CULTURE OF TRANSPARENCY

requestor is unable to write, the receiving official has an obligation to help the requestor by putting the request in writing.

While a requestor who succeeds in speaking to the right official stands a good chance of getting the information, all institutions responded better to written requests, even if they did not provide the requested information. Only two oral requests resulted in the information being provided. A requestor who phones or visits is generally given the run-around before eventually being put into contact with the information officer or deputy information officers. The results not only point to a preference for written requests by public bodies but, perhaps more importantly, show what a large segment of the population experiences when trying to access information. In the 14-country study, the excluded group of requestors received by far the worst treatment.

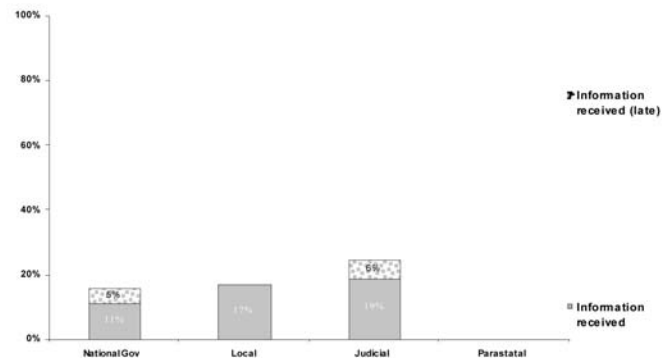
Institutions Included in the Study

The 18 public bodies in the study were selected from national and local government; judicial institutions and parastatal bodies. The chart below provides an overview of how the different institutions responded to the 13% of requests where information was received.

As can be seen, the best performers were the two courts representing judicial institutions which provided the requested information on time to 19% of the requests received. They were followed closely by the six municipalities representing local government institutions which provided the requested information to 17% of the requests received. The six national departments provided information to only 11% of the requests received. The two utility companies (electricity and water utilities) representing the parastatals did not respond to any of the requests received by providing the requested information.

The Interview Process

During the interview process, which was the second stage of the study following the requests, the public bodies were provided with the opportunity to explain their performance. The interviews provided some



insight into why there is such a high rate of mute refusals. Many officials attributed their failure to respond to lack of capacity to deal with the requests, some pointed out that the 30-day period was not long enough to deal with more difficult requests and others found the Act to be complex and onerous.

The poor performance of the Department of Defence, all mute or oral refusals, was particularly disappointing given the department's apparent commitment to the Act; its unenviable performance reflected a gap between the Department's commitment to making PAIA work and some prevailing attitudes and procedures within the department that may not support proper implementation of the law. Another disappointing agency was Eskom, the parastatal which in 2003 invested over R1 million in the development of software to implement the PAIA. This system is designed to centralise requests but it seems that once the central point sends the requests to the correct record holder the request does not always make its way back to the central point. As with the Department of Defense, requesters met with either all mute or oral refusals. Again these results reveal that despite the huge investment by the parastatal to facilitate compliance with the law, there is a need to implement internal policies and procedures to ensure that employees do in fact respond appropriately.

The 63% of submitted requests that resulted in mute refusals points to major challenges for public bodies in applying the PAIA and not to weaknesses in the law itself. The fact that only a few requests



were acknowledged by the public bodies means that often the requestor never knew whether his/her request had landed in the right hands and if it was being processed. When requestors followed-up, it was not uncommon for them to be asked to resubmit their requests or to receive only vague answers.

THE PLIGHT OF EXCLUDED GROUPS

The illiterate, elderly, black woman requester was categorized as “an excluded person” on the basis of her race, class, language, age and gender. She had to make requests to three provinces—Eastern Cape, Western Cape and KwaZulu-Natal—where her language, Sesotho, is rarely spoken. In some instances she could not submit her requests because of the language barrier.

In the Sakhisizwe Municipality in the Eastern Cape, she spoke to an official who could understand her but who simply refused to assist her further by submitting her request to the body she claimed would have the information. Again in KwaZuluNatal, at

Umgeni Water, she was referred to a person who appeared to be a Sotho speaker herself. Nevertheless, this official refused to grant her the records, repeatedly asking why she wanted the records and even suggesting that this illiterate woman might actually be a journalist conducting an investigation!

It seems the official could not accept that an elderly black woman would require that sort of information for herself. During the interview at Umgeni Water we were advised that it was because the organisation had had adverse publicity in the past and that staff was apprehensive about handling requests and not because of any prejudice. However, in the Umgeni Water case the requester encountered overt presumptions, while in the other cases she was just ignored. It is underlying attitudes of this kind that explain why this

requester was not able to submit 15 (75%) of her requests. It is factors such as these that present obstacles to her and many others like her in filing requests for information.

RECOMMENDATIONS

The results of the 2004 monitoring are worse than those of a similar study conducted in 2003, painting a rather bleak picture. Despite the five-year-old legislation that is hailed as one of the best of its kind, the results of the monitoring reveal the gap between policy and implementation, and the challenges faced by the general public, particularly excluded groups, in accessing information. There is clearly a need to bridge this gap and make information easily accessible to the public.

Implementation requires political will, but the high rate of mute refusals demonstrates that this is evidently lacking. The results also caution against coming to conclusions about access to information in South Africa based merely on a

highly regarded piece of legislation and, more broadly, suggest that countries that have not yet adopted freedom of information legislation need to realise that just passing a law in itself does not promote access to information.

The following are ODAC’s recommendations to strengthen compliance with the PAIA and improve the flow of information between the public and the custodians of public information:

i) Training, Education and Awareness

Firstly, it is not enough that public servants and holders of information are trained on the PAIA. The general South African population needs to be made aware of its right to know through the PAIA. Training, education and awareness will therefore

... the results of the monitoring reveal the gap between policy and implementation, and the challenges faced by the general public, particularly excluded groups, in accessing information.



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ensure that there is a supply and demand, which will hopefully instill a culture of transparency and open government.

Secondly, the South African Human Rights Commission, the Government Communication and Information Service and the Department of Justice need to lead the way in this regard by committing their respective departments to creating programmes that will train, educate and popularise the right to know and the PAIA. Other national departments, such as the Department of Public Service and Administration and the Department of Provincial and Local Government, have a key role to play in ensuring the law is implemented at all levels of government. In addition, other institutions established by the Constitution, such as the Auditor-General, could play a role in ensuring compliance with the law by conducting an audit every three to five years.

ii) Institutional Capacity/Systems Development

There remains a lack of capacity and resources within departments to deal with requests in terms of the Act. The effective implementation of the PAIA will require public bodies to appoint deputy information officers to deal with information requests. These deputy information officers must be genuinely empowered to make decisions regarding these requests and be able to properly apply the exemptions set out in the Act. A proper records management system is also key to the effective implementation of the PAIA.

iii) Oversight Body

If the PAIA is to work, particularly for vulnerable communities and groups, it is essential that the appeal procedures are inexpensive, quick and easy to use. ODAC is lobbying the government to establish an independent information commissioner or ombudsman to deal directly with access to information issues. The creation of such an appeal mechanism will enable requestors to more readily challenge mute and actual denials; build up a larger body of jurisprudence faster; and help establish good practice and higher standards.

CONCLUSION

The challenges with implementation of the South African Freedom of Information law are not particularly unique to South Africa, and could reflect the challenges faced elsewhere in emerging democracies where similar attempts at strengthening democratic rule are being made.

South Africa presents a useful case study on the campaign for and implementation of a law that is seen by civil society in South Africa, because of the country's special history, not only as an important tool for enhancing democracy, promotion of state and corporate accountability but also—most importantly—as a leverage tool that can be effectively used in the promotion of socio-economic justice.

Through passage of the Promotion of Access to Information Act, South Africans have managed to secure for themselves the promise of an open democracy and an open society—a democracy where they have the right to scrutinise the actions of government and the private sector, and to demand more accountability from both and participate meaningfully in the decisions that affect everyday lives in a profound way. But as implementation reviews conducted by the Open Democracy Advice Centre (ODAC) and detailed in this paper show, the process of transforming South Africa from being a closed and secretive police state to a people-centered open democracy is still in its infancy and remains a process. Joint civil society action, in partnership with government and institutions established to protect the constitutional democracy, is needed to ensure that the constitutional gains of the past ten years since the democratic transition are defended and enhanced.

Organisations like ODAC, the South African History Archive (SAHA), Freedom of Expression Institute (FXI), the Public Service Accountability Monitor (PSAM) working with the South African Human Rights Commission (SAHRC), independently and jointly, strive to ensure that the potential of South Africa's freedom of information law is realised and that it does not fail on the rock of weak implementation.



CHALLENGES AND SUCCESSES IN IMPLEMENTING THE ACCESS TO INFORMATION ACT IN JAMAICA

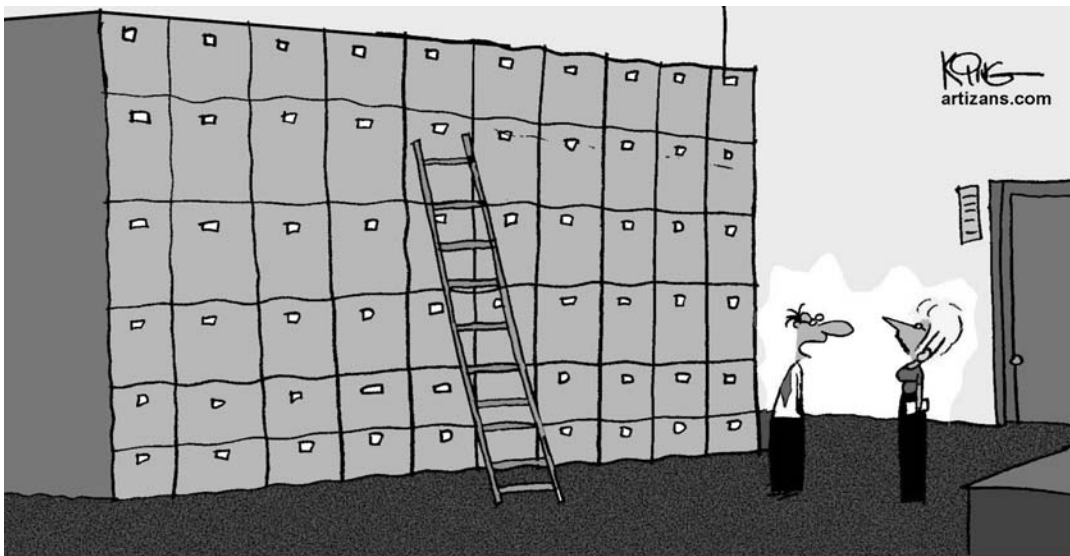
HELEN RUMBOLT

The success of access to information (ATI) legislation is premised not only on a government's commitment towards disclosure but fundamentally on an effective records and information management programme. In bureaucratic cultures, a custom of the Jamaican government, records are viewed to be the sole property of the organization and are privy only to a select group of civil servants who contribute to the transactions recorded on each file, or by virtue of their position, have access to the files on demand. These official records were not authorized to be used freely across the public authority. When the need arose for these recorded documents to cross the floor, permission had to be granted. Prior to the passage of the Access to Information Act, government records were deemed to be sacred, secret,

confidential and territorial. There has been a gradual yet positive cultural change towards openness since the implementation of the Act in 2004.

The ATI Act legitimizes the public's right to access official documents created and maintained by all government authorities. It is one of the boldest initiatives adopted by the Jamaican government to make government more transparent, publicly accountable and accessible to its populace and has created an environment to encourage and foster public participation. The Act has directly impacted records management in Government entities, as the demands on record-keeping practices have increased dramatically as a result of the ATI Act.

The Act itself relies heavily on a comprehensive records management programme in government along



"I would move my files onto a disk, but I estimated it would take me around 12 years."



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with the requisite professionals to administer the new norms. It was recognized from the start that to become proficient at delivering ATI services to the public a good records management programme must be in place. A comprehensive and well-executed Records Management Programme is a strategic necessity in all government institutions, and necessary to ensure compliance with legal and regulatory obligations, to support core functions and to provide the basis for effective and accountable administration.

Thus, the records management professionals transformed into “access administrators,” civil servants who have come to realize and accept their role not only as the custodians for documented government information but also their obligation to guarantee and facilitate the public’s right to know what government is doing or has done. As such the tenets of the Act have been willingly embraced and the administrative machinery powered to deliver and meet the positive objectives of the Act.

THE BEGINNING OF IMPLEMENTING THE ACT

In June 2002, an affirmative motion by the Jamaican Parliament caused the enactment of the ATI Act. Though Parliament was aware of the state of “unreadiness” of government to implement the Act, they were resolved in their decision to usher in this profound piece of legislation providing the public the right to have evidentiary access to government activities. The Act facilitated and encouraged citizens need to become more participatory in the business of governance, supporting the country’s democratic ideals. At the heart of this far-reaching piece of legislation is the need for good public records management practices. This was immediately

recognized and the machinery activated to foster the necessary changes.

As a first step, documentation and information managers positions were created in government entities at a mid-management level. Every central government Ministry recruited appropriate personnel to assume these positions. This triggered a ripple effect in the line agencies of the Ministries, which resulted in the appointment of key officers to handle ATI matters in these entities. With the implementation of the Act, the roles of these Officers were expanded to include the duties of assisting requesters and providing access to information consistent with the terms of the law. Using implementation models from Australia, England, and Canada among others, the Access to Information Unit was established under the autonomy of the Office of the Prime Minister. This oversight office’s sole responsibility was to support the smooth implementation and operation of the Act across government.

This office executed its responsibility with fervor and vigor, and it became integral to the success of the Act. In addition to its implementation mandate, it embarked on an island wide campaign to sensitive both government and the wider citizenry of the benefits of the country having the legislation.

Bolstered by the enthusiasm of the appointed access officers in government, the ATI Unit upon its inception immediately formed a strategic alliance with these Access Officers. Out of this alliance the Association of Access

to Information Administrators (AATIA) emerged, an active consultative group committed to formulating policies and setting guidelines to enhance the quality and efficiency of services delivered by the Officers to the public.

At the heart of this far-reaching piece of legislation is the need for good public records management practices.



STATE OF PUBLIC RECORDS MANAGEMENT PRIOR TO THE ACT

Prior to the implementation of the ATI Act, the Government of Jamaica was lacking an overarching institutionalized records management programme. Records Centers (often referred to as registries) were disorganized, and the incidences of files not being located in a timely manner were frequent. The practice of retaining all records created contributed to the congestion in the system; dormant and obsolete records were shelved with current files further compounding the problem of timely retrieval. Procedural manuals often were not revised to reflect the ongoing changes as they occurred. Although, internal policies, guidelines and systems changed to reflect the needs of the public authorities' records keeping efforts, these invariably went undocumented thus leaving the public authorities to rely heavily on verbal/oral transfer of knowledge. Overtime these verbal instructions became distorted, causing a breakdown of the established standards and procedures.

There was also a lot of distrust in the competence of the records officers to locate files on demand. Management of documented corporate activities was lacking or in most cases reduced to a clerical activity with no accountability of their stewardship. This gave rise to multiple storage locations throughout the organization and the proliferation of mini registries. Invariable the files kept in these locations were not accounted for fully in the official system. Only the specific division or Unit to which these files related were aware of their existence. The absence of an overarching records management policy assisted in perpetuating this deleterious practice. Moreover, no sanctions were ever levied for officers' negligence with regards to the loss or careless destruction of official records.

Other problems that plagued the records management activity in government included an ignorance about the value of records management, leading to the low priority given to records, the lack of an overarching records management policy and standard for government, the low visibility of the Jamaica

Archives in this records management landscape, records systems within organizations that were open and unsecured, and the continued recruitment of untrained records officers. Inevitably, these factors had an immense impact on the smooth implementation of the Act.

CHALLENGES TO IMPLEMENTATION

Records Management

With the passage of the Act, public authorities were mandated to institute effective records management programmes to ensure that information is retained as long as required, is readily accessible, and that useful documents are properly created in the first place—documents that accurately record the decisions being made or transactions undertaken. Underpinning the records-management difficulties, were a variety of challenges including:

- The lack of qualified staff,
- Insufficient funding,
- Poor physical infrastructures, and
- Absence of a culture of good records-keeping.

All of these complexities negatively impacted the development of good records management practices and made implementation of the Act that much more problematic. The ATI Act highlighted the inadequacies within the system, and served as a catalyst for reenergized and proper records management practices in government. Its positive impact was reflected through the increased accountability of official records and the new emphasis placed on accurate record-keeping and organized files.

The Act gave rise to a more structured and unified programme in government. The logical organization of records, standardization of systems and procedures, recognition and acceptance of the discipline of records management coupled with better records keeping practices became the main priority. This was not to say that management controls were non-existent prior to the Act, but what had been lacking



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was a sense of a consistent, institution-wide approach to best practices, that were not confined to individual departments but rather spread across government.

This leads us back to the issue of cultural change, which can only become entrenched through organization-wide involvement. Records committees were formed where senior officers were integrally a part of the changes planned for the organization's records keeping practices. ATI thus served to significantly and positively impact the organizational communication and its resultant outflow to the public. Since the advent of the ATI Act,

publishing in government has been on the rise.

Non-exempted official documents are posted on Internet sites for the public to gain access without the use of the Act. Improved interactions between records management staff and officers in the public

authorities also have facilitated the sharing of documents that were once hoarded, thus easing the process of coordinated search for documents and disclosure in response to information requests.

The ATI Act also has initiated and built stronger links within government records management community. The Government Records and Information Managers (G-RIM) Group and the ATIAA were formed out of the response to the perceived demands on records management. The groups have used the combined strength and expertise of their members to promulgate best practices in the administration and deliverance of documents, consistent with the ATI Act.

Difficulties for Users

In addition to the internal problems of the public authorities, it quickly became apparent that citizens themselves had problems with understanding aspects of the Act and its limitations. For example, the title "Access to Information Act" rather than access to

documents created ambiguities. Persons using the Act expected to receive information via the telephone. They also expected government officers to research, collate, compile and package the information requested in a digestible manner for them to use. As a result documents provided in response to requests were sometimes refused as either the applicant was unwilling or unable, due to the documents technical nature, volume or format, to peruse the documents themselves. This led to some applicant's expectations that government officers (not those administering the

Act) should sit with them to go through the documents that they have requested to explain/clarify their meaning.

Lobby groups are very involved in the promotion of the Act and monitor its administration in the various entities. While this is good, their general

message to the public has at times been misunderstood as implying that any information requested must be provided. Conflicts sometimes arose when exempt matters were not furnished, resulting in appeals. Another problem that arose from their intervention was the issue of to whom should response letters be sent. A help desk was established by one of the non-governmental organizations that monitors the rates of response and apparently inefficient communication between the parties led to appeals.

Most applications for documents were received by government entities situated in Kingston, the country's capital. Applicants from the rural areas have had difficulty accessing the documents if they are not in an electronic format that can be transmitted for free. Other formats provided attract a fee, and presently there are no arrangements for the remittance of these fees except directly to the government entity. This has and is still hindering some people's ability to access official documents.

ATI thus served to significantly and positively impact the organizational communication and its resultant outflow to the public.



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POSITIVE IMPACT AND BENEFITS OF THE ACT

Administratively the Act has elevated record management to the importance and status it truly deserves professionally and within the organization. There is now a recognition that the ATI regime is only as good as the quality of the information to which it relates. Put simply, if there is no recorded information a government entity cannot provide access and without such documented evidence there can be no transparency, no accountability and therefore no participatory democratic governance.

The more visible impact of the Act has been increased accountability for good records management. The incidences of misplaced or lost documents have been minimized with the new structured records management programmes.

The logical organization of records within the organization's holding, improved records keeping practices and standardization of systems and procedures have all contributed to the recognition and acceptance of the discipline of records management.

Capacity strengthening of records management programme in public authorities is as a direct result of the Act. Training needs have been identified and conducted to equip staff with the requisite skills needed to administer the Act. In some instances records keeping activities have been computerized to increase efficiency in service delivery and the prospect of introducing compatible electronic systems for information resource sharing is closer becoming a reality. Other areas of capacity strengthening have been achieved through networking within the professional community and through the monitoring and support of the ATI Unit.

Another positive impact has been the changes to the organizational structure of the records department

to reflect the work being undertaken and to attract more qualified staff. Through business process reengineering there has been an alignment with other information functions such as information technology and public relations. The Act has forced public authorities to make clear distinctions between official and unofficial records. Official documents are no longer territorial but freely shared as a corporate resource and a document for public perusal once non-exempt. Greater reliance on the dissemination of documents via the corporate Internet is fast becoming the preferred route to disclosure to lessen the workload brought on by the Act when information is not readily available in the public's domain.

On the administrative side better storage facilities have been provided for records, there is greater emphasis on records retention and the assured

longevity of archival records. There is greater compliance with legal retention requirements, faster retrieval of information in response to access requests, fewer lost or misfiled records and benchmarked service standards set for document delivery. Additionally, more resources are being

allocated to the information and documentation functions in government and it is now an established line item in the government's published budget.

SUCCESSES IN THE ACT'S IMPLEMENTATION

The period between the passage of the legislation and its actual implementation was a brief eighteen (18) months, and at the end of this period more than ninety eight percent of the government entities were not deemed ready to implement the Act. However, this process had to be fast tracked as the Jamaican Parliament had no desire to renege on their promise to make government more open and

The more visible impact of the Act has been increased accountability for good records management. The incidences of misplaced or lost documents have been minimized with the new structured records management programmes.



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transparent. Through the work of the ATI Unit and officers committed to making the Act work, government entities were assessed and those deemed “ready” to implement the Act were used as the guinea pigs to the Act. Six entities namely the Ministry of Finance and Planning, Office of the Prime, Cabinet Office, the Bank of Jamaica, Jamaica Information Services and the Planning Institute of Jamaica all dutifully implemented the Act on January 5, 2004 and paved the way for the other entities to follow.

The phased implementation of the other government entities minimized the teething pains associated with its implementation. The implementation strategies and activities were well executed and as a result Jamaica can boast of its successes. The following significantly contributed to the transition from a closed to a more open system of government:

- **Establishment of the ATI Unit**
- **Appointment of dedicated ATI personnel in government entities**
- **Channels of appeals**

The public could seek redress at different levels, from the head of the government entity to which he or she has applied for information. Failing to get redress at this level the next was an Appeals Tribunal, an independent body established to adjudicate ATI matters. The court was deemed to be the last resort but is also an option to the applicant
- **Wholesale sensitization of government workers to the Act**

Awareness of the Act greatly assisted its implementation. Access officers at no time every felt isolated in identifying and reviewing documents requested as other officers within the organization readily threw their support behind locating and making documents available. While these awareness sessions were widespread in government, there remains a need for the greater public more awareness sessions to achieve wider

participation in the democratic processes of government.

- **Greater accessibility to government documents and information**

To minimize the number of requests for more generic documents and information, government entities have become prolific authors and publishers, increasingly placing information on WebPages. This has contributed to greater availability of these documents, and hence the numbers of requests submitted are being reduced as applicants can be referred to these open sites. It is to be noted that Jamaica being a democratic society has always made information available to its citizen, however with the Act access is unencumbered.
- **Enhanced inter-Governmental Coordination**

The coming together of the ATI officers in government to form a unified support group to provide education, research, and networking opportunities and to leverage the value of records, information, and knowledge as corporate assets has greatly facilitated the implementation of the Act. The AATIA is a support group in government representing professionals charged with the function of managing public records and implementing the ATI Act. This Association is intended to increase the awareness of ethical issues among information and records management practitioners and to guide them in reflection, decision making, and action in the discharge of their officer functions with respect to the Act.
- **The publication of “Guidelines on the Discharge of Functions by Public Authorities Under the Access to Information (Jamaica) Act 2002”**

This became the standard manual used by ATI officers throughout government to carry out their function. Recommended practices and procedures, policies, standardised correspondence,



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form letters, advise to frequently asked questions among other relevant issues were addressed to aid the officer in delivering an equitable and efficient service.

- **Support from the political directorate**

The support has been overwhelming and has made the task that much easier to perform.

- **Stakeholder participation**

The users engagement and participation must be commended. They have monitored the implementation of the Act and kept government entities on their toes, highlighting the flaws and commending the good works of the individual entities in the operation of the Act.

PARLIAMENTARY REVIEW OF THE ACT

The Jamaican Parliament mandated that a review of the ATI Act be conducted 2 years after its implementation date. In keeping with this mandate, earlier this year, a Joint Select Committee of Parliament sat to hear submissions from government and civil society. The AATIA group made a series of recommendations for both legislative and administrative changes to the Act in order to improve its implementation. These recommendations included the following:

Regarding Amendments to the Act

1. That a provision made that where the applicant fails to respond after 30 days of being informed, his request has been granted he has abandoned the request.
2. Prohibit applicants from soliciting the same document from several Public Authorities when the request has been satisfied by the first Public Authority and where the document being applied for is clearly known to be the subject of Public Authority one (1) and not residing in subsequent Public Authorities. This behaviour by the public ties up our limited resources and slows up the process of access to others.

3. The Act did not make it clear whether it is mandatory that all written application be signed by the applicants, so we recommended that this be clarified.
4. That the computation of the thirty days period for access be clearly stated, as ambiguity arose early in the Act's implementation as to whether it was 30 calendar or workdays.
5. Penalties be included for any applicant who with the grant of access to view or listen to documents held by Public Authorities commits any of the offences that defaces, mars, steals or destroys any public record.
6. Include a provision for the reasonableness of request.

That grant of access in the context of reasonableness was the major issue that the access officers had to grapple with, and as such the Select Committee was asked to consider when is a request "reasonable" and when would the Access Officer not have to meet their obligations of granting access to documents based on the voluminous requests being made by applicants. It has been the collective experience of the Association that some requests require extensive research and may result in over 2,000 documents or pages of documents being retrieved for reproduction. This invariably ties up several officers in the public authority rendering them incapable of performing their regular duties including how they are able to treat with other requests. To date voluminous and unreasonable requests received have not been met in the required timeframe as stipulated by the Act.

The AATIA also asked the Joint Select Committee to ratify the recommendations to ensure that government can continue to deliver and improve its service and to educate the populace to engender wider and more active participation in the governance of the island.



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Regarding Administration of the Act

1. That aggressive public education be undertaken to sensitize the citizenry of all aspects of the Act and how they can individually utilize this Act to their benefit. The ATI Unit should be immediately strengthened to undertake this campaign.
2. That the ATI Unit be immediately staffed with the requisite personnel to ensure that the mandate of government under this Act is efficiently executed.
3. Where the amount of fees for reproduction costs has been agreed to with the applicant, no request for fee waiver should be allowed.
4. Special provision be made in the budget to provide the resources needed to facilitate ATI work in the Public Authorities.
5. The position of at least one Access Officer be mandatorily filled in all Public Authorities.
6. A comprehensive programme for the training of records managers through scholarships, attachments, distance learning and otherwise should be undertaken throughout government to build and strengthen the cadre of professionals operating in this field and to ensure continued success of the operations of the Act.
7. Mandate the ongoing training of Permanent Secretaries and other senior officers.
8. The development of an effective records management programme in government

WAY FORWARD

The full impact of the Access to Information Act has not yet been fully realised by the Jamaican people. The Act is still in its infancy stages, but as it grows it is anticipated that its potential far reaching effects will be explosive and potentially overwhelming to satisfy. The present users of the Act all presume that information requested must be made available to them, even when its proven to be in the exempt categories. This is fueled by their right to know and they are willing to challenge decisions through intervention to gain access to documents.

The commitment of government to the entrenchment of the ATI Act is genuine and recognising that this cannot be accomplished without good records keeping practices has ensured the continued strengthening of the programme to fulfill their mandate to its citizenry. Government entities also have become very proactive in the dissemination of information in a timely and comprehensive manner. This it is deemed will make the organization more credible and transparent to its citizens.



APPEAL PROCEDURES FOR ACCESS TO INFORMATION: THE INTERNATIONAL EXPERIENCE

Laura Neuman and Carole Excell

The Jamaican Parliament identified the passage of the Access to Information Act of 2002 as a “fundamental principle underlying the system of constitutional democracy” with the specific objectives of ensuring government accountability, transparency and public participation in the decision-making process.¹ Access to information, once thought of as either a relative to the right to freedom of expression or as a “luxury” is increasingly recognized as a fundamental human right necessary for the enjoyment of other rights, such as the right to a healthy environment, right to education and housing, and other public benefits. However, the right to information is only as effective as an individual’s ability to enforce it. “If there is widespread belief that the right to access information will not be enforced, this so-called right to information becomes meaningless. Thus some external review mechanism is critical to the law’s overall effectiveness.”²

The best enforcement bodies will allow the petitioner to submit his appeal with minimal formality or cost. As the Freedom of Information Act of Western Australia specifies, the “proceedings are to be conducted with as little formality and technicality, and as expeditiously, as a proper consideration of the complaint will allow.”³ These entities should be tasked with determining the appeal quickly and without the need for attorneys, and their decisions should be binding. Moreover, they will function under the doctrine of natural justice: the decision maker shall have no per-

sonal interest in the proceedings; they shall be unbiased and act in good faith; and perhaps most importantly “not only should justice be done, but it should be seen to be done; in other words, legal proceedings should be made public.”⁴

The recognition of access to information as a human right portends the obvious implication that this appeal body will differ from other narrowly defined administrative bodies charged with simply upholding an administrative procedure. The functions of an access to information appeals body must be developed and applied within the expansive human rights paradigm. This paper explores some of the best practices of access to information enforcement bodies

around the world, particularly related to the development of appeal procedures under the law. For more details on enforcement models generally, please see the chapter in this guidebook entitled “Mechanisms for Monitoring and Enforcing the Right to Information around the World.”

Enforcement of access to information laws is a crucial part of ensuring an appropriate balance between the right to know and the public’s interest in guarding certain sensitive

The international trend is to establish an intermediary body, such as a Commission(er), Ombudsman or Appeal Tribunal, to review agency decisions with the power to order the public authority to comply with its findings and decisions, as is the case in Jamaica.

¹ The Access to Information Act, 2002, Jamaica, sec. 2.

² Neuman, Laura. “Access to Information Laws: Pieces of the Puzzle,” in *The Promotion of Democracy Through Access to Information: Bolivia*, (Atlanta, GA: The Carter Center, May 2004).

³ Freedom of Information Act 1992, Western Australia, Part 4, Division 3, sec. 70.

⁴ See encyclopedia.thefreedictionary.com/Natural%20justice



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information. There is no one approach used around the world in the hearing or review of access to information decisions. There are, however, commonalities in the practice and procedures used to ensure fairness in the enforcement of the right of access to information and appropriate resolution of disputes between the Government and citizens.

The international trend is to establish an intermediary body, such as a Commission(er), Ombudsman or Appeal Tribunal, to review agency decisions with the power to order the public authority to comply with its findings and decisions, as is the case in Jamaica. This serves as a more accessible and affordable mechanism for enforcement than those modalities where the first opportunity for a hearing is before the Court. Best practices can now be identified in relevant legislation and rules of procedure found governing the work of ombudsman, commissioners, and tribunals charged with the task of reviewing right to information decisions. It is these core functions that should be defined and developed through procedures and regulations.

APPEALS PROCEDURES AND REGULATIONS

Comprehensive and clear procedures for the hearing of matters in relation to the denial of a request for access to information or the failure to properly implement or apply the law are a critical part of guaranteeing a transparent and accessible process in the resolution of disputed “right to know” cases. Procedures help ensure uniformity in processing of appeals and in the decision-making, and allow for greater efficiency on the part of the appeal body. Regulations and procedures should strive to:

- clarify the broader law,
- support the underlying objectives of the law, and
- provide guidance to both the implementers and the users.

In drafting rules and regulations, an emphasis should be placed on ensuring that there is no conflict or restriction on the provisions of the Act to which it is associated or other relevant laws. Often regulations

include sections on scope, powers, and procedures. Regulations should use clear, unambiguous language and should be written for the layperson to understand. And in applying the rules, “they shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”⁵

As discussed above, although there is great variance among jurisdictions, there have emerged some similarities in practice and procedures, such as:

1. the burden of proof for any denial falls on the agency;
2. flexibility in the rules of procedures to allow for greatest accessibility and ease of use;
3. efforts to reduce costs for petitioners, including the possibility of appealing without the need for attorney representation;
4. broad investigative powers;
5. the power to compel the agency to release documents to the tribunal in a timely manner for review; and
6. the power to sanction agency personnel for noncompliance.

After the passage of governing legislation, regulations or subsidiary legislation may have to be enacted to set out the detailed procedural rules to guide the scope and conduct of the review of the Government’s decision.⁶ In those jurisdictions where the controlling law provides great detail, the regulations may not be as extensive; the opposite is often true for countries with access to information laws with less procedural specificity. Ultimately, the regulations and procedures for any access to information enforcement body must be crafted to best suit the legal and socio-economic, political context of the specific country.

⁵ United States Federal Rules of Civil Procedure, Scope of Rules, Rule (1).

⁶ S.79 of the South Africa Promotion of Access to Information Act provides that the Rules Board for Courts of Law is to prepare rules of procedure for the hearing of applications made by persons aggrieved of decisions of relevant Authorities.



The following is a brief description of some of the core provisions necessary for an effective and accessible appeals process, based on our interpretation of good international practice.

SCOPE

Most access to information laws specify the type of complaints that an appeals body may hear, however, this may be further developed through regulation and procedures. The scope of the review determines the extent of the intermediary bodies' jurisdiction over a matter. Adjudicatory bodies are charged with issuing decisions on matters of interpretation of the law, substantive finding of facts and procedural matters. In practice, it is important that the appeals body be empowered to hear all complaints related to the access of information including, but not limited to:

Denials (Full, Partial and Severability)

The most common complaints are based on a denial of information, whether an express denial or deemed denial (also called mute refusal). The general basis for this type of appeal is the refusal by a Government Authority to grant a request for a document whether wholly or in part. This includes either (a) failing to give access to a document by claiming an exemption under the Act, (b) giving access to only some of the documents requested, (c) deleting parts of the document that have been requested as being exempt information within a document, (d) determining that on balance release is not in the "public interest," or (e) claiming that document does not exist.

Some access to information acts include provisions for deferral of requests for access; whereby access to the document is refused because the document has not been completed within a specific period as required, or where the document is being reviewed internally at the time of the request. For example, in the South African Promotion of Access to Information Act, where a record is to be published within 90 days of the date of the request, access to

that record may be deferred for a reasonable period provided that the requester may make representations as to why he or she needs the record before that time and access shall be provided where the requester is likely to suffer substantial prejudice.⁷ Thus, although not an express denial, the deferral of a request has the same ultimate outcome and should be open for appeal review.

The best access to information laws afford for redaction of exempt material, and the provision of the rest of the document. This is often called severability or deletion of material. As this is considered an adverse decision, like any other denial it should be open for appeal.

Costs for Receiving Documents

The scope of most access to information appellate bodies includes complaints for fees and costs. Costs are a critical issue for requestors, as it can serve as an obstacle to exercising the right to information. In Ireland, where they recently raised the costs for reproduction of documents, the Information Commissioner has stated that the number of requests dropped by 50%. In many jurisdictions the access to information law or accompanying regulations will provide the potential for a waiver or reduction of costs for reproduction of materials. In others, there is a fixed charge for search and/or reproduction. In the United States, where the federal Freedom of Information Act contains both a schedule of fees and a fee waiver provision, both elements are subject to review. Like the Information and Privacy Commissioner of Ontario, Canada, the New Zealand Information Ombudsman, who serves as the intermediary decision-making body, is given the power to investigate and review fees and fixed charges to determine if they are reasonable. The international experience makes clear that the Commission(er) and Appeal Tribunals must be vested with the authority to review cases related to costs for requesting and receiving documents, in order to

⁷ The Promotion of Access to Information Act, South Africa. sec. 24.



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assure public authority compliance with the law and its regulations.

Extension of Time Periods

Grounds for appeal have also been based on questioned time extensions. In most modern access to information laws, the agency has the capacity to extend the time period for completing an information request. However, the requestor often has a right to appeal this decision to the appellate body, particularly when there is a complaint of abuse of process. In New Zealand, the Access to Information Ombudsman is empowered to investigate and rule on “extension of time limits for a reply to a request.”⁸

Practices that Undermine the Law

In many jurisdictions there is a catch-all provision for the right to appeal an agency’s failure to follow procedural requirements of the law. These may include practices that undermine the law, such as inappropriate use of transfers, a request handled in a manner that dissatisfies the applicant, incomplete responses, or failure to perform an adequate search. In addition to the express ability to review a denial, this provision would also capture those cases where the public authority systematically ignores requests, thus undermining the objectives of the law. This has been one of the greatest problems in implementation of the South African Promotion of Access to Information Law, and experience suggests that the adjudicatory body should have the capacity to review a public authority’s systematic and persistent failure to respond to request.

In Scotland’s Freedom of Information Act, 2002, the Commissioner is authorized to issue a “practice recommendation” if it is determined that “the practice of a Scottish public authority in relation to the exercise of its functions under this Act does not con-

form to the code of practice.”⁹ Good practice is defined as including, but not limited to “compliance with the requirements of this Act and the provisions of the codes of practice.”¹⁰ The Mexican Access to Information regime authorizes the Federal Access to Information Institute, the body charged with adjudicating complaints, to hear cases related to incomplete information and dissatisfaction.¹¹ The Ontario Information and Privacy Commissioner’s office

accepts appeals for “adequacy of agency decision.”

Miscellaneous

a. Form of Information

The Bulgarian Access to Public Information Act 2000 includes provisions that the information shall be provided in the form requested unless this is not

technically feasible, or it results in an unjustified increase in cost. The Tribunal has the authority to review any complaints related to the form in which the information was provided.

b. Use of Information

Information belongs to the citizens, and thus requesters should never be required to provide a reason or explanation of its use. The New Zealand Official Information Act codifies this tenet by empowering the Ombudsman to review any decision of a Department, Minister of the Crown or organization that imposes conditions on the use, communication, or publication of information made available pursuant to a request.¹²

In many jurisdictions there is a catch-all provision for the right to appeal an agency’s failure to follow procedural requirements of the law.

⁸ See, The Official Information Act 1982 and The Ombudsmen Act 1975.

⁹ Freedom of Information Act 2002, sec. 44.

¹⁰ Id. at sec. 43.

¹¹ Ley de Transparencia y Acceso a la Informacion Publica Gubernamental, articulo 50.

¹² See sec. 28 of the Official Information Act New Zealand



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c. Refusal to Provide or Amend Personal Records

Access to information laws, such as Ontario Canada and Mexico, provide a right to appeal the agencies refusal to provide or amend personal records. The appellate body is, thus, responsible to determine such complaints.

d. Issuance of a Certificate of Exemption

In the United Kingdom Access to Information Act 2000, the Minister of the Crown may issue a national security certificate of exemption when required for the purpose of safeguarding national security. This certificate serves as “conclusive evidence” of the documents exempt status.¹³ Nevertheless, the issuance of a certificate may be appealed to the Access to Information Tribunal on the grounds that “the certificate does not apply to the information in question.”¹⁴

In these cases, the Tribunal has the authority to review the information request and the information for which the certificate was issued.

POWERS

The powers bestowed on the intermediary decision-making body can vary from recommendation-only to the full powers of a binding adjudicatory body, such as a court of law. In general, the international experience is demonstrating that the power to make binding orders is critical to meeting the objectives of the right to information. In countries such as South Africa, where the law does not provide for an intermediary body with order making powers, the Legislature is seriously contemplating an amendment of the law to allow for the creation of this critical body. Order making power allows an independent decision making authority to resolve disputed cases quickly and in a cost effective manner without reference of all matters to the court for final resolution.

Order making power allows an independent decision making authority to resolve disputed cases quickly and in a cost effective manner without reference of all matters to the court for final resolution.

General Powers

In jurisdictions with order-making powers, it is accepted good practice that the body hearing the appeal enjoys the same attributes as the original decision maker and the judiciary. Generally there are three broad actions available to the body:

- uphold the decision under review (affirm)
- reverse the decision and make their own order (vary and set-aside)
- remand to the agency for further action

In all laws where the enforcement body is vested with order-making powers, they may “provide any relief that the Commission, at its own discretion, believes appropriate to rectify the denial of any right conferred by the Freedom of Information Act.”¹⁵ This includes a finding that the information is not exempt, or that on balance release of the information is in the public’s interest. Moreover, the adjudicatory body may dismiss the case for lack of jurisdiction, failure to exhaust administrative

procedures or comply with procedural requirements, abandonment, or frivolousness, unreasonable or vexatious appeals.

Investigations

Most access to information laws and regulations provide extensive powers for formal inquiries and investigations, and require the agency to provide information as part of an investigation within a specified period of time.

¹³ Freedom of Information Act 2000, United Kingdom, secs. 23 and 24.

¹⁴ Id. At sec. 60.

¹⁵ The Connecticut Freedom of Information Act, sec. 1-206(2).



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In the Ontario Freedom of Information and Privacy Act, the Commissioner in the course of an inquiry is empowered to summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry to the same extent as a superior court of record. These types of rules are generally utilized where there is a more formal hearing as witnesses may include very senior officials in Government including Ministers. Other countries use less formal powers for the conduct of investigation and inquiry to encourage a more informal resolution of appeals, including the power to allow for Conferences and Mediation as discussed below.

PROCEDURES

The overriding principle relating to any access to information appeals procedure must be simplicity, with minimal formality or unnecessary obstacles. For example, in the case of a denial, a well designed system will allow the intermediary body to receive a simply stated request for appeal, get the document in question from the public authority, review the document, accept representations from the parties with the burden of proof on the agency, and decide on whether or not the information should be released.

Procedures on the request, investigation and hearing of an appeal may vary depending on the powers of the review body and whether there is first a process for internal review. For example, where there is no internal review procedure, cases are heard for the first time by a commissioner, ombudsman, court or tribunal on the basis of an agency's preliminary determination. There is generally less of an investigation or record and, thus, more responsibility on the adjudicatory body.

In processing appeals, the Commission(er) or Tribunal is often vested the ability to "determine the

procedure for investigating and dealing with complaints and give any necessary directions as to the conduct of the proceedings."¹⁸ This may include consolidating claims where there are appeals that involve common questions of law or fact, requesting additional documentation, or requiring pre-hearing mediation or compulsory conferences.

Requesting Appeal

In filing a complaint, appellants should be obligated to describe basic information but not be required to use prescribed forms that serve to create rigidity in the appeal process. If example forms or a boilerplate form for requesting appeal are provided, they should include the minimal details needed to properly file a complaint and an explanation of any alternative dispute resolution mechanisms available. There should also be

an explanation for completing forms to aid disadvantaged applicants. As the filing of an appeal can be quite cumbersome and confusing, in many jurisdictions the Commission(er) or Appeals Tribunal staff is directed to assist the petitioner.

Time limits for requesting an appeal vary depending upon the jurisdiction but are often 30 to 60 days, with provision for the adjudicator to extend or waive the deadlines for good cause.¹⁹ In some cases, such as in Thailand, where there is an Information Board or Ombudsman that sends the cases to the adjudication body the time limit for filing may be shorter.

In addition to the basic details, some laws have specific provisions that allow the complainant to request an early hearing of the appeal and the

The overriding principle relating to any access to information appeals procedure must be simplicity, with minimal formality or unnecessary obstacles.

¹⁷ Freedom of Information Act 200, United Kingdom.

¹⁸ Freedom of Information Act 1992, Western Australia, Part 4, Division 3, sec. 70.

¹⁹ See Information and Privacy Commissioner, Ontario and US.



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reasons for that request, as part of the initial filing of the complaint.²⁰

Notice of Appeal and Public Authority Response

Upon the filing of an appeal, unless the regulations dictate that completed filing includes service on the agency, the adjudicator should provide notice to the public authority. Notice to the agency may include details pertinent to the complaint, as well as the timeline for response. It will also notify the agency of the day of the hearing, and if any mediation or informal conference shall proceed the hearing.

The public authority against whom the appeal is taken may be ordered to submit documents necessary to understand the reason for their adverse decision, as well as written arguments. Where the case relates to extension of time, transfers, or costs, detailed information and the basis of the decision must be included in the response.²¹ Again, the weight of proving the correctness of the decision is on the public authority, so their burden to produce documents and arguments will be greater.

Dismissal of Appeal

The Commission(er) or Tribunal may decide “not to deal with the complaint, or to stop dealing with the complaint” for lack of jurisdiction, frivolousness, abandonment or withdrawal.²² In all cases, procedures must be in place to notify the complainant in writing of the decision and its basis, and any additional right to appeal.

A case may be determined “abandoned” when the decision-maker issues a finding for failure to appear at the hearing or respond to written requests.²³ The Ontario regulations provide that when an appellant has not responded within 21 days to attempts by the Commissioner to contact him or her, the appeal is considered “abandoned.” However, safeguards may require that prior to disposing of the appeal, the decision makers must be satisfied that appropriate notice was given to the person who failed to appear or respond, and there should be provision for reinstatement of the application and clear directions for seeking reinstatement.²⁴ Often, regulations also will

provide guidance for withdrawing a complaint. In Ireland, for example, it states that a requestor may by notice in writing given to the Commissioner, at any time before an appeal is determined or discontinued, withdraw the application. In this case, the Commissioner must then notify all parties in writing of the withdrawal.²⁵

Even more difficult to determine than abandonment, are the cases of frivolousness and vexation. Frivolousness is considered to be those cases that are brought “without any reasonable grounds and solely for the purpose of harassing the agency from which the appeal has been taken,” and these cases may be subject to both dismissal and monetary fines.²⁶

PROCEDURE FOR INVESTIGATION

Included in most countries access to information enforcement procedures is the adjudicator’s ability to call for and examine any evidence, including exempt documents.²⁷ The process for requesting the production of documents from public authorities generally includes written notice from the Tribunal, and a timeline for submission of the material.

20 A request for an early hearing could be considered where there is (1) an imminent threat to the life or physical safety of an individual (2) the loss of substantial due process rights (3) failure to reveal a matter of widespread and exceptional media interest (4) failure to be able to disseminate information which is essential for the public to be informed. See American Battle Monuments Commission 36 CFR Part 404 Freedom of Information Act Regulations

21 Administrative Appeals Tribunal Act 1975, Australia specifies the respondents provide a schedule of the documents to which the claims of exemption relate including (a) date of the document; (b) person or persons by whom the document was created and, where applicable, the person or persons to whom it was directed; (c) A sufficient description of the nature of the contents of the document so as to provide a prima facie justification for the ground or grounds of exemption relied upon; (d) Where applicable, a statement as to the ground or grounds of public interest relied upon in support of the claim of exemption; (e) Where the claim of exemption relates only to part of the document, a concise indication of the part or parts involved (e.g., para 6 or part para 6).

22 Freedom of Information Act 1992, Western Australia, sec. 67.

23 Ontario Freedom of Information and Protection of Privacy Act (s.19).

24 Administrative Appeals Tribunal Act of 1975, Australia, sec. 34B.

25 The Freedom of Information Act, Connecticut, sec. 1-206(2).

26 Administrative Appeals Tribunal Act 1975 of Australia Practice Directions.

27 Freedom of Information Act 194, Belize, sec. 40.



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The fact that the public authority has asserted a claim that the document is exempt should not deter the Tribunal from reviewing it. In order to make a determination of the document, the information contained in the document and the policy for withholding the information must be examined. Therefore, the process must delineate specific safeguards for physical safety of the documents and protection of sensitive and classified information. Often the regulations provide for either one specified person to review classified documents, such as the case of Belize where by the Ombudsman is solely vested with the power and is mandated to “return the document to the person by whom it was produced without permitting any other person to have access to the document or disclosing the contents of the document to any other person.”²⁸ The person designated to review sensitive documents must have a security clearance commensurate with the national security classification of the document.

Moreover, there also may be a requirement that “the Commissioner . . . must ensure the return of the document to the agency that produced it when the complaint has been dealt with.”²⁹ In Ontario, the Information and Privacy Commission’s (IPC) Practice Directions proclaim that “the IPC’s security arrangements satisfy the security standards of the Ontario Provincial Police.”³⁰ In some rules there is also provisions allowing for entry into premises of a public authority to inspect large documents or documents that are in a poor condition that may contain exempt information.³¹

In Australia, the administrative tribunal rules provide that the public authority must prepare the records in a form determined by the Tribunal including requiring the institution to number the records,

number the pages of records, provide legible copies, provide highlighted copies, or provide a detailed index indicating the date of creation of each record, a brief description of the record, the extent to which it was disclosed, and what exemption has been claimed.³² Similarly in Scotland’s Freedom of Information Act the Commissioner may require the submission of additional information if he has concerns that an authority is not complying with the Act. The request for such information will be provided to the agency through written notice, and the public authority may appeal the request to the Court of Session, but only on a point of law.³³

In its role as “investigator,” intermediary bodies in jurisdictions like many of the Canadian Provinces have served to assist the complainant in compiling the necessary record for their case. Often petitioners do not have the capacity or jurisdiction to unearth the necessary documents, and must rely on the Commission(er) or

Appeals Tribunal staff for assistance.

Service of Documents

Good practice indicates that procedures should indicate what types of service of notices and pleadings are accepted, such as registered mail, regular mail,

The fact that the public authority has asserted a claim that the document is exempt should not deter the Tribunal from reviewing it. In order to make a determination of the document, the information contained in the document and the policy for withholding the information must be examined.

28 Freedom of Information Act 1992, Western Australia, sec. 75.

29 Information and Privacy Commissioner of Ontario, Practice Direction #1, sec. 11, August 2000.

30 s.52 of the Freedom of Information and Protection of Privacy Act Ontario gives the Information Commissioner the power to enter premises and inspect documents on site.

31 Administrative Appeals Tribunal Act 1975 of Australia.

32 s.50 of the Freedom of Information Scotland Act 2002.

33 Regulations of the Connecticut Freedom of Information Commission, sec. 1-21j-35.



hand delivery or via facsimile. Requirements vary from personal service to post with receipt by authorized representative (of either the appellant or the public authority) or to last known address. In most jurisdictions, recorded delivery is used to ensure proof of posting.

HEARINGS

All laws governing enforcement of the right to information include provisions on how the hearing is to be conducted and the process to make decisions. The purpose of any hearing “shall be to provide to all parties an opportunity to present evidence and argument on all issues to be considered.”³⁴ In general, hearings may be held with representations in person or in writing. Although in Ontario Canada the majority of inquiries are conducted in writing with submitted written representations, like most other jurisdictions the appellant may choose the modality. On appeal, it is customary that the Appeals Tribunal may review any of the public authority’s findings of fact or determinations of law.³⁵ The commission or presiding officer may also choose to consolidate proceedings involving “related questions of law or fact or involving the same parties.”³⁶

Oral Hearings

Regulations relating to the conduct of the oral hearing should be promulgated, seeking to ensure that there is minimal formality and to avoid the need for attorney representation. The complaint should be afforded to opportunity to present argument and respond to the public authority’s rationale, again with the burden of proof on the public authority. “To avoid unnecessary cumulative evidence, the commission or presiding officer may limit the number of witnesses or the time for testimony upon a particular issue in the course of the hearing.”³⁷ Regulations may also provide an opportunity for additional written submissions following the hearing, when necessary for due process.

If the appellant chooses to proceed with an oral hearing (rather than on the record), the regulations could provide for either public hearings or in camera.

In Connecticut, the hearings of the Freedom of Information Commission are open to the public, except when in camera inspection of documents or testimony is necessary to preserve confidences. Public hearings can contribute to confidence in the tribunal’s independence and fairness. Regulations may provide that these proceedings are tape recorded, with some time “off the record” for stipulations and negotiations.

In other jurisdictions, such as British Columbia, the oral hearings may be conducted in private. In Ontario, the law provides that no one is “entitled” to be present during the presentations. The Australian Administrative Tribunal Act provides that all hearings are to be held in public, except under specific circumstances, such as confidential nature of matter or evidence. In these cases, the amount of material taken in private is to be limited and the Tribunal has the discretion to direct which part of the hearing will take place in camera, who may be present, and how the evidence or disclosures will remain confidential.³⁸

In either case, the common practice is to publish the findings and final decision. Personal information provided to the Tribunal as part of the proceedings, however, should remain confidential and not be disclosed without that individual’s consent. In Canada, the regulations provide that if the public authority on the recommendation of the Commissioner intends to release any third party information he must give that third party a reasonable opportunity to make representations as well.³⁹

34 Freedom of Information Act 2000, United Kingdom, secs. 58 and 59.

35 Regulations of the Connecticut Freedom of Information Commission, sec. 1-21j-18.

36 *Id.* at sec. 1-21j-35.

37 Administrative Appeals Tribunal Act 1975, Australia (s.35).

38 Report of the Access to Information Task Force of Canada “Access to Information: Making it Work for Canadians” and s.27,28 & 29 of the Access to Information Act.1980-81-82-83, c. 111, Sch. I “1”.

39 Administrative Appeals Tribunal Act 1975, Australia,(s.32).



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Legal Representation at the Appeal Hearing

Many countries have access to information laws or procedural rules which explicitly provide the right for the appellants to have legal representation or other representation at the hearing. This right also extends to the public authority, witnesses or any third party attending the appeal.⁴⁰ In Australia's Administrative Appeal Act the rules specifically state that the Attorney General is given the jurisdiction for himself or his representative to appear before the Tribunal whenever he considers it expedient in the public interest.⁴¹ Such cases may include appeals of Ministerial certificates of exemption, national security, defence or international relations documents, or the disclosure of deliberations or decisions of the Commonwealth Cabinet or of a committee of the Cabinet.

Evidence

In some access to information procedures or regulations there is provided a specific statement that the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as possible and that ordinary rules of evidence are relaxed or do not apply. The norm, internationally, is that intermediary bodies tend to adhere less rigidly to rules of evidence. Moreover, in jurisdictions such as Canada where the Federal law vests the Information Commissioner with recommendation powers only, the Commissioner may accept evidence and other information, whether or not the evidence or information is or would be admissible in a court of law.

Calling Witnesses

An intermediary body may serve as the arbiter, inquisitor or both. Thus, regulations should include powers that enable the conduct of this function, including the power to call witnesses and require the production of documents.⁴² The Commission(er), Tribunal or presiding officer should also be authorized to subpoena witnesses and administer oaths.⁴³ In the Australian Administrative Appeal Act powers have also been given to the Tribunal to call their own wit-

nesses, and the Public Authority and the Appellant given an opportunity to cross-examine. This is an important provision for situations in which the adjudicator consolidated cases of similar facts or issues of law. Other jurisdictions include provisions to allow the submission of sworn statements or affidavits to be submitted where witnesses are unable able to attend, with the proviso for a modified cross-examination.

Third Party

The modern practice in access to information laws is to ensure that there is a potential for third parties to attend and make representations before a decision making body on right to know cases, particularly when information related to their person or business is at issue. The Australian Act, among others, makes provisions for the Tribunal to hear applications by third parties, this may include third parties with a business interest in a document or government agencies with a legitimate interest in a document, or individuals where there is a request that may reveal personal information.⁴⁴ "If the Commissioner is satisfied that another person or body might be affected by a decision made on the complaint the Commissioner may obtain information or receive submissions from that person or body."⁴⁵ This provision opens the possibility for Amicus Curie and third party briefs.

Time Periods

In addition to time periods for submitting appeals, regulations in some jurisdictions include time limits for submission of required documentation and even for determination of appeals. For example, the procedures for complaint in British Columbia allow for an

40 Administrative Appeals Tribunal Act 1975, Australia (s.36).

41 Council on Tribunals Guide to Drafting Tribunal Rules, November 2003.

42 Regulations of the Connecticut Freedom of Information Commission, sec. 1-21j-36.

43 Administrative Appeals Tribunal Act 1975, Australia, sec. 30.

44 Freedom of Information Act, Western Australia, sec. 69.

45 Freedom of Information and Privacy Act, British Columbia, sec. 56(6).



inquiry into matters of fact which must be completed within 90 days of the request.⁴⁶ A rule prescribing extension of necessary time limits is also important to allow for fair conduct of any hearing. In the Australian Administrative Appeals Act Rules there are provisions for the Tribunal to extend the time appointed for doing any act, notwithstanding that the time appointed has already expired. On the flip side the rules also state that the Tribunal may in special circumstances reduce the time appointed by the Rules for doing any act, once there is an agreement of the parties. This allows the Tribunal to determine that if an appellant would or might suffer hardship by compliance with the longer periods set forth in the Act; they may reduce the period for document filing.

Decisions and Sanctions

Regulations of freedom of information laws often provide the form of a decision including requirements for a decision to be made by a specific number of members, recorded in writing and signed by the Chairman and communicated to both the Appellant and the Respondent within a specific amount of time.⁴⁷ In some jurisdictions, such as Connecticut, the decision initially may be made orally, but it is then written and published. The international trend is that all intermediary body decisions should be published.

Often in the conduct of a hearing a decision will be made that contains terms and conditions, including requiring the production of document within a specific time. Some Acts include criminal sanctions for the failure of the public authority to comply with the directions of the tribunal, while others include specific provisions for the Tribunal to find for the petitioner in whole or part or bar a respondent from contesting an appeal. The Thailand Official Information Act, 1997 provides that where there is a failure to comply with a decision of the Official Information Board in relation to the issue of a summons or to produce information this can result in a criminal charge with possibility of imprisonment for up to three months and/or a fine.⁴⁸ In British Columbia, the agency has 30 days to comply with

the Commissioner's order, unless an appeal for judicial review was filed. Similarly in the Irish Freedom of Information Act there are sanctions included in the Act for failure of an Authority to respond to the Commissioner's notice.⁴⁹ In this case, the Commissioner may refer the authority to the Court of Session, which can take action against the authority for contempt of court. Under Section 15 of the Contempt of Court Act 1981, the maximum penalty for contempt of court is two years imprisonment or an unlimited fine or both. If the public authority fails to comply with an order of the intermediary body there must be provision to allow for sanctions and further action, or the authority of the body will be largely lost.

MISCELLANEOUS

Mediation or Conferences

Access to information cases can be quite contentious and therefore the most modern enforcement rules provide an option for alternative resolution of disputes. Without a speedier and less cumbersome method for resolving complaints, the adjudicatory body may quickly become overwhelmed and the process inordinately costly. For that reason, tribunal Rules in Canada and Australia make specific provision for mediation of a decision on access to information cases, if the parties agree.⁵⁰ In Ontario, the Commissioner is given power to use a mediator to effect a settlement. It authorizes a mediator to investigate the circumstances of any appeal and to try to

46 Federal Transparency and Access to Information Law of Mexico Article 55-60 includes specific requirements as to the method of decision making and communication to the appellant. The Jamaica Access to Information Act Schedule one allows one Tribunal member sitting alone to make a decision where the parties to the appeal consent.

47 s.40 Thailand Official Information Act.

48 The Act provides in s.37 for a person who fails or refuses to comply with a requirement under this section or who hinders or obstructs the Commissioner in the performance of his or her functions to be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 6 months or both.

49 See, Freedom of Information and Privacy Act, Ontario Canada, Freedom of Information Act 1992, Western Australia.

50 Council on Tribunals Guide to Drafting.



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reach a settlement without recourse to hearing. In Western Australia and Ireland, the law stipulates a requirement for a conciliation mechanism. The Act provides that the Commissioner may, at any stage, suspend inquiries, investigations or other proceedings so that efforts can be made to resolve the complaint by conciliation or negotiation between the parties. Mediation also is utilized in the state of Connecticut in the United States through an ombudsman program.

The use of mediation to resolve ATI cases has taken many forms including: a process to narrow issues, allow the release of some of the documents in dispute, reduce fees; or facilitate the process of identification of additional information. Mediation allows for creative solutions and may help develop options, consider alternatives and reach an agreement. It can ensure speedy settlements for all parties; provide better service tailored to meet the needs of the parties and assist in the resolution of complex cases. Mediation also does not take away rights but can narrow differences and establish the issues in dispute even where a matter has to go forward to a hearing for a binding decision. It avoids the necessary effort of preparing legal submissions and attendance at public hearings.

Mediation may be conducted by a neutral third party (the mediator) or a member of the Tribunal, however this would preclude involvement of this member in adjudicating the matter should mediation fail. If the matter is not resolved at mediation, it should proceed to a hearing. However, if successful, the agreement should be reduced into writing and signed by both parties before any matter can be withdrawn from a hearing. Regulations should make clear that the mediated decision is binding.

Mediation allows for creative solutions and has the advantage of identifying the disputed issues, develop options, consider alternatives and endeavor to reach an agreement.

Costs

Costs are inherent in any appeal process including the cost of representation, the costs of preparing documents, costs for the hearing of the matter, etc.⁵¹ Costs can act as a deterrent to appellants. Thus, the well accepted international norm is that there should be no cost for Tribunal hearings and the issuing of cost awards “should normally only be ... where a party has acted vexatiously or unreasonably or in favour of an appellant where there is a successful appeal against an administrative decision affecting the appellant’s livelihood.”⁵²

If awarding of costs as damages is included there also must be consideration of the manner in which the costs will be assessed, and whether there will be limitations as to the amount of costs awarded. In

access to information laws that provide a court as the final arbitrator of a “right to know,” costs for appeal usually are provided to the appellant when the public authority’s decision was unreasonable. In countries that have provisions allowing review either by a Commissioner or a quasi-judicial administrative body there has been a gen-

eral view taken that the appellant shall bear his own cost and expenses of his appeal and that no costs are awarded against the losing party. This reduces the potential costs associated with the decision-making process and allows for a less formalized process for the hearing of an appeal.

51 Tribunal Users’ Experiences, Perceptions, and Expectations: A Literature Review,” Michael Adler and Jackie Guiland, University of Edinburgh, Nov 2003, Commissioned by the (former) Lord Chancellor’s Department and published by the Council on Tribunals.

52 Council on Tribunals Guide to Drafting Tribunal Rules, November 2003.



Annual Reports

The issuing of an annual report that details the number of appeals filed, the number of appeals heard, the type of case, and the final disposition is another mechanism for promoting transparency and has proven critical in establishing confidence in the Commission(er) and Tribunals. In some places, such as the United Kingdom and Australia, these reports are issued annually and laid before the House of Parliament. In Canada the report is submitted to the Speaker of the Assembly, and in Connecticut all decision, opinions and related matter are printed and made available to the public at a reasonable cost.

Right to Further Appeal

As with most enforcement matters, the right to further appeal, beyond the Commission(er) or Tribunal decision, varies depending on the jurisdiction and the scope and powers of the adjudicating body. In the United States, both the appellant and the agency

have the right to further appeal. In Thailand and Mexico, the decision of the Information Disclosure Board is binding on the public authority, thus removing the possibility for further appeal. However, if there is an adverse decision against the citizen, he or she may appeal to the judicial court system

CONCLUSION

The objective of any intermediary body is to serve as a more accessible, affordable, user-friendly and timely mechanism for resolving complaints. These principles should be foremost when crafting the powers and procedures of the body, difficult procedural rules or limited scope and powers will bind the public's ability to fully exercise their right to information. As practice develops, it will become evident the effect of overly stringent or ill-defined regulatory provisions and alternatives that allow for effective resolution of cases should be considered.



ENFORCEMENT UNDER THE JAMAICA ACCESS TO INFORMATION ACT

NANCY ANDERSON

*Roget's II — The New Thesaurus —
"Enforcement- to compel observance of;
implementation, to put into action"*

Enforcement is a vital ingredient in most legislation. The Access to Information Act is an excellent example of this principle. Without enforcement measures in the Act, the right to access would be only an illusory exercise, an idealistic aspiration. If citizens are not assured that they have an effective mechanism to carry out their requests, they will not use the opportunity provided by the Act.

Enforcement has at least two objectives, as set out above in the quotation from Roget's: to put into action and to compel observance. The implementation and monitoring of the Act must be the role of the Access to Information Unit. The recent review of the Act undertaken by a Parliamentary Committee has generated submissions from several bodies, NGOs and government departments and agencies. Nearly all of the NGOs, as well as the Access to Information Association of Administrators (AITAA), have called for the strengthening of the ATI Unit. Some have also suggested that the Act be amended to include the Unit in its substance.

The monitoring of the performance of agencies under the Act has been neglected and this has contributed to the inconsistency of implementation across public authorities. Enforcement demands the proper monitoring of the use of the Act, training of public officials, improving record management and public education to raise awareness concerning the Act.

While this is an area of enforcement that requires action, it is however, not the area of consideration in



"No, it's too late for the oversight committee, send it to the hindsight committee."

this paper, rather my focus will be the mechanisms to compel observance. While there are different models for enforcement of the right to information legislation around the world, all models that are successful, have review bodies that are:

- Accessible
- Affordable
- Timely
- Independent, and
- Specialist.¹

The Carter Center in its submissions to the Parliamentary Committee reviewing the Act, in March, 2006, states:

"The enforcement mechanisms of any access to information law are crucial to the ultimate success of

¹ See, "Mechanisms for Monitoring and Enforcing the Right to Information Around the World," Neuman, L., *Access to Information: Building a Culture of Transparency*, ed. Neuman, L., The Carter Center 2006.



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the new transparency regime. If enforcement mechanisms are weak or ineffectual it can lead to arbitrary denials of information or ignoring of request. And if applicants believe that there is no effective mechanism for review, they will lose confidence in their right to access to information. Thus, some independent external review mechanism is critical to the law's overall effectiveness.”

THE CURRENT ENFORCEMENT MODEL IN JAMAICA

The Access to Information Act sets out both an internal review process and an appeal process. Although it does not make specific provision for an appeal to the Courts, the use of judicial review proceedings is not excluded and therefore also must be considered in any dissertation on enforcement. The enforcement mechanisms are to be approached in stages beginning with the internal review, then the appeal and in certain circumstances, judicial review.

Part V of the Act sets out the provisions on Review and Appeal and is so named. Section 29 interprets “relevant decision” within these provisions as a decision referred to in section 30 (1) or (2). These two processes are therefore limited to the decisions set out in these subsections; they are:

- Refusing to grant access to a document;
- Granting of access only to some of the document specified in an application;
- Deferring the grant of access to the document;
- Charging a fee for action taken or as to the amount of the fee;
- Refusing to amend or annotate a personal record.

It is immediately seen that there are decisions that are neither subject to internal review nor appeal, including transferring an application from one Ministry or agency to another and issuing a certificate to the effect that a document is an exempt document, under section 23.

Internal Review

The review process is called “Internal Review” in the Act. The procedures with respect to the internal review are set out in sections 30 and 31 of the Act. Below is a brief description of areas relevant to internal review:

Subject Matter: The relevant decisions that can be reviewed are listed above. In addition, the failure to make any decision, to just ignore the application, is deemed a refusal after the time limits have passed and can be the subject of an internal review.

Condition: Internal review is only possible where the initial appealable decision was taken by a person other than the responsible Minister, a Permanent Secretary or the principal officer of the public authority concerned. If one of these more senior officers made the initial decision, then the applicant must go directly to the Appeals Tribunal, rather than internal review.

Review Official: On internal review, the responsible Minister is the review official with respect to documents affecting security, defence or international relations, Cabinet documents, documents relating to law enforcement, subject to legal privilege and affecting national economy. In any other case, the review official is the Permanent Secretary in the relevant Ministry or the principal officer of the public authority.

Powers of the Review Official: The official who conducts the review may take any decision in relation to the application which could have been taken on an original application, and must make that decision within 30 days of receipt of the application for the review. The review official can transfer the application to another Ministry or public authority, grant access to all or some of the documents requested or uphold the refusal.

Timeframe: The application for an internal review must be made within 30 days of the date of notification of the decision on the initial application (which by law must occur within 30 days, with the possibility of a maximum 30 day extension for reasonable cause)



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or where no notification is given within 30 days of the expiration of the period allowed for the decision.

Appeals

Section 32 and the Second Schedule to the Act set out the legislative framework for appeals to the Appeal Tribunal under the Access to Information Act. There are five members of the Tribunal appointed by the Governor-General after consultation with the Prime Minister and the Leader of the Opposition. The Governor-General appoints the chairman. The members hold office for a period of five years and are eligible for re-appointment.

An appeal can be lodged:

- Against a decision taken on internal review;
- Where no internal review has been conducted after a period of thirty days from receipt of the application for internal review;
- Where there has been a refusal to grant access to a document or some of the documents requested;
- Where there has been a deference of the grant of access;
- Where there has been a refusal to make an amendment or annotation of a personal record.

Timeframe: An appeal must be lodged within 60 days of the decision, whether on internal review or otherwise, or within 60 days of the expiration of the period required by the Act where no notification has been given on the initial application. The Tribunal is given the power under section 32 (4) to extend the period for lodging an appeal, where it is satisfied that the appellant's delay is not unreasonable.

Procedures (Pre-hearing): The Second Schedule of the Act gives the Tribunal the power to regulate its own proceedings. Rules cited as the Access to Information (Appeal Tribunal) Rules were gazetted on August 11, 2005.

These rules have set out the mechanisms for requesting an appeal and preparing for the hearing before the Appeals Tribunal. For example, the

appeal must be made to the Appeals Tribunal using a specific form, which in practice is very unfriendly and complex for an ordinary citizen to complete. *It asks the appellant to set out challenges to the findings of fact and of law, the grounds of appeal, to list relevant documents and correspondence and the names of witnesses.* Several of the submissions to the Parliamentary Review Committee addressed this issue. Their suggestions will be considered in the section on Problems, Challenges and Reforms.

Upon receipt of a notice of appeal, the Appeal Tribunal shall acknowledge receipt of the appeal and issue copies of the notice to the public authority whose decision is being appealed. The Tribunal is to fix a date, time and place for the hearing of the appeal and serve the notice of hearing on the parties not less than fourteen days before the date of the hearing.

Lists of documents on which a party intends to rely are to be provided at least ten days before the date of the hearing and each party may inspect the documents included in the other party's list. The Tribunal can also require the parties to supply any additional information or documents relating to the appeal the Tribunal thinks fit.

The appellant is entitled to appear in person and/or to be represented at the hearing by an attorney at-law. Witnesses can be called at the hearing, and affidavit evidence is permissible. The evidence given by affidavit can relate to the whole case or to any particular fact or facts. Any affidavit to be relied on must be delivered to the Tribunal not less than ten days before the hearing date. Any party may require the attendance of the person who has sworn the affidavit for the purpose of giving oral evidence, unless the Tribunal is satisfied that the evidence in the affidavit is purely formal and requiring the attendance of the person is only made to cause delay in the proceedings.

The Tribunal retains any documents and affidavits delivered to it with respect to the hearing of the appeal. Rule 22 also gives the Tribunal the power to order any documents used at a hearing to be retained by it "until the time for appealing the decision has



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expired". This is an extraordinary statement in Rule 22, as there is no further appeal procedure in the Act and judicial review is not mentioned.

The Tribunal also is empowered to adjourn a hearing and set another date on its own motion or on the application of any party. Unusually, there is a reference related to costs in the terms on the adjournment. Hopefully, costs will not be awarded against a citizen who is appealing the refusal of access.

Rule 23 allows for the consolidation of appeals in the following circumstances:

- a. the facts are similar in two or more appeals;
- b. it is convenient for the parties;
- c. there is a common issue in the appeals of law or fact;
- d. no prejudice will result; and
- e. notice is given to all parties.

An appellant may at any time while an appeal is pending withdraw the appeal by sending a Notice of Withdrawal, signed by the appellant, to the Tribunal. The Tribunal then is to inform the other parties of the withdrawal.

The Hearings: The hearings are to be held in public at any place and time, as determined by the Tribunal. The frequency and regularity of the hearings has caused some concern and the Tribunal has been urged to set monthly sittings that appellants and their attorneys can better plan and prepare for the hearings.

At the hearing of the appeal, the Tribunal is to enquire into the grounds of appeal and may:

- a. hear evidence from the parties and any witness as well as consider an affidavit evidence;
- b. seek the advice of any person who, in the opinion of the Tribunal is able to assist it in its deliberations.

There have been very few appeal hearings to date, only three are known by this author, from which to draw any precedents concerning the actual procedure

at the hearings. The experience this far has been that the hearing resembles a court setting and the procedures follow those of a formal court.

Notes are to be taken of the proceedings before the Tribunal. Rule 18 states that any party who has appeared in the proceedings shall be entitled to inspect the original or a copy of the notes of the proceedings. While this is limited to a party who has appeared, hopefully a party to an appeal who has not appeared will also be entitled to inspect and receive a copy of the Notes. The Notes are a document to which access should be granted under the Act. Rule 18 also states that a copy of the Notes can be received on payment of such charges as may, from time to time, be prescribed under the Act for the reproduction of official documents.

The Rules give the Tribunal the power upon proof of service, to proceed in the absence of any or all of the parties to the appeal. The party or parties who were absent can apply to the Tribunal to reconsider the appeal provided the application is made within one month of the decision of the Tribunal. On the hearing of this application, the Tribunal may grant the application with conditions, including costs, make any decision it could have made on the hearing or amend, vary, add to or reverse its findings or order originally made. While the time period of one month may seem restrictive, the Tribunal has the power under Rule 21, to extend the time for doing anything under the Rules.

Rule 24 gives the Tribunal the power to dismiss an appeal if it decides that it is unfounded and frivolous or vexatious. In making its decision under this Rule, the Tribunal is to consider the nature of any injustice or abuse of administrative process. It is to consider the nature, content, language or subject matter of the request or appeal, any other requests or appeals by the same party and other verbal or written communications by the party to the agency or anyone in the agency. The necessity for this rule is doubtful and the use of it must be closely monitored.

On the hearing of an appeal, section 32 (5) places the onus of proving that the decision by the public



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authority was justified or that a decision adverse to the appellant should be made by the Tribunal on the public authority. In other words, the burden of proof lies with the government.

Powers of the Tribunal: Some of the powers of the Appeal Tribunal have already been set out. This section concerns the decisions of the Tribunal. The Act conveys the power to the Tribunal to make any decision which could have been made on the original application. However, the powers are limited in that the Tribunal cannot nullify a conclusive certificate issued by the Prime Minister or a responsible minister that a document is exempt from release.

The Tribunal also is given powers to call for and inspect an exempt document, presumably including documents exempted by Ministerial certificate. The sub-section mandates the Tribunal to take steps to ensure that the document is only inspected by members of its staff. This sub-section is curious in at least two respects: it is unclear why the Tribunal would be looking at the exempt document at all as it has no power to nullify the issuance of the certificate exempting it and it presupposes that the Tribunal has a staff.

Decisions: The decisions of the Tribunal are to be in writing and published in the Gazette or in a daily newspaper. The parties to the appeal are to be sent a copy of the written decision not later than 21 days after the decision.

REVIEW AND APPEALS TO DATE

The number of internal reviews that have taken place to date under the Act are unknown, but it is estimated that there have been many. The appeals lodged with the Tribunal in nearly every case would be taken after an internal review had failed to secure access to the document requested.

As of May 2006, the Appeal Tribunal has heard and determined three appeals. Several other appeals are pending, so many in fact that the Tribunal is currently setting dates for August and September for the hearings of these appeals.

The Appeal Tribunal met in October 2005 to hear the first three appeals, and have not heard any appeals since. The appellant in all three cases was Susan Goffe and the respondents were The Office of the Prime Minister and the Bank of Jamaica (two appeals). The decisions of the Tribunal were handed down in one document dated December 7, 2005.

In the appeal against The Office of The Prime

Minister, the appellant had requested the accounts of the final costs for the government delegation to a conference in Malaysia in 2003. The request had been made to the Ministry of Finance who transferred it to the Office of the Prime Minister. That Office informed the appellant

that compliance with the request required extensive research from other Ministries, two of which had not yet been brought under the Act and denied access to any documents.

The duty of a public authority in a situation where the information sought is not to be found in any one document in the possession of the particular Ministry but in a number of documents and in a number of Ministries was considered. The Tribunal held that there was no duty, obligation or legal power on a ministry to extract documents from another ministry and to ensure that those documents were complete and correct so as to pass on to the applicant the information requested, but that there was a duty to send any documents in that ministry's possession to the applicant and to transfer or pass on the request to the other ministries.

The Act conveys the power to the Tribunal to make any decision which could have been made on the original application. However, the powers are limited in that the Tribunal cannot nullify a conclusive certificate ...



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Concessions were made on both sides during the hearing and the Tribunal treated the appeal as having been settled. It ordered the respondent to provide access to such documentary information as it had in its possession and to transfer the request to the other ministries. The appellant was granted liberty to refer the matter back to the tribunal if she was not fully provided with all the relevant documents.

The second appeal, and the first one brought against the Bank of Jamaica, centered around the issue as to whether a public authority in receipt of a request while not yet under the Act was obliged to answer the request once it was brought under the Act. The Tribunal held that institutions could not be retroactively liable for the non-fulfillment of obligations arising prior to their being brought under the Act. This situation can not occur again as all ministries and agencies are now under the Act, but was important in providing guidance for other pending requests.

The final appeal arose from a request for the minutes of the meeting of the Board of Directors of the Bank of Jamaica at which a decision was taken to purchase a property. The Bank sent the appellant a document headed “Extract from Minutes of Board Meeting...” with a subhead relating to administrative matters and an extract of the minutes from that section which was obviously not the whole of the section.

The appellant requested an internal review and the Bank responded reaffirming its position that it had complied with the request. The appellant appealed. The Bank argued that the minutes of Board Meetings primarily dealt with matters which were expressly exempted under the Act and that it had complied with the request. Counsel for the appellant argued that minutes of the Bank’s Board meetings were not expressly exempted and the law specifically set out the way in which exempted matters should be dealt with- access should be granted to the document with the exempt matter deleted therefrom. He also argued that it was not for the respondent to determine the limits of what could be considered relevant to the request.

The Tribunal in allowing the appeal, and directing the Bank to deliver a copy of the minutes to the appellant, held:

- The law gives the public the right to see documents that are not specifically exempted and to obtain information that does not come within what the Act has declared to be exempted matter;
- As the appellant is not required to give any reason for requesting access to a document, the fact that the request refers to a specific item in a document does not limit the public authority’s obligation to one of disclosing only those portions of the document that specifically refer thereto, the public authority must disclose all of the document;
- The public authority is however permitted to delete all the matters in a document which are exempted by the Act or any other legislation.

These appeals have set precedents that can be used as guidance for public authorities as well as for other appeals.

JUDICIAL REVIEW

Judicial review allows the Court to supervise the activities of public bodies, including appeal tribunals. It brings to the judicial forum the consideration of the exercise of power and decision-making within Executive bodies and public authorities and enjoys an increasing prominence in the Jamaican legal system.

The decisions of the Appeals Tribunal can be the subject of judicial review, as may the decisions to exempt certain documents and the application of the public interest test under the Act. The principles which apply to judicial review are applicable including natural justice, illegality, unreasonableness and procedural impropriety.

The Bank of Jamaica had indicated that it would be taking the decision of the Tribunal concerning the disclosure of the Minutes of the Meeting of its Board



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to the court for judicial review. However, the time to apply for leave has expired and there has been no information to confirm that the application has in fact been filed.

The modern process of judicial review is set out in Part 56 of the Civil Procedure Rules—Administrative Law—and is a two-staged process with time limitations that must be carefully followed. The following is a concise summary of the basics in the Rules:

Who May Apply: Anyone who has a sufficient interest in the subject matter of the application, such as:

- One who has been adversely affected by the decision which is the subject of the application
- Any body or group acting on behalf of a person who could apply because they were adversely affected by the decision
- Any body or group representing members who may have been adversely affected by the decision
- Any body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application
- Any body or group who has the constitutional right to be heard

Time Limits: A person wishing to apply for judicial review must first obtain leave by filing an application promptly, but in any case must do so within three months from the date when grounds for the application first arose. The court can extend this time period if good cause is shown. Leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave.

Relief: The court may award any of the following:

- Certiorari, for quashing unlawful acts;
- Prohibition, for prohibiting unlawful acts;
- Mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case;
- An injunction;

- Damages;
- Restitution;
- An order for return of property.

PROBLEMS, CHALLENGES, AND PROPOSED REFORMS

In early 2006, Parliament established a joint select committee to review the Act. Submissions have been made to this Committee by several organizations and agencies. Many of the problems and challenges concerning the implementation and enforcement of the Act have been enumerated in these submissions.

Many of the submissions focused on the functioning of the Appeal Tribunal. For instance, neither the Act nor the Rules reference the establishment of a Secretariat for the Tribunal. Presently the secretariat for the Tribunal is housed in the Office of the Prime Minister where the current ATI Unit is also operating. This vacancy has resulted in delays in the acknowledgement of the receipt of appeals as well as delays in the hearing of appeals. The submissions from Jamaica Environment Trust outlined their experience with appeals they lodged, including examples of the inefficiency caused by the lack of a properly resourced and functioning secretariat for the Tribunal. Also there are concerns about the “appearance” of bias when the secretariat is so close to a respondent (ie both in the Office of the Prime Minister), as has already happened in one of the appeals referred to above. The Tribunal needs to assure its independence by having its own secretariat outside of any government ministry.

The ATI Act is designed to make it as easy as possible for ordinary citizens to request documents. The Appeal process should similarly be designed to make it as easy as possible for citizens to ask the Tribunal to consider a refusal of their request, guided by the five principles mentioned above. The Rules as presently promulgated are neither effective nor user-friendly.

For example, the mandatory forms which must be used to request an appeal are very complex for an



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ordinary citizen to complete and can lead to severely limited access to the Tribunal. To ask the appellant to set out the challenges to findings of fact and of the law and grounds of appeal are too legalistic for the average person. A friendlier Notice is more within the objectives of the Act.

The Notice need only contain the following information:

- Name and address of the appellant;
- An address for service of notices and other documents on the appellant;
- The name and address of the public authority to whom the request was made;
- Particulars of the requested document(s);
- Particulars of the decision by the relevant public authority;
- Particulars of the decision on internal review;
- A list of relevant documents or correspondence (if any);
- Any request for an early hearing of the appeal and the reasons for that request (if needed);
- Name and address of any legal representative.

There is no need for the following to be in the Notice of Appeal:

- The legal basis for the appeal;
- Specification of the power which the Tribunal is being asked to exercise.

Grounds of Appeal: The onus is on the Public Authority to prove that the relevant decision was justified.

In short, an appeal should be received and heard once it is in writing, even if not in the prescribed form.

There should be a time frame for acknowledgement of the receipt of the notice of appeal, such as 2 to 3 days. And again a time frame is suggested for the setting of a date for the appeal, such as within 14 days. At present, the Tribunal does not appear to be sitting on any regular basis. Setting dates for the hearing of appeals in a timely manner with some

measure of predictability requires the Tribunal to sit on specific dates per month, for example every second and fourth Tuesday.

Rule 16 states that the Tribunal's decision shall be in writing and should be sent to the parties not later than 21 days after the decision, but fails to set a time limit for the decision after the hearing of the appeal. In The Right to

Information Act, 2005 in India, section 19 (6) states that an appeal "shall be disposed of within thirty dates of the receipt of the appeal or within such extended period not exceeding a total of forty-five days from the date of filing thereof." There are no reasons why such a timetable can not be set in Jamaica as well.

The Rules state that the decisions of the Tribunal are to be published in the Gazette or in a daily newspaper circulating in Jamaica. The decisions in the appeals that were heard and determined in December, 2005 have still not been published in the Gazette or in a daily newspaper. This should also be subject to a time limit so that the public, and public authorities, can know what has been decided by the Tribunal.

Rule 7 requests lists of documents on which each party proposes to rely when this has already been asked for on the Notice. If the Notice were made

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friendlier as suggested, then maybe this Rule would be necessary. The exchange of documents and copies to be provided could be much deal with much easier by the Secretariat of the Tribunal.

Based on the Rules, the Tribunal may hear an appeal in the absence of any or all of the parties. This could deny a citizen the right to present his case to the Tribunal, and as such should be tightened up with provisions for service, time for service and provisions for the Secretariat to contact appellants and public authorities before hearings.

The issue of costs is another matter which merits further consideration. As discussed above, the request for re-hearing could attract costs and the section regarding adjournments also speaks of costs. The Civil Procedure Rules for the Supreme Court at Rule 56:15 (5) states : “ the general rule is that no order for costs may be made against an applicant for an administrative order unless the court considered that the applicant has acted unreasonably in making the application or in the conduct of the application.” Costs are therefore inappropriate in these Rules as well.

Rule 18 speaks to the right of parties to inspect and obtain a copy of the notes of appeal, but makes no reference to the public at large having a right to request a copy of the notes. This matter came to light on a request made for the notes by a non-party applicant; the applicant was told she was not entitled to them. It can not be in the spirit of the ATI Act to refuse access to these notes.

The Rules provide the Tribunal the power to dismiss an appeal when they consider the appeal frivolous, but does not give the appellant a right to be heard before his appeal is dismissed. In accordance with the rules of natural justice, this should be amended.

Moreover, the Rules fail to deal with several matters of importance:

- Mediation;
- Directions;
- Service of documents by fax; and
- Issues related to transfer of requests.

Mediation is an opportunity for an applicant and a public authority to try to negotiate a settlement of their dispute with a neutral third party's assistance. The mediator is trained not to tell the parties what to do or decide the case, but to help the parties to arrive at an agreement. If an agreement is reached, the parties will sign a written agreement and the appeal can be withdrawn. If no agreement is reached after mediation, the appeal can proceed. Even if an agreement is not reached, mediation often narrows the issues for hearing by the Tribunal. Mediation can be mandatory or the Chairperson of the Tribunal can be given the power to decide that the case should go to mediation before the hearing.

Powers should be given to the Tribunal at the first hearing of an appeal to give directions that will facilitate the proper conduct of the hearing; such as exchange of documents, number of witnesses to be called, admission of facts and determination of the issues that are to be decided by the Tribunal.

Technology has provided an easy, sure and inexpensive way to service documents – facsimile. This method of service should be allowed in the Rules.

No where in the three sections dealing with Internal Review and Appeals is the right to an internal review or an appeal allowed where a public authority transfers an application. In some cases, an applicant has a belief or actual knowledge that the document he seeks access to, is in fact with the authority to whom the application has been addressed and the transfer therefore amounts to a refusal. In other cases the transfer has been made to a public authority that does not hold the document. The applicant presently has no right to contest the transfer to another authority nor to which other authority. This should be included to enhance the enforcement of the Act.

Finally, the appointment of the members of the Tribunal, limitations on their terms of office and the employment of a least one permanent member are also matters of concern that must be addressed.



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CONCLUSION

Access to information legislation is essential in the establishment of a framework of open governance. Eternal vigilance is the price we must pay. The right to access to information must be enforced. The

law needs to have teeth, in order to take bites - big bites - out the bureaucratic culture of secrecy. But at the same time the enforcement mechanisms should be designed with the user in mind, so that all persons have equal access to justice and information.



THE RIGHT TO ENVIRONMENTAL INFORMATION

CAROLE EXCELL

“Degraded forests, polluted rivers, and dying coral reefs around the world frequently reflect the flawed process of environmental decision-making, which lacks transparency, inclusiveness, and accountable decision-making over natural resources . . . Plans to exploit natural resources without the input of local inhabitants all too often enrich just a few but dispossess the larger community and disrupt ecosystems.”

World Resources 2002-2004: Decisions for the Earth¹

A right to access environmental information is a central tool to promote democratic accountability and transparency in decision-making on the environment. Without the recognition and implementation of this right in domestic law, citizens will have very few mechanisms to understand and participate meaningfully in government determinations that affect the environment, their communities and their lives. The development of specific legal rules that govern access to environmental information is significant as frequently there is no voice for the quality of the environment in dialogues where the government is constrained or pressured to act in the interest of economic short term gains. It may be argued that environmental protection if seen as a co-operative process between the State and its citizens requires even greater public participation, consultation, dialogue and access to information than any other area of governance.

Development of a right to environmental information has emerged in a number of International and regional legally binding agreements foremost of which is the European Directive on Freedom of Access to Environmental Information (1990), the Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters in the European Commission. In a number of developing countries in the Caribbean the introduction of laws to increase

transparency and prevent corruption have included a general right of access to information, which has resulted in increased access to environmental information with corresponding benefits.

DEVELOPMENT OF A RIGHT TO ENVIRONMENTAL INFORMATION IN INTERNATIONAL LAW

The development of a right to access environmental information in international law has been linked to the increasing recognition to person's fundamental right to a clean and healthy environment. The right to access environmental information goes to the heart of a State's obligation to make responsible decisions that promote sustainable development and create a healthy environment “of a quality that permits a life of dignity and well-being.”² Without a right to environmental information, the right to a healthy environment, the proper utilisation of natural resources and provision of minimum standards of environmental health cannot be monitored, or enforced by an informed citizenry.

¹ World Resources Institute 2002-2004 : Decisions for the Earth: Balance, voice and power 2003, ISBN: 1-56973-532-8 United Nations Development Programme, United Nations Environment Programme, World Bank, World Resources Institute Commentary by Mark Malloch Brown, Klaus Toepfer, Ian Johnson, and Jonathan Lash.

² Aarhus Convention Preamble.



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The right to access environmental information is new in the development of international norms. This right has been described as a part of the “growing inter-connectedness between the fields of human rights and environmental protection”³ where procedural rights are recognised to promote environmental protection, and its genesis traced to the recognition of States’ obligations to exchange scientific information and as a prerequisite to notify States of accidents and emergencies and hazardous activities.⁴ The obligation has also manifested itself as a duty of the State to consult the public as a precondition to public participation in environment and development decisions and provide information on activities or measures that adversely affect the environment (environmental impact assessments).⁵ The authors Sunkin, Wight, Ong (2001) see the development of the right to access environmental information as part of an evolving legal regime between States, and with States and their citizenry.⁶ They articulate these developments as States having a duty to inform and consult citizens and allow their participation in local environmental decision-making and the recognition of the duty of due diligence in rules related to State responsibility and liability for transboundary environmental damage with requirements for notification and consultation. Determining whether the right to access environmental information may be said to be a customary right under international law will depend on the continued evolution of state practice and acceptance of this right by States.⁷

The 1972 Stockholm Declaration, Agenda 21 and the 1992 Rio Declaration articulate the growth and scope of the right to access environmental information. They also speak to its functionality in the

achievement of sustainable development.⁸ Principle 2 of the Stockholm Declaration is one of the first declarations by the international community of the need to provide access to information through facilitation of exchange of information that encourages “the free flow of up to date scientific information and transfer of experience” amongst states. Agenda 21 Chapter 40 Section II speaks to this perspective on the right to environmental information in (s.23) by stating, “individuals, groups and organisations should have access to information relevant to environment and development held by public authorities.” Principle 10 of the Rio Declaration on

“At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.”

Environment and Development crystallized this principle by providing for a mandatory right of access “At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.” Finally the right to access information is also incorporated in Article 12 of the IUCN Draft Covenant and Draft Principles on Human Rights and Environment in terms of a human right⁹ and the Draft Principles on Human Rights and

3 Meeting Of Experts On Human Rights And The Environment 14-15 January 2002 (UN- OHCHR) note 4.

4 e.g. Seveso accident and Chernobyl Incident.

5 The World Charter for Nature 1982.

6 see fn8, above.

7 Sunkin, Maurice, Ong David, Wight Robert Source Book on Environmental Law, Cavendish publishing 2001.

8 The sustainable development concept is described in many ways, but rests on the interweaving of economic, environmental and social considerations on equal footing and bearing in mind the principles of inter and intra-generational equity in decision making on all three.

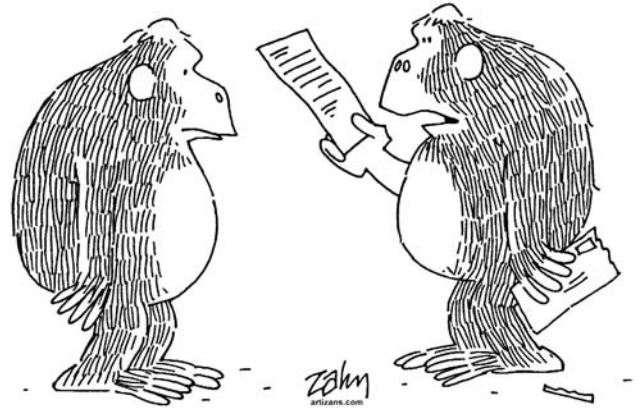
9 IUCN Environmental Policy and Law Paper No. 31 Rev.2 (2004)



Environment. These outline the principle that “All persons have the right to information concerning the environment. This includes information, howsoever compiled, on actions and courses of conduct that may affect the environment and information necessary to enable effective public participation in environmental decision-making. The information shall be timely, clear, understandable and available without undue financial burden to the applicant ... all persons have the right to hold and express opinions and to disseminate ideas and information regarding the environment.”¹⁰

In addition to the myriad of declarations described above, there also currently exist a number of treaty rights from which environmental rights are derived. (Birnie and Boyle (1992) 192). Together, these legally binding conventions and regional agreements provide concrete provisions relating to the obligation to provide access to environmental information that have shown support for the development of a holistic procedural right to environmental information at international law. These include, to name a few, the ECE Convention on Environmental Impact Assessment in a Transboundary Context (ESPOO Convention 1990), Ospar Convention 1992, The Convention for the Protection of the Marine Environment of North East Atlantic (Lugano Convention 1993), the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (September 10, 1998) and Convention on Persistent Organic Pollutants (Stockholm, May 22, 2001). In each instrument from as early as 1990 the existence of an obligation to provide access is framed in a different way. Some of the most prevalent features are obligations on the state to:

1. Respond to requests from natural or legal persons, with no interest needing to be proven for provision of access
2. Respond within a specific time frame
3. Disseminate information



"It's from the government...we'll have to file an environmental-impact statement before we can evolve."

4. Ground a refusal on an exception and provide a reason for refusal to the applicant.

In none of the Conventions for which this obligation is espoused is there provided an absolute right to access environmental information and exemptions are provided under the Conventions both in mandatory and discretionary terms. It is clear that this obligation has not developed in a linear manner and provisions for access have varied in scope.

THE AARHUS CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters is recognised as the most comprehensive international environmental law agreement that outlines the right to environmental information. It has been described as “a giant step forward in the development of international law.”¹¹ The Preamble recog-

¹⁰ (16 May 1994) International Program Sierra Club Legal Defense Fund.

¹¹ The Aarhus Convention: an implementation Guide UNEP — <http://www.unece.org/env/pp/acig.pdf>



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nizes the intricate role of each individual in the protection of the environment and their role to ensure its improvement by providing that “every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations... to be able to assert the right and observe the duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters.”

The Convention was developed under the auspices of the Economic Commission for Europe and entered into force in October 2001. Members of the ECE consist of all of Europe, USA, Canada, Central Asia and republics of the former Soviet Union. Currently it has thirty-nine (39) parties, with provisions to allow others to accede.

The objectives of the Convention are “the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well being through the guarantee of the right of access to information, public participation in decision making and access to justice in environmental matters.” Parties must also provide information that facilitates requests by providing the type and scope of information held and the procedure to obtain it. The negotiators of the Convention were far sighted as the Convention mandates broader considerations for the provision of information in national states through active information dissemination to the public including information on controversial issues like genetically modified organisms.

Operationalising the Convention

The Convention includes a binding obligation on parties to not only respond to requests but to collect and publicly disseminate information (Article 4-5). Parties have to prepare a report on the state of the environment within a defined period and disseminate legislative and other policy documents and establish domestic provisions that allow the public to obtain

information on proposed and existing activities, which could significantly affect the environment. The Convention requires the parties to keep and update such information through “an adequate flow” of information. This includes making information available by electronic databases, and explanatory materials. Information on the state of the environment must be provided and legislation, international treaties and other significant documents should be disseminated. In addition, each party is required to “take steps to progressively establish” a system of pollution inventories or registers on a structured computerized and publicly accessible database.

The Convention applies both to public authorities having functions related to the environment and any other natural or legal persons having such public responsibilities under the control of such body or person at a national, regional or other level. The Convention sets a limit of one month for a response to an inquiry and no interest has to be proven to gain access to the information. The ‘public concerned’ is defined as the public effected or likely to be effected or having an interest in the environmental decision-making. Non Governmental Organisations are also deemed to have an interest. Any refusal to provide information must be in writing with reasons provided for the refusal. Reasonable fees may be charged for giving access to information.

Convention Framework

The right of access to environmental information is conferred in article 4 and public authorities are required to respond to a request for environmental information within the framework of national legislation without an interest having to be stated within a specific time frame subject to the exemptions. Article 9 requires parties through national legislation to facilitate the right of the public to have access to a review procedure once information has been refused either before a court of law or other independent body. This article also creates practical requirements including the need for Parties to ensure that there is an expeditious procedure established by law to review decisions



taken by public bodies and that the review is inexpensive. The obligation to provide access is not absolute but subject to a number of exemptions.

The Convention creates eleven grounds for a public authority to refuse a grant of information. The exemptions are written in more specific language than in a number of other earlier sectoral environmental agreements. Qualifiers are included which limit the application of the exemptions, including consideration of the public interest in disclosure of the information particularly in relation to emissions affecting the environment. Commendably there also are articles governing severance, where exempt information can be deleted and non-exempt released and each State is allowed to provide broader rights of access to information than those contained in the Convention.

The Convention is a progressive development at international law, as the objective and content of the Aarhus Convention clearly provides the mechanisms for development of a right within national jurisdictions.

A RIGHT TO ENVIRONMENTAL INFORMATION IN JAMAICA

Since the early 1960s, the Jamaican Government has created a number of pieces of new environmental legislation to ensure the proper utilisation of Jamaica's natural resources. Legislation has created statutory boards and public officials with direct responsibility for the management, monitoring and protection of the environment. Chief among these includes Natural Resources Conservation Authority, The Town and Country Planning Authority of Jamaica, the Conservator of Forests, the Director of Fisheries, the Water Resources Authority, and the Environmental Health Department. A number of governmental agencies that are not environmental agencies are also of central importance to sustainable development decision-making including the utility companies that regulate the provision of water, sanitation and roads and port development and shipping e.g. the National Water Commission and the Port

Authority of Jamaica, and the agencies that promote development including Jamaica Promotions Corporation (JAMPRO) and the Urban Development Commission.

These statutory bodies, departments and officials have wide ranging discretion and powers to make decisions to protect or seriously impact the environment, review development proposals, require the submission of environmental impact assessments, control air, land and water quality and manage natural resources. Few of the statutory instruments that exist however contain adequate legal provisions that allow for, and promote public participation or consultation to the public before decisions are made or prior to the initiation of new legislation or policies¹² or that give the public the power to appeal the decisions of these authorities. Legislative provisions that allow access to environmental information are also limited in the most part to the provision of information through registers. The Natural Resources Conservation Authority Regulations 1996 contains an example and provides for access to a register of permits for prescribed categories of development. This register should provide access to all documents central to decision making on environmental permits. Although existing in the law, this has not created access to a user-friendly method of determining how environmental decisions are made and instead allows access to some documents on working files that are filed in a registry without reference to any standards of transparency in the decision making process. Without the information on policy determinations, the public is limited in any meaningful participation. A key criticism of environmental legislation in Jamaica also is that it does not include specific annual reporting requirements on the state or

¹² A number of policies have been subject to national public consultation, including the Beach Control Policy, Coastal Zone Policy, Watershed Policy, and Biodiversity Strategy and Action Plan. However this is not a specific legal requirement to consult the public and supply background documents and scientific studies that are the basis of these decisions or for any person to monitor the implementation of these policies and report results to the public.



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quality of the environment that has to be produced on an annual basis that is user friendly and easily available to the public.¹³

PROVISION OF A LEGAL MECHANISM TO PROMOTE TRANSPARENCY AND ACCOUNTABILITY

Legal frameworks governing access to information at the national level have been founded in many jurisdictions prior to the recognition of the right to environmental information at international law and in customary rules. For example, the right of public access to official information in Sweden has continued since 1766 and there are now over 60 countries with national access to information legislation.

Jamaica may be counted as one of the countries with a comprehensive access to information law—the Access to Information Act (ATI) 2002, that was brought into force in January 2004. This Act does not limit access to environmental information but rather sees access to information as a broad human right in Jamaica allowing for requests related to how decisions are made at a national and local level, including in relation to the environment. This may include information on how public and international funds are spent on the environment in Jamaica, how public authorities make regulatory, enforcement and permitting decisions and the manner in which priorities and programs are implemented.

Terms of the Act

The Access to Information Act 2002 has been applied to all public authorities within the Jamaican Government since July 5, 2005. All environmental agencies or agencies holding environmental information are currently under its jurisdiction. The Act confers a right to persons to access public documents. The objects of the legislation are to create a right to information that reinforces the system of constitutional democracy by promoting transparency, accountability and efforts to ensure public participation in national decision-making. The Act allows all

persons to have access to documents from public authorities¹⁴ requested in a number of different forms whether it is a copy of the document or in other electronic or visual and oral forms.¹⁵

In addition, the ATI Act calls for automatic publication of certain official documents. Unfortunately, to date this publication scheme has not been fully implemented. However, once in place, these publication schemes will likely provide insights as to how decisions are made that affect the environment and the government priorities in spending.

The significance of this new right to information is slowly growing in the environmental movement, as civil society realizes the benefits that this tool can offer. A chasm exists in Jamaica between the citizenry and the arms of government responsible for carrying out its functions of policy development, permit and licensing and enforcement of the laws governing human health, environmental protection and planning. Citizens in general do not know what kind of significant environmental and development decisions are being made or how to get involved in the decision-making process. The ATI Act has presented an opportunity to change the current landscape in which decisions are made in the field of the environment.

Significance for Environmentalists

For environmentalists, this has opened up the possibility to truly understand the manner in which political authority manifests itself in the management of natural resources. It allows scrutiny of the process that gives effect to national and local policies that affect

13 In Jamaica there has been published the State of the Environment Report, however this is published at the discretion of the public authorities as there is no legal requirement for it to be published or tabled in Parliament on an annual or bi-annual basis. The last Report was for 2001 and a new report is overdue. This is contrasted with the Forestry Act, which contains a provision to publish a Management Plan and update it with a specific time frame.

14 Public Authorities have been defined in the Act (s.3) to include “Ministry, Department, executive Agency or other agency of Government, a statutory body or authority, parish council, government company that the government holds more than 50% shares.”

15 Document in the interpretation section of the Act (s.3) includes any map, plan, graph, drawing, photograph, disc or electronic device, tape, sound track or film.



the environment and adds the element of accountability and public participation into decision-making.

Environmental NGOs in Jamaica have already begun to use this new right to make a case for change in environmental policies and practices. Requests have been made in relation to: (1) A controversial hotel application for location in pristine coastal areas that was a proposed protected area site, (2) information on an environmental levy on plastic bottles that has failed to be implemented in two years, (3) information on implementation and enforcement of fishing closed seasons, (4) information on air quality testing on the expansion of a bauxite plant, and (5) information on the proper regulation and maintenance of sewage treatment plants by the Government.

The right to access information is not absolute. In the first two years of the implementation of the Act there have been a number of requests for environmental information which have been refused as falling within one of the statutory exemptions, including on the basis that the information relates to the opinions, advice or recommendations prepared for Cabinet or a Cabinet Committee (which specifically excludes documents containing material of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature).¹⁶ There also has been deferment of access; but the greatest challenge has been the lack of response within the time period specified under the Act. And in one request, which should have been subject to the public interest test, the applicant was denied information without explanation.

Another challenge to access information in the environmental sector has been the state of readiness of the environmental agencies to implement the Act. This included the state of the Ministry of Land and Environment's registry and record management

practices, the provision of assistance on requests which has sometimes been refused, and the changing relationship between civil society and government when government agencies are challenged on the manner in which they make decisions through the use of their own records.¹⁷

It is not yet known whether the Act will be implemented in environmental agencies in the spirit of openness enshrined in the Access to Information Acts objectives and in line with International soft law instruments such as Agenda 21 and the Rio Declaration. The test will be the response to individual requests for information but also the general openness of individual

It allows scrutiny of the process that gives effect to national and local policies that affect the environment and adds the element of accountability and public participation into decision-making.

agencies holding relevant environmental information to provide information to the public in different forms through their publication schemes, the issuance of reports on the state of the environment, and general provision of information on decision-making including minutes of meetings and documentation relating to new policies and programs.¹⁸

Nevertheless, under the ATI Act, a great amount of environmental has been obtained over the past two years. For example, there was information released about the cause of death of dolphins held in captivity and information on the enforcement of the fishing season. Access to information has enabled ordinary individuals and environmental NGOs to more

¹⁶ Request for information on the Government environmental levy was refused on the ground that all the documents are being prepared to be submitted to Parliament

¹⁷ The Ministry of Environment had to develop a registry and hire an access officer to respond to requests under the Act.

¹⁸ s4 of the Access to Information Act requires the provision of a Publication Scheme that must contain a statement of the documents that are used by the Authority in making decisions or recommendations and that affect individuals rights, privileges or benefits or to obligations penalties or detriments



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effectively participate in national and local decision-making on environmental issues in Jamaica. A new culture of active citizen participation and greater self-governance is being created through increased access to information.

CONCLUSION

At the international level rules governing access to environmental information are widespread and accepted as a method to ensure public participation in the process of implementing of domestic obligations. The requirement to exchange scientific information, consult with members of the public in the implementation of obligations or provide notification of accidents or shipments of hazardous material has developed into rules that ensure the right of the public to access a broad spectrum of environmental information. Minimum standards for the provision of access have been developed for implementation by international organizations and in international fora. However, explicit recognition in a binding global agreement of the right to access environmental information is still needed, which can only be furthered by the growing recognition of the link

between human rights and the environment and appropriate legal regimes in national jurisdictions must continue to advance.

Provisions on access to environmental information are substantive obligations and require both financial and human resources commitments to be properly implemented. Citizens have to be informed of their rights, public servants have to be trained and time has to be taken to develop proper record management practices.

Access to environment information can expand opportunities for involvement in solving environmental and public health problems at the local level; it can generate public awareness about the environment and its importance to daily lives, and ensure an appropriate response where there are disasters and emergencies. Access to information can change entrenched positions but it has no impact without the active participation of citizens. The development of a right of access to environmental information both at the national and international level can only serve to ensure a more democratic process of decision-making about our world's resources for the benefit of present and future generations.



BUDGET TRANSPARENCY AND ACCOUNTABILITY FOR THE PREVENTION AND TREATMENT OF HIV/AIDS IN MEXICO

ALICIA ATHIÉ AND TANIA SÁNCHEZ

Accountability is a necessary ingredient of democracy. In turn, accountability is built upon transparency and access to information. Transparency fosters better State-society relations, as, on one hand, it allows for government to develop the capacities needed to recognize society's needs and demands; and, on the other hand, it provides society a tool to demand fulfillment of those needs, through adequate public policies.

A basic condition of transparency is the availability and access to budget information. In order for this information to be useful, it has to be elaborated and released in a systematic, detailed and timely manner,

allowing for citizens to use it to evaluate its government's performance. Indeed, public budgets reflect the priorities set by the government, and should reflect society's wishes, since it is citizens who contribute with their taxes.

Budget transparency implies that every governmental and administrative decision, as well as the costs and resources involved in the application of such decision are accessible, clear and are communicated to the public.¹ Budget transparency sets powerful incentives for changing institutional behavior. While public servants are aware that all their decisions are open to the public eye, they become more inclined to abiding to the rule of law and to use public resources carefully; margins for the discretionary use of resources are reduced, leading to responsible and honest behavior in the exercise of public authority. In contrast, the lack of transparency in the budget process easily gives way to corruption or poor use of public resources.

During the last decades, civil society organizations have developed an important role in the analysis and monitoring of public policies and budgets, thus, participating in the decision making process and promoting the transparency and accountability in public expenditure. In particular, civil society groups have used budget analysis and monitoring to participate in the definition of national priorities, and to advocate for the interests of the most disadvantaged groups of population, seeking their consideration as a top national concern.



"Well, folks, that information has been leaked, spun, confirmed, denied and dismissed...may it rest in peace!"

1 Helena Hofbauer and Juan Antonio Cepeda, "Transparencia y rendición de cuentas" in Mauricio Merino (coord.) *Transparencia: Libros, autores e ideas*, IFAI-CIDE, México, 2005.



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This is the case of the work done by several organizations worldwide dedicated to advancing the right to health, especially for poor people. In this arena, there are particularly vulnerable groups of population, such as the poor persons living with HIV/AIDS, who do not have access to health services provided by social security or to private health services.

In Mexico, officially there are 180,000 persons living with HIV.² Since 2003, Fundar has monitored public expenditure on HIV/AIDS. With the enactment of the Mexican FOIA, the Federal Transparency and Access to Public Information Law (Transparency Law), in 2003, very useful mechanisms to access information were set in place, which in turn allowed detailed monitoring of the public resources allocated to prevent and care for the HIV/AIDS epidemic.

The case presented here describes how the right to access to information was used to advance the right to health care for persons living with HIV in Mexico, through a process that involved examining how federal government spent the budget earmarked for this matter; getting involved with patients who were not being cared for properly; making those findings public; and discussing how the policy needed to be improved with Congress and Government.

THE 2005 BUDGET FOR HIV/AIDS: FROM APPROVAL TO ALLOCATION

In comparison with the past few years, the federal budget submitted to the House of Representatives had an assigned expenditure for the prevention and treatment of HIV/AIDS with less resources allocated than those required. Initially, it seemed contradictory that the Health Department—which boasts 100% coverage of the demand for anti-retroviral (ARV) medications—would send a proposal that was clearly insufficient.

In 2004, for example, the federal budget included a request for almost one half of a million dollars for the HIV/AIDS epidemic, which was obviously not enough to provide the necessary treatment to the people living with HIV. The House of Representatives on its own initiative increased the

amount eightfold for HIV/AIDS than what was originally requested by the health department. The largest part of these funds was directed to CENSIDA, which is the entity in charge of integrating and coordinating the policies for the prevention and treatment of HIV/AIDS. 67 million pesos—more than the whole amount that was originally requested for these activities—were channeled through a group of hospitals involved, in some way, in providing services related to the disease.

In 2005, the story was similar, at least at first glance. In the proposal tabled in the House of Representatives, the amount requested was 32.7 million dollars (360 million pesos). Although this was a more reasonable amount than the previous years request, it was still not enough to guarantee 100% coverage of the ARV demand—Congress' final allocation was for 56.2 million dollars (618 million pesos).

Interestingly, this time the greatest part of these funds were not assigned to CENSIDA, but to the *Seguro Popular*, which operates through a mechanism of resource distribution, which in some cases does not reach the majority of the affected people. Moreover, the funds that were allocated to CENSIDA were 109 million pesos less than those requested in the budget project. Also, some specific research institutes and hospitals received funds, but some institutions with highly specialized services for the treatment of HIV/AIDS were left without funds.

BUDGETARY TRANSPARENCY AND THE PUBLIC POLICIES FOR THE PREVENTION AND TREATMENT OF HIV/AIDS PUT TO THE TEST

With the initial information obtained from analysis of the public documents (2005 proposed budget and approved federal budget), from March to September 2005, using the right convoked by the new Transparency Law, we sent out 233 differ-

² Casos de SIDA y PVVIH (2005) in www.salud.gob.mx



ent requests for information through the System for Information Requests (SISI) operated by the Federal Institute for the Access to Public Information (IFAI). In 15 cases we appealed the negative decisions received.

The information requests were directed mainly to the Finance Ministry and Health Ministry. The latter also received the requests we made to CENSIDA and the *Seguro Popular*. From these two Ministries, we requested information regarding the criteria used in the selection process of the institutions to receive the monies, the spending of the funds, the collaboration and coordination mechanisms used by CENSIDA with other entities, and the possibility that the “new” allocation of funds would reach the HIV/AIDS program’s goals.

We also requested information from the hospitals and institutes that had funds for HIV/AIDS, in order to disaggregate their budget and appreciate the destination of the funds. With this information, we carried out a broad public campaign to inform the patients of these institutions and people living with HIV the services that they could receive and where they could find them.

Through some of the documents that we received from the Health Ministry, we realized that part of the funds specifically designated for HIV/AIDS care and prevention had been reassigned; thus we began a second round of information requests concerning:

- Documents supporting the hospitals and institute’s reassignment of funds tagged for HIV/AIDS;
- The criteria by which these reassignments were approved;
- The new programmatic structure applicable at the end of the first semester of the year, in order to understand the final distribution of funds; and
- The amount of the allocated budget spent in the first semester of the year with a copy of all supporting documents.

THE 2005 BUDGET FOR HIV/AIDS: FROM ALLOCATION TO SPENDING

The information received gave us the opportunity to understand that the work of CENSIDA, as the main public institution in the prevention of HIV/AIDS epidemic had been diminished due to the deficient coordination with the *Seguro Popular*. Regarding the funds for HIV/AIDS, the Administration Officer of the Health Ministry informed us that all the resources “will be used exclusively for the purchase of anti-retroviral drugs, as designated in the budget”³ while the Director of the *Seguro Popular* stated, to the contrary, that the funds mentioned were for diagnostics and treatment.

We found that the autonomy (and lack of accountability or oversight) of several hospitals and institutions was another element contributing to the inability of CENSIDA to meet its goals. According to CENSIDA, it does not coordinate the hospitals and institutes⁴; its role simply is to collaborate in the design of awareness raising workshops for public employees and to promote, with patients, the use of treatment. Different responses received by the Health Ministry indicated that CENSIDA had determined the resource allocation for the hospitals and decentralized institutes, but was not allowed to dictate rules or establish spending criteria. That meant that the main federal entity in charge of combating of the epidemic assigned seven million dollars to institutions where it does not have the mandate to insure that these resources are used according to the national HIV/AIDS program goals.

These inconsistencies in the series of answers and documents received revealed specific aspects that clearly question the commitment of the Mexican government with budgetary transparency and with the prevention and treatment of HIV/AIDS.

³ Public information request number 0001200039705.

⁴ Public information request number 0001200018305.



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Financial Criteria Predominates Over Epidemiological Criteria

According to the Health Ministry, the House of Representatives approved a health reassignment with a 200 million pesos reduction (more than 18 million dollars) to the budget for HIV/AIDS. Health indicated that the Lower Chamber did not explicitly provide the criteria for the reduction nor the type of expenses affected. This reduction “practically implied the paralysis of the efforts in the combat of HIV/AIDS” in the hospitals and health institutes. Due to this, Health decided to assign undesignated resources to these institutions in order to compensate for the previous reduction.

This reduction and reassignment of funds implied the complete loss of resources used to combat HIV/AIDS for at least two of the institutes with important centers of research and treatment: the National Institute of Respiratory Diseases (INER) and the National Institute of Nutrition. On the other hand, almost 20 million dollars was granted to two other institutes that do not have specialized services and that, as one of them indicated, “eventually treat patients with HIV/AIDS.”⁵

Likewise, other responses to our access to information requests indicated important changes in the designation of resources during the spending period. For instance, in the middle of year, the National Institute of Cardiology (INER) suffered a 50% budget reduction, so rather than allow that shortfall, 500 thousand dollars allocated specifically for HIV/AIDS was redirected to INER for other service areas.

These occurrences were indicative of a significant lack of planning and the predominant use of financial criteria in the assignment of funds, rather than relying on epidemiological criteria.

Discretionary Power for the Management of Resources

The seven institutions, which were assigned resources for HIV/AIDS, transferred these from *Chapter 4000 Subsidies and Transfers* to others. In four cases, such as that of the Mexico General Hospital, Cardiology, Neurology and Cancer, they transferred the funds to *Chapter 2000 Materials and Supplies*. In the other three cases, that of the Juarez Hospital of Mexico, the Dr.

Manuel Gea González General Hospital and the National Institute for Perinatology, they transferred the funds to *Chapter 3000 General Services*.

In contrast to those institutions that transferred the funds to Chapter 2000, the insti-

tutions that transferred them to Chapter 3000 did not spend any of the money on treating or preventing HIV/AIDS.

From January 1 to June 30, Perinatology spent its HIV specific funds mainly on cleaning and surveillance services. The Dr. Gea González Hospital, for its part, gave us a lengthy explanation of its HIV patients’ treatment and their planned prevention strategy,⁶ yet our analysis indicated that it spent the funds mainly on banking and financial services as well as maintenance of public buildings and vehicles.⁷ Hospital Juarez spent its HIV/AIDS resources on similar matters, rather than on the prevention and care of persons affected by the disease.

Lack of Accountability of the Health and Finance Departments

Mechanisms to ensure accountability throughout the system face important challenges. For instance, as discussed above, the Health Department assigned

... other responses to our access to information requests indicated important changes in the designation of resources during the spending period.

⁵ Public information request number 1225000001205 and 1225000001305.

⁶ Public information request number 1219500001305 and 1219500001405.

⁷ Public information request number 1219500002705.



resources specifically approved for spending related to the prevention and treatment of HIV/AIDS to compensate for the reduction of funds in other budget areas. Additionally, although the agency transferred funds to decentralized institutions and earmarked them for HIV/AIDS related services, they have no authority to establish rules, designate line items or activities, or mandate reports. Thus, there was no means of guaranteeing that the decentralized institutions spent these funds on HIV/AIDS.

For their part, the hospitals and institutes undertook the required legal procedures for changing the funds from one chapter to another, but no entity has the authority to deny

them the reassignments, so long as they carry out the requests within the designated time period and on the correct forms.

Nevertheless, the most troublesome aspect of this is that the Department of Finance considers the funds spent once they are transferred to the administrative units, without registering reclassifications within that unit. Due to this, the resources spent on cleaning, maintenance and banking services will appear as spent on HIV/AIDS programs.⁸ This issue points to a major structural problem: the balance of spent money, which annually is provided to the House of Representatives is not a faithful portrayal of reality.

Further, there were considerable differences among the responses that we received from the Department and institutions regarding the expenditures as well as between these official responses and the public documents that we gathered through access to information requests. For example, the Health Department only provided information on the CENSIDA expenditures, stating that it did not have a mandate to provide information on the spending of hospitals and institutes. Likewise, in the case of CENSIDA, we analyzed

three documents, CENSIDA's response delivered through the Health Department, the response delivered by the Finance Department through the SISI and the Report on the Advance of Financial Management in which Finance informs the House of Representatives on the exercise of the budget for the first semester of the fiscal year, and each provided a different amount for the same expenditures.

THE STRATEGY FOR ADVOCACY

Taking into account the political context—the budget discussion period at the House of

Representatives—we undertook a strategy focused on obtaining the most resources possible for CENSIDA and other institutions with specialized services, as well as accomplishing the approval of a higher amount of resources destined to the prevention of the epidemic.

In September 2005, the Finance Secretary handed the 2006 PEF Project over

to Congress, in which, for the first time in a proposed budget⁹, resources for hospitals and institutes are integrated, including the INER and Nutrición.

Unfortunately, once again there was a proposal to provide resources to Perinatology and Hospital Gea González, two of the three institutions that had spent their HIV/AIDS resources on something other than the disease. Positively, the majority of the funds proposed were for CENSIDA and there was a considerable decrease in the proposed amounts for the *Seguro Popular*.

... there were considerable differences among the responses that we received from the Department and Institutions regarding the expenditures as well as between these official responses and the public documents that we gathered through access to information requests.

⁸ In the 2004 and 2005 PEF Projects there were no resources for hospitals and institutes, these appear until the assignment published in the PER (see table 1).

⁹ The story was published in five national newspapers for three consecutive days and two newspapers followed up on the story a couple of weeks after.



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Collaboration with Persons with HIV/AIDS and NGOs

A group of HIV/AIDS patients being treated at INER who had been refused or delayed some services because of the lack of funds, according to what they were told in meetings with the institute's administrators, formed a group with the objective of an increase in funding. Hearing about the research project and budget analysis that Fundar had carried out on the issue, they contacted us to form an alliance. Together, we now attend meetings with the authorities involved to update them on the results of our research, while at the same time putting a human face to the problem—so that they can identify how the misuse of funds is affecting already vulnerable populations.

In addition, we were supported by civil society organizations interested in transparency issues and/or committed to the fight against HIV/AIDS. We kept these partners updated on our research findings and activities.

The Media

On October 12, 2005 Fundar, along with the Transparency Collective (a group of six civil society organizations dedicated to greater governmental transparency of which Fundar is a member and coordinator) and the IFAI held a press conference with great results.¹⁰ Through this channel, we were able to raise awareness of the problems, and catch the attention of the relevant authorities. The stories in the media brought immediate replies; particularly from the Health Department, which in turn held its own press conference the following day to deny our results.

During the press conference, the presence of a federal entity (IFAI) was relevant in order to give information about the lack of budgetary transparency, nevertheless we seized the moment so we could highlight the importance of HIV/AIDS policy and the situation the patients are undergoing.

CHANGES IN POLICY

State Departments

Probably as a consequence of the press conference, separate meetings with the Director of CENSIDA and with the General Director of Programming, Operation and Budget (DGPOP) of the Department of Health, were held. Both meetings were useful for clarifying and furthering issues that has not been contemplated in our original information requests and arose through analysis of the documents received, for instance, why CENSIDA had stated that they had only exercised 2 per cent of their budget during the first semester of the year contrary to the declarations of the Department of Health in its press conference.

These meetings had positive results. Not only were a number of questions resolved, but agreements were made to investigate further the allocation and use of HIV/AIDS earmarked resources as well as a promise that a smaller percentage of these funds would be reassigned to general services. Moreover, CENSIDA agreed to support a proposal to the House of Representatives to increase the budget dedicated to prevention of HIV/AIDS and to present new mechanisms for coordinating the relevant institutions.

Finally, we met with the Department for Government Internal Control, who we asked to investigate whether the reassignments of specified HIV/AIDS funds was done in accordance with law and to develop mechanisms to prevent discretionary changes to the use of these earmarked monies.

House of Representatives

We held several meetings with the Commissions of Health and Equality and Gender of the House of Representatives with the objectives of presenting our budget analysis and findings and to propose modifications to the budget, such that designated resources are used more efficiently and increases are provided for such necessary areas as prevention, research and care.



On November 14, 2005, the House of Representatives approved the 2006 Federal Budget for 2006, in which there was an increase for research and monies earmarked for prevention.

CONCLUSIONS

There is still much to be done in order to achieve true budgetary transparency, and above all, to efficiently fight the HIV/AIDS epidemic in Mexico.

Regarding budgetary transparency, we found that the quality of the information is a tremendous obstacle. Information that we requested was often not provided timely, was incomplete or inaccurate. The majority of the data that we received through access to information requests could not be found in the agencies published documents, or at least they were unavailable to the public at the time. We required more than 200 information requests and nine months of work to analyze all the replies and, in the end, we found contradictions and discrepancies that only deepened our initial doubts. Also, it was neces-

sary to use the media in order to catch the attention of the authorities and achieve some kind of communication with them.

In addition to other NGOs, groups of affected people and even IFAI support, a certain specialization on both issues—HIV/AIDS and public budgets—was required in order to find the answers. As many of the documents that we received from the various agencies and Ministries were inconsistent, we needed specialists to help us analyze the information, and with the data we then had to meet with the authorities. This may not be possible for most citizens. Thus, although

information is public by law, it may not be truly accessible for most persons.

Through the request and receipt of documents under the access to information law, and analysis, we were able to hold the government accountable for its policies and its

spending, as well as to support the state in ensuring that their mandates were followed. It is our hope that these revelations will encourage more efficient and precise public policies aimed at the prevention and treatment of HIV/AIDS, and improved financial accountability.

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ACCESS TO INFORMATION AND HUMAN RIGHTS: FUNDAMENTALS, POINTS OF EMPHASIS, AND DISTINCTIVE TRENDS

RICHARD CALLAND

ACCESS TO INFORMATION AS A FUNDAMENTAL HUMAN RIGHT

“T”ransparency” is one of the buzzwords of the 1990s “good governance” agenda—to a significant extent an ideological agenda pushed by the World Bank and the other main “Washington Consensus” actors. Nonetheless, there is now widespread acceptance of the importance of the principle of transparency to good democratic practice and legal accountability. One manifestation of this trend is the proliferation of freedom of information laws at the national level—more commonly known now as access to information (ATI) or right to information law. Over sixty states now have ATI laws of some kind¹; over forty have been passed in the last decade, many in developing countries and/or new democracies, often, but not always, as a result of civil society campaigns.²

ATI—or “freedom of information” as it is also known—is widely recognized as a fundamental human right. Resolution 59(1) of the UN General Assembly during its first session in 1946 stated:

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

Article 19 of the Universal Declaration of Human Rights (UDHR)³ and Article 19 of the International

Covenant on Civil and Political Rights (ICCPR) [in almost identical terms to the UDHR] enshrines the right to freedom of information. Regional conventions, including the African Declaration of Principles on Freedom of Expression in Africa, the American Convention on Human Rights (at Article 13), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (at Article 10), do likewise.



1 <http://www.privacyinternational.org/issues/foia/foia-laws.jpg>.

2 See the case studies presented at freedominfo.org—including, India, Bulgaria and South Africa.

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



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Despite the ostensibly unequivocal disposition of these treaties, there is however a residual uncertainty about the full character of the right—in particular whether it amounts to a right to access to information—and therefore to request, as well as to receive information. The language of the provision is ambiguous. As the Office of the High Commissioner for Human Rights pointed out in a General Comment, Article 19(2) “requires protection of the right to freedom of expression, which includes not only freedom to ‘impart information and ideas of all kinds’, but also freedom to ‘seek’ and ‘receive’ them ‘regardless of frontiers’ and in whatever medium, ‘either orally, in writing or in print, in the form of art, or through any other media of his choice.’”⁴

The word “seek” may be pivotal, but it has not yet been tested or determined by a tribunal of international law. Since it is fundamental to the instrumentality of the right in the context of meaningful public participation in democratic decision-making processes, this issue is examined in greater depth later in this paper.

THE INTERNATIONAL BILL OF RIGHTS AND ATI

While activists and academic writers such as Mendel⁵ and Birkinshaw confidently assert that “Freedom of Information is a human right; it enables us to fulfil our potential as humans”⁶ the international law position vis-à-vis the precise content of the right is actually somewhat cloudy. While it is clear that *Freedom of Information* is a fundamental right, it is not clear that this means that there is a *right to (request and) access information*—which is the modern, ‘customary’ understanding of the right.

Curiously, there is no clarifying case law under Article 19 of the ICCPR. In *International Human Rights Law & Practice*,⁷ 146 pages are devoted to Article 19 but all the case law is about freedom of expression with no reference to any right—or any claim of the right—to access information. The jurisprudence on the ECHR is the most advanced.

However, Article 10 of the ECHR differs from the two Article 19 guarantees in that it does not enshrine the right “to seek” information. Hence, the European case law on Article 10 has made it clear that Article 10 does “not confer on the individual a right of access . . . nor does it embody an obligation on the Government to impart . . . information to the individual.”⁸

In *Guerra*⁹ and *McGinley & Egan*,¹⁰ the ECJ discovered, in the distinctive phrase of Stephen Sedley, “a right to information in the entrails of Article 8”¹¹ of the ECHR, in these terms:

Where a government engages in hazardous activities such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information.

A potentially seminal case is (at the time of writing) before the Inter-American Court of Human Rights, in which four organisations are seeking to establish that Article 13 of the American Convention on Human Rights guarantees a right of access to information held by public bodies.¹² The case concerns a massive logging project, the Condor River

4 OHCHR, General Comment No. 10: Freedom of Expression (Art. 19): 29/06/83.

5 Mendel T. *International Standards and Trends*, Article 19.

6 Birkinshaw, P. *Freedom of Information and openness as a fundamental human right*.

7 Martin et al, Kluwer 1997.

8 *Leander -v- Sweden* (1987) 9 EHRR 433, para 74, notwithstanding the existence of Recommendation No. R(81)19 on Access to Information Held by Public Authorities.

9 (1998) 26 EHRR 357.

10 (1998) 27 EHRR 1.

11 Sedley S. *Information as a Human Right* in Beatson and Cripps (2001), at page 239, where the highly respected Mr. Justice Sedley QC offers an astute and far more prudent argument in support of the idea that access to information is a fundamental human right.

12 *Claude Reyes et Al. vs. Chile*. Case 12.108.



project, that is being undertaken by US company Trillium Ltd in Chile. A local NGO, the Terram Foundation, sought access to information on Trillium's environmental record from the Chilean Foreign Investment Committee, a public body that is supposed to assess foreign investment proposals. The NGO was shunned by the company and rejected by the Chilean national courts, so a number of South American rights' groups applied to the Inter-American Commission on Human Rights who in March 2005 found that Chile had violated the rights contained in Article 13 of the Convention. Following Chile's failure to comply with the order, the Committee referred the case to the Inter-American Court for adjudication. One of the main arguments before the Court goes to the nub of the issue concerning the core content of the right: "Given that the freedom to receive information should prevent public authorities from interrupting the flow of information to individuals, the word seek would logically imply an additional right."¹³ A decision is awaited.

OTHER JUDICIAL DECISIONS

Two recent decisions in other tribunals are worth considering. In the *Metalclad*¹⁴ case, the arbitral tribunal of the International Centre for Settlement of Investment Disputes applied the principle of transparency to the dispute, derived from Article 102 of the North American Free Trade Agreement (NAFTA), which was the governing law. The case involved an investment by a US corporation in a landfill construction in central Mexico. Approvals for the construction, which involved the confinement of hazardous waste, were obtained at the federal and state level in March 1995. There were local demonstrations against the site and, in December 1995, the local municipality issued a denial of the permit and obtained an injunction which prevented the operation of the landfill until May 1999. The award of \$16m made to *Metclad* in August 2000 was the first to uphold, on the merits, a claim submitted to arbitration under Chapter Eleven of the NAFTA. In its judgment, the arbitral tribunal, the first established for a NAFTA Chapter Eleven proceeding, had to

consider whether the duty under NAFTA Article 1105(1) had been met, namely, "each party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." At paragraph 76 of the award, it held that:

Prominent in the statement of principles and rules that introduces the Agreement is the reference to "transparency" (NAFTA Article 102(1)). The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt of uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.

Then, at paragraph 99 of the award:

Mexico failed to ensure a transparent and predictable framework for *Metalclad's* business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be fairly and justly treated in accordance with the NAFTA.

¹³ Paragraph 57 of the Application submitted by the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against the State of Chile.

¹⁴ *Metalclad Corporation -v- The United Mexican States*. International Centre for Settlement of Investment Disputes, Case No. ARB(AF)/97/1. <http://www.worldbank.org/icsid/cases/mm-award-e.pdf>. ICSID Review - Foreign Investment Law Journal. Volume 16, Issue 1, 2001.



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In the 2003 OSPAR¹⁵ case in the Permanent Court of Arbitration (PCA), Ireland claimed that the UK had failed to provide with information pursuant to Article 9 of the 1992 Convention, which provides as follows:

ACCESS TO INFORMATION

1. The Contracting Parties shall ensure that their competent authorities are required to make available the information described in paragraph 2 of this Article to any natural or legal person, in response to any reasonable request, without that person's having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months.
2. The Information referred to in paragraph 1 of this Article is any available information in written, visual, aural or data base form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention.

In many respects, this formulation represents a model, condensed version of many of the modern national ATI statutory rights. The UK defended on three grounds its refusal to provide to Ireland the information contained in the redacted copies. First, that Article 9 does not establish a direct right to receive information. Second, that the information requested did not in any event fall within the scope of Article 9(2). And third, that the information was exempt on the ground of commercial confidentiality pursuant to Article 9(3)(d).

It is the first of these arguments that is of relevance. In its Counter Memorial, the UK submitted

that “[Article 9(1)] does not impose on Contracting Parties an obligation, owed directly to natural and legal persons, to disclose information in response to a request. Nor does it require one contracting party to disclose information in response to a request from another Contracting Party. Rather it imposes on Contracting Parties an obligation to ensure that their competent authorities are required to make information available. Each contracting Party is to discharge this obligation by such means as may be appropriate in its case, eg by suitable legislative or administrative measures.”¹⁶ Thus, continued the submission, “The only possible cause of action for breach of Article 9

would be in respect of a failure to provide for a domestic regulatory framework dealing with the disclosure of information. Ireland does not allege such a breach.” In other words, according to the UK’s argument, the duty was not to provide information in response to requests but to establish an appropriate

system to ensure that competent authorities would be required to make certain information available.

Ingenious though the argument was, it failed to persuade the majority of the Court of Arbitration. In customary fashion, the tribunal distilled the issue into one short paragraph:

The issue for determination is whether the requirement in Article 9(1) “to ensure” the obligated result, mandates a result rather than merely a municipal law system directed to obtain the result.¹⁷

... there is a judicial trend towards a more expansive understanding of the right to access to information, which, in turn, serves to further entrench the right in international law.

¹⁵ In the Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention and the Mox Plant. Ireland –v– United Kingdom. <http://www.pca-cpa.org/ENGLISH/RPC/OSPAR/OSPAR%20final%20award%20revised.pdf>.

¹⁶ UK Counter Memorial, paragraph 3.2, page 19.

¹⁷ Paragraph 132 of the PCA Award.



The PCA held that “to accept the expression of the requirement ‘to ensure’ a result as expressed at the lesser level of setting up a regime or system directed to obtain the stipulated result under domestic law of the Contracting Party, as is contended by the United Kingdom, would be to apply an impermissible gloss that does not appear as part of the unconditional primary obligation under Article 9(1).” Hence, the UK was under a duty to supply the information in response to the request from Ireland (subject to articles 9(2) and (3)).

Both these cases reflect a judicial appreciation for the “real” purpose of the right to information—namely, to provide information upon request. Although they are circumscribed by the limitations of their facts and the provisions of the Conventions they were interpreting, they do provide jurisprudential succour to the notion that there is a judicial trend towards a more expansive understanding of the right to access to information, which, in turn, serves to further entrench the right in international law.

CHANGE IN LEXICON; SHIFT IN PARADIGM

Both cases also demonstrate the instrumental value of ATI rights to the exercise and protection of rights more generally. In *Metalclad*, there were important investments to be protected; the jobs of many people were at risk. In the *OSPAR* case, Ireland was concerned about the possible environmental harm that would be done to the Irish Sea by the UK in terms of its nuclear disposal policy.

Alongside the explosion of ATI law around the world, and the intricate legal debates about the precise content of the right under international law, there is an important human dimension. A plethora of stories from around the globe illustrate the potency of ATI as a leverage right: from the Thai school case where a single ATI request exposed the institutionalized racial discrimination rotting at the core of its schools’ system to the request for a secret government policy document that proposed to limit compensation for victims of apartheid in South Africa which led to President Thabo Mbeki hurriedly announcing immediate payments.

Labelling the right as ‘the right to know’, some activist social movements, such as the MKSS in Rajasthan, have worked under the banner: *The Right to Know is the Right to Live*. Part of this conceptualisation of the right is a recognition that there is a family of laws that together constitute ‘the right to know’ and which should properly govern a progressive information regime, including: whistleblower protection law, data protection law, administrative justice law and records’ keeping/making rules.

The shift towards a rights-based language is significant: the notion of a positive right of access, including the right to receive information, as distinct from a negative right not to have one’s freedom of expression disturbed, represents a qualitative shift. In Stephen Sedley’s more compelling phrase, “...[the right to] information may be coming to feature not as a parasitic requirement of another tabulated right but as a prior requisite if other rights are to have value and substance” (Beatson & Cripps 2001: 246).

Thus, ATI is now widely seen as a ‘linkage’ right—especially to social and economic rights, rather than as (‘merely’) a civil or political right.¹⁸ The debate on whether, and to what extent, social and economic rights are justiciable rights, the greater the imperative to ensure that the ‘linkage’ civil and political right is realized. Put another way, if the social or economic right is not justiciable, it becomes even more important to be able to use the right to access to information as a ‘way in’ to social and economic rights’ realization.

In my own country, South Africa, painstaking work by the fieldworker of the Open Democracy Advice Centre has shown how ATI can make a material difference to the lives of poor people. In Kouga, discussed in more detail in the accompanying box, despite a ministerial decision to allocate resources, the municipality had ‘borrowed’ for another area the forty houses that had been earmarked for one community. Pressing for access to the minutes to the meeting at which the decision was taken by the municipality led to a reversal of the decision.

18 Jagwanth S. *The Right to Information as a Leverage Right in Calland R. and Tilley A.* (2002).



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PUBLIC HOUSING FRAUD: SOUTH AFRICA

In March 2004, an Open Democracy Advice Centre field worker attended a meeting in the Kouga municipality, in the Eastern Cape of South Africa. A group from the small, poverty-stricken community of Weston complained that they had problems getting their local councillor to address their concerns. “They raised this question of how there is no contact from their local government and that they feel ignored. Then they raised the question of housing,” says Melvis. “One lady was the leader, the facilitator. She was emotional, very upset.”

Since 1997, no houses had been built in Weston by government despite promises that there would be more construction. A serviced site for 40 units with water and sanitation had been developed but the plots stood empty or half-built and abandoned. The leader of the Weston group said they had attempted to get answers from the official responsible, the Housing Development Manager, but had had no satisfactory explanation.

Following the meeting with the citizen’s of this community, Melvis made a number of requests, under the South African Promotion of Access to Information law, for documents that might explain what had happened, including asking for council minutes and reports by building consultants. When the mandatory thirty days for response had elapsed and phone calls to the official brought no bounty of records, a legal appeal for the information was made—finally resulting in some documents.

Though the documents did not yet explain why these houses had not been completed, but it gave Melvis and the community something to work with. The municipality was saying that the houses had not been built because there was not enough available land in Weston. The community disagreed. In fact, they had learned that the municipality had signed contracts with private business people and farmers to lease large tracts of state land in the area to ensure sufficient space for new housing. So, Melvis included in a second application a request for copies of all the municipality’s land contracts and minutes from relevant council meetings and important contracts. After another long wait, a bundle of documents arrived.

With all this pressure coming from the Weston community, the Kouga Municipality recommenced the housing project and completed the 40 new homes. As a result of the requests for information and pressure to extract a paper trail from the Kouga Municipality, a chain of events was set in motion that led to the resolution of what had been a deadlock issue for the people Weston for over 8 years—their right to housing.

In Vryburg in the North-West province, a secret decision was taken to sell off the public swimming pool for private development. Again, access to the paper trail, initially denied, was obtained under South Africa’s ATI law, the Promotion of Access to Information Act 2000, and embarrassed by the manifest injustice of the process, the decision was canned. The community kept its communal swimming pool. In Emkhandwini in remote Kwa-Zulu Natal, the villages wanted clean water; they were tired of the five mile trek to collect it from the nearest town. The municipality was arrogant: the villages had no right

to any information about water access. ODAC pressed the District Council and it was revealed that there was a plan: to phase in piped water over five years, with a weekly delivery by truck of a large barrel of clean water in the interim. It was a good plan; the villagers were content. ATI, properly implemented, can be good for government as well as citizens. By corollary secrecy, as the Emkhandwini case shows, is harmful to both.¹⁹

¹⁹ Five Years On: The Right to Know in South Africa. Open Democracy Advice Centre; Cape Town. April 2006.



NON-STATE ACTORS AND THE RIGHT TO ACCESS TO INFORMATION

Once the Rubicon was crossed, campaigners have recognised the need to ‘follow the information trail.’ Accessing state-held information is not enough—it is just one slice of the information matrix. The structural plurality of contemporary state-society relations means that activists have sought to extend the notion of the right to know to corporations, to multi-lateral organisations and international organisations.

Accordingly, a new set of initiatives has emerged, including: the Extractive Industries Transparency Initiative; the Publish What You Pay campaign; the Equator Principles; the transparency provisions of the Aarhus Convention—in particular, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. Environmental affairs have proved to be a ‘vanguard’ arena for access to information—see, for example, the system of Toxic Release Inventory in the United States.

The case for ATI in the corporate sector has grown as people have come to recognize the power that companies exert over the every day lives of citizens—often in terms of some of the most important aspects: jobs, pay, access to basic services such as electricity and water—alongside the global trend of the last thirty years towards privatizing public services.²⁰ Modern ATI laws have in the majority of cases reflected this trend by extending the definition of ‘public information’ to include information held by private bodies that are performing a ‘public function’. The South African law goes even further, in line with its constitutional derivation, by providing a right of access to private information where access is “required for the protection or exercise of a right.”²¹

Attention has turned also to International and Multilateral Organisations. International Financial Institutions (IFIs) in particular, have increased in number, range and influence over the past forty years. As well as the International Monetary Fund (IMF) and the World Bank Group—which comprises the International Bank for Reconstruction &

Development itself [IBRD], the International Development Agency, and three affiliate organisations, the International Finance Corporation, the Multilateral Investment Guarantee Agency and the International Center for Settlement of International Disputes—there are now the main regional development banks (African, Asian, Inter-American and European Bank for Reconstruction & Development).

Together, these bodies yield huge amounts of power and have an enormous impact over the lives of ordinary people throughout the world, especially in the developing countries. “It is clear that... IFIs have in effect become managers of economic policies of the vast majority of developing countries.” (Anghie 2004: 259). In the past five years, around \$600bn has been loaned by IFIs or used to support projects in the developing world. There is substantial evidence of the harm done by IFI lending and macro-policy leverage, and a matching literature.

CONCLUSION

The notion of the right to access to information—and understanding of its content and potential—has matured rapidly over the past decade. Its instrumental value as a ‘leverage’ right, interdependent of, and pivotal to the realization of, other rights, is now firmly acknowledged in the fast-growing body of cases and stories from around the world. Ironically, despite the emerging custom of legal protection at national level, the position in international law remains somewhat uncertain. The right to receive information is an established, fundamental human right—unequivocally. But the right to ‘ask and get’—which is the essence of ATI—remains a matter of legal contestation as much as it is a site of struggle in the implementation and enforcement of the right. As the right matures further, so new frontiers will be identified and crossed. Jamaica is a key node, a regional staging post in this process.

20 Calland R. *Transparency at the For-Profit World*, in *Transparency*, University of Columbia Press, forthcoming 2007.

21 Section 32(1)(b) of the South African Constitution (1996).



WHISTLEBLOWING PROTECTION: ACCOMPANYING ACCESS TO INFORMATION IN ASSURING TRANSPARENCY¹

GUY DEHN

Freedom of Information is the best guarantee there is to demonstrate and ensure the quality of countless decisions and policies which are taken every day across the public sector. By making the information related to these decisions open to public scrutiny, access to information laws provide an inherent quality control and serves as a deterrent for ill considered or improper decisions or corrupt conduct. But to work in practice, freedom of information regimes depend on an application being made (and often a precise one at that) after the event had occurred or the decision has been made. For these reasons an effective freedom of information regime will include whistleblowing provisions as these have a healthy deterrent effect and also can come into play before damage is done. As this paper explains, whistleblowing provisions aim to provide a safe alternative both to silence and to anonymous leaking.

Whistleblowing provisions will also help maintain public confidence where requests for access to public information are denied or ignored. The core purpose of both access to information and whistleblower protection laws is to enhance public accountability, whether by allowing persons to access documents or by providing sufficient safeguards so that civil servants and employees can raise concerns about wrongdoing so serious risks may be assessed and remedied. Viewed in this way, whistleblower protections must be considered primarily in the greater context of openness and accountability rather than of employment rights, and should be implemented as a close relation of the right to access to information. With the movement for

access to information firmly entrenched around the world, increasingly the trend toward establishing complementary whistleblowing protection laws must emerge.



WHAT IS WHISTLEBLOWING?

Whistleblowing matters to all organisations and to all people. This is because every public body, and every business, faces the risk that something it does will go seriously wrong. The risk may be that some food you are about to buy is badly contaminated, that the train your family will travel on is unsafe, that the surgeon that will operate on your child is incompetent, that a hazardous substance is being dumped near your home or that your savings or taxes are being stolen. Whenever such a risk arises, the first people to know about it are usually those who work within the public body or organisation. Yet while civil servants or employees are the people best placed to raise a warning flag or concern and so enable the risk to be removed or reduced, they also are the people who have the most to lose if they were to do so.²

¹ Much of this paper is drawn from *Whistleblowing Around the World: Law, Culture and Practice*, ed. Calland, R. and Dehn, G., ODAC and PCaW in partnership with the British Council S. Africa, 2004.

² Id., Introduction, Calland and Dehn.



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Whistleblowing matters because it addresses how we can counter this breakdown in communication in the workplace. That such a breakdown undermines the public interest is clear when one considers that the most successful way the police deter, detect and clear up crimes is through information communicated to them by the public. Yet in workplaces and government bodies across the world, law and practice gives a strong message that employees should not communicate information about suspected wrongdoing either internally or externally.³

The consequence of this culture is that it discourages normal, decent law abiding people from raising concerns about workplace wrongdoing that threatens the interests of others. It encourages employees to be guided exclusively by their own short-term interests and undermines any sense of mutual interest between the organisation and its workforce. In practical terms, if an employee is concerned about corruption or serious wrongdoing in his workplace, he has four options. These are

- To stay silent;
- To blow the whistle internally;
- To blow the whistle outside; or
- To inform anonymously.

The issue of whistleblowers and their response to recognized problems must be considered, as the cost of silence has proven too high.

WHY IS WHISTLEBLOWING PROTECTION LAW NECESSARY?

In the old days, miners would take a canary underground with them. Gas is highly dangerous underground, but very hard to detect. Canaries, with their more sensitive capacities, served as an early warning system. Unfortunately, they often died in their efforts. Whistleblowers have long served the same role as a warning system against misdeeds or imprudent actions. In order to ensure that they are not martyrs to their (and our) cause, strong legal protections are necessary.⁴

Unless society encourages and the law protects people who raise whistleblowing concerns openly, they will stay silent or at best will leak information anonymously. Rather than impose another legal duty on people, whistleblowing should be a protected right which encourages good citizenship.⁵ If the governments and organisations fail to foster a culture that indicates that it is safe and accepted to raise a genuine concern about wrongdoing, employees will assume that they face victimisation, losing their job or damaging their career. The consequence is that they will stay silent where there is a threat—even a grave one—to the interests of others. This silence means that those in charge are denied the opportunity to remove or reduce any such risk, and can only find out about it when the damage is done. Equally, the knowledge that there is a culture of silence in the workplace both encourages and shields the corrupt and dishonest.⁶

But without appropriate protections, silence is often the option of least risk for the individual employee even when privy to knowledge of wrongdoing in the workplace which threatens others, be it colleagues, consumers or the community. It is the default option for many reasons. The employee will realise that his suspicions could be mistaken or that there may be an innocent explanation for the conduct. Where colleagues also are aware of the suspect conduct but are staying silent, he will wonder why he alone should speak out. Where the wrongdoing seems clear to the employee, he will assume that those in more senior positions have also seen it and are implicated in some way and so will see little reason to pursue the matter internally. In societies where unions are scarce or their independence has been

³ Whistleblowing and Data Protection, Public Concern at Work, Paper presented to Article 29 Working Party Brussels, 31 January 2006.

⁴ Conclusion: Giving People a Voice, Whistleblowing Around the World: Law, Culture and Practice, ed. Calland, R. and Dehn, G., ODAC and PCaW in partnership with the British Council S. Africa, 2004.

⁵ Where's the Public Interest, Biennial Review 2005, Public Concern at Work.

⁶ Whistleblowing and Data Protection, Public Concern at Work, Paper presented to Article 29 Working Party Brussels, 31 January 2006.



compromised, the employee will be left without any independent guidance as to who to approach and how, and so will more likely stay silent. In organisations where labour relations are adversarial and whistleblowing is unwelcome, the employee will be expected to prove that the wrongdoing is occurring, even though it clearly would be far better if those in charge assessed and, where appropriate, investigated the matter. Finally, unless the employee believes there is a good chance that something will be done to address the wrongdoing, there will be no reason why he should consider risking his own position.

Even if the employee is not deterred by any or all of these considerations, he will rightly need to consider his private interests and those of his family before raising the matter. Without any reassurance to the contrary, he will fear workplace reprisal—be it harassment, isolation or dismissal.⁷

Moreover, in many countries, the public sector employee is affirmatively forbidden, by laws such as Official Secrets Act, and threatened with criminal prosecution if they dare to come forward—even when it is in all of our best interest.

Certainly, the most efficient method for whistleblowing would be disclosure within the specific body or organisation. However, where it is not safe and accepted for people to blow the whistle internally, there must be palatable and safe options for external disclosure. It is in these cases, where legal protections are most necessary. Until recently, there were very few jurisdictions around the world that provided statutory safeguards for an employee who makes an outside disclosure—even if done in good faith, justified and reasonable. Accordingly, such disclosures were often made anonymously, raising the difficult issues of judging its value, investigating the claims, and mediating the effects. Although difficult to balance the right of the worker with that of his employer, in order to encourage internal and external disclosure in a manner that can best benefit both as well as the community at large, carefully crafted legal protections should be instituted.

In the United Kingdom, the Public Interest Disclosure Act 1998—see www.pcaw.co.uk for further information—provides workers (including civil servants) with full protection against victimisation for reporting wrongdoing. While the protection will apply in virtually every case where a genuine concern is raised internally, it is also readily available where the whistle is blown to key regulatory authorities. Wider disclosures (including to the media) are protected where they are both reasonable and justified for one of four reasons. The Act does not prescribe what whistleblowing procedures employers should put in place; it simply recognises them for disclosures purposes where they exist. As such it provides good reason for employers and the public bodies to establish and promote whistleblowing channels which make it clear that it is both safe and acceptable for staff to report concerns about wrongdoing.⁸

One of the points emphasised by the Committee on Standards in Public Life was that “the result of failing to provide a confidential system for matters of conscience is, ironically, to encourage leaks, which are damaging to the cohesiveness of civil service bodies and weaken the relationship between Ministers and civil servants.”⁹ For these reasons, provided the reporting systems in Whitehall are effective and have the confidence of civil servants, the 1998 Act should reduce the likelihood of leaks.

In addition to the protection and inherent reinforcement of a new culture of whistleblower acceptance that legislation provides, laws provide needed guidance to both the would-be whistleblower and their employer.

7 Id.

8 Freedom of Information Bill, Briefing on Amendments, Public Concern at Work, October 2000.

9 First Report (May 1995, Cm 2850-I), page 60, para 54.



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WHISTLEBLOWING AND ACCESS TO INFORMATION LAWS

Where the ability of the authorities or the media to do their job depends so much on the information that they receive, there is every reason why law and culture should explain and provide for circumstances where open disclosures are permitted and protected. In this light, public interest disclosures through whistleblowing and access to information are two sides of the same coin.¹⁰ “While right to information laws provide people with the right to access records, it is equally necessary to have someone on the inside who is prepared to speak and act in the public interest as you can only ask for information that you know exists.”¹¹

Access to Information law allows persons to seek a wide-range of public documents, and as such is pivotal to ensuring proper decision-making. Under a robust freedom of information regime, if an official thinks something is going wrong, is poorly considered or that party political advice is being provided then—he or she can make the point by reminding colleagues that the information could readily become public and, as such, they should take care to address the issues and be able to justify their conduct. Operating this way, such an official can feel and be

seen to be loyal to colleagues and to his employer (be it the Crown or some other employer).

But this mechanism of accountability, which deems that ministers and senior managers are as responsible for hundreds if not thousands of decisions as if they had taken them personally themselves, will not work if those officials who actually take the decisions do not believe that their conduct is, in principle, open to scrutiny. If those civil servants do not fear recriminations through the more traditional access

to information route, knowledge that colleagues could appropriately become whistleblowers will serve as an additional deterrent. As a result, there remains a need for both a properly balanced and effective freedom of information

... public interest disclosures through whistleblowing and access to information are two sides of the same coin.

regime, a key safety valve against shoddy or shabby decisions in and by public authorities, as well as whistleblower protections.

In both cases, the shared purposes are to progressively extend a culture of openness, and thereby promote the accountability of public authorities, informed debate, public participation and public understanding of the functions and activities of public authorities. Increasingly, advocates for greater transparency will need to turn their attention to the establishment of both disclosure laws—freedom of information and whistleblower protection.

¹⁰ Conclusion: Giving People a Voice, Whistleblowing Around the World: Law, Culture and Practice, ed. Calland, R. and Dehn, G., ODAC and PCaW in partnership with the British Council S. Africa, 2004.

¹¹ Id.



OPEN GOVERNMENT: THE CHALLENGES AHEAD

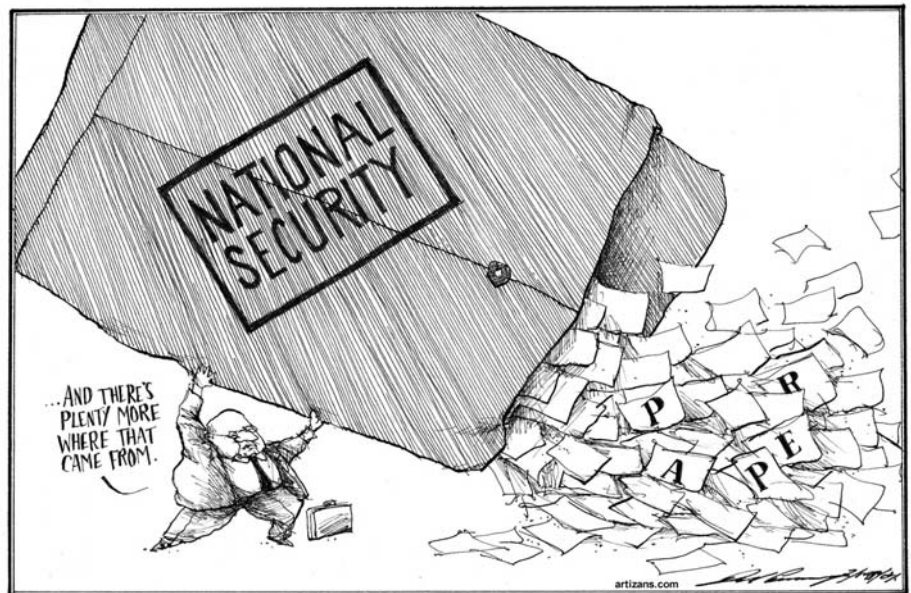
ALASDAIR ROBERTS

Every few years, the Organization for Economic Cooperation and Development (OECD) issues a report on global trends in government reform. These reports are a useful snapshot of the priorities of policymakers and citizens around the world. Ten years ago, the OECD's statements reflected the preoccupations of the time: about shrinking the role of the state, finding cheaper ways of doing government work, and making societies more competitive. A report released by the OECD in November 2005 takes a markedly different tone. At the top of its new agenda is the need for governments to respond to the demand for increased transparency. "Open government," the OECD says, "is increasingly recognized as an essential ingredient for democratic governance."¹

The OECD report effectively captures the spirit of the times. There is a remarkable, global movement to improve transparency in government. International institutions such as the World Bank and International Monetary Fund, and non-governmental organizations such as Transparency International, the Open Society Institute and the Carter Center, have promoted transparency as a tool for fighting corruption, protecting human rights, and improving economic growth. The enthusiasm for open government is reflected in the dramatic rise in the number of countries which have adopted national laws recognizing a right to information held by public authorities. A decade

ago, only two dozen countries had adopted right-to-information (RTI) laws; today, almost seventy have such laws. Jamaica, which adopted its Access to Information Act in 2002, is part of this remarkable international phenomenon.

Of course, the adoption of an RTI law is only one of the first steps toward improved governmental openness. Around the world, advocates of openness will continue to confront substantial challenges. In this paper, I wish to describe three of these challenges. The first of these challenges is ongoing official resistance to rules that require increased transparency. The second of these challenges arises from profound changes in the structure of the public sector, which also have the effect of undercutting transparency rules. The third challenge is posed by the advent of



¹ Organization for Economic Cooperation and Development, *Modernising Government: The Way Forward* (Paris: OECD, 2005), 28.



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information technologies, which will revolutionize the way in which information is stored within government agencies. These are substantial, and perhaps chronic problems, which will demand continued attention and advocacy. The fight for transparency is not over; rather, it has barely begun.

A CHANGE IN CULTURE?

The first challenge that will confront advocates of transparency in years ahead is ongoing official resistance to transparency requirements. This is a reality that is seldom acknowledged in debates over the adoption of new transparency rules.

On the contrary, political leaders often tell us that new RTI laws will bring fundamental changes in bureaucratic practices and culture. In the United Kingdom, for example, Prime Minister Tony Blair promised that the country's new Freedom of Information Act would break down the "traditional culture of secrecy" within the UK government and produce a "fundamental and vital change in the relationship between government and governed."² In 1999, Home Secretary Jack Straw lauded the law as a landmark in constitutional history that would "transform the default setting" of secrecy in government.³ Shortly before its implementation, Lord Chancellor Charles Falconer, predicted that the FOIA would lead to "a new culture of openness: a change in the way we are governed."⁴

British policymakers were not alone in making such claims. In countries that had already adopted similar laws, it was commonplace to suggest that the aim was to encourage a "culture of openness" in public institutions. Shortly after the adoption of the Irish FOIA, Information Commissioner Kevin Murphy claimed that "the enactment of the FOI Act does mark a radical departure from one style or culture of public service to another."⁵ "The culture of FOI," said an Australian High Court justice, "is a culture which asks not why should the individual have the information sought, but rather why the individual should not."⁶

However, there is little evidence to support the

claim that RTI laws produce radical changes in the essence of bureaucratic culture. Consider, for example, the experience of the United States, which adopted its Freedom of Information Act exactly forty years ago. Would we say, looking at the controversies of the last four years, that the US federal government has been transformed by a "culture of openness"? The Bush administration has fought many battles, often successfully, in an effort to limit FOIA and other laws, and avoid disclosure of information. Some critics have called the Bush administration the most secretive in decades. Defense and intelligence agencies have also campaigned vigorously for tighter controls on the release of information. We should not exaggerate the extent to which the Bush administration has succeeded in undermining transparency rules. Nevertheless, it is very clear that the fundamental norm of transparency is still strongly resisted by elected officials and senior bureaucrats throughout the American government.

Unfortunately, this is true in other countries as well. In Canada, which adopted its Access to Information Act over twenty years ago, a recent inquiry into corruption within the Liberal government revealed that officials had invented sophisticated internal procedures for dealing with information requests which they believed would cause political

2 United Kingdom, *Your Right to Know: The Government's Proposals for a Freedom of Information Act*, Cm 3818 (London: Stationery Office, 1997), Preface.

3 Jack Straw, *House of Commons Debates* (London: House of Commons, 1999).

4 Lord Charles Falconer, *Address to the Society of Editors' Annual Conference* (London: Department of Constitutional Affairs, October 18, 2004 [Accessed May 17, 2005]), available from <http://www.dca.gov.uk/speeches/2004/lc181004.htm>.

5 Kevin Murphy, *Address on the Launch of the Freedom of Information Act*, 1997 (Dublin: Office of the Ombudsman, April 21, 1998 [Accessed December 3, 2004]), available from http://ombudsman.gov.ie/21c6_156.htm.

6 Hon. Michael Kirby, *Lecture to the British Section of the International Commission of Jurists: Freedom of Information, the Seven Deadly Sins* (Canberra: High Court of Australia, December 17, 1997 [Accessed December 10, 2004]), available from http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_justice.htm.



damage to the government. The inquiry found that bureaucrats had also manipulated government records to avoid revealing corrupt practices.⁷ Australia adopted a Freedom of Information Act in 1982. Today, procedures for controlling politically dangerous requests are now “well entrenched” in the Australian bureaucracy, according to Rick Snell, a leading commentator on RTI law. Snell calls this the “dry rot” within the Australian RTI system.⁸ A veteran user of the New Zealand law, also adopted in 1982, has likewise complained of the growing number of “professional ‘communications’ or PR people whose job it is to manage and restrict the information that reaches the public”. “There is plenty of scope,” this user complains, “for deliberate bending of Official Information Act requirements for tactical political reasons.”⁹

Even governments with relatively new RTI laws have begun to resist the obligation to release information. Ireland, for example, increased fees for making requests under its 1997 law so substantially that the number of requests dropped by fifty percent. The fee changes, an opposition critic charged, “rendered the whole concept of Freedom of Information almost useless.”¹⁰ In Britain, the Blair government adopted special procedures for handling politically sensitive requests shortly before its RTI law was scheduled to go into effect, and then refused to release any details about the requests that had been singled out for special handling.¹¹

In sum, a few decades of experience does not provide us with evidence that RTI laws produce radical changes in the bureaucratic culture. On the contrary, elected officials and career public servants prove to be highly skilled in finding ways, difficult to detect, to undermine the effectiveness of RTI laws. They may do this with a clear conscience, believing that secrecy is essential to the public interest, or because they wish to hide evidence of corruption or mismanagement.

In saying that the predispositions of bureaucracy are unlikely to change, we are not saying that the adoption of a RTI law is pointless. Even if bureaucratic culture does not completely transform, an RTI law can produce critically important benefits. When

officials resist disclosure, the law regulates the ensuing conflict and provides citizens with remedies to ensure that the conflict is resolved fairly. Case law may eventually lead officials to create procedures that result in the routine disclosure of classes of information that were previously withheld. These are important changes: the information that is released may be essential for protecting individual rights, enhancing political participation, or fighting corruption.

Nevertheless, it is important to recognize that such disclosures do not follow because officials have adopted a new “culture of openness.” They do it, for the most part, because they are good public servants and they respect the law. But many officials are likely to continue in their belief that the law should be drafted differently, or interpreted more restrictively. As a practical matter they are likely to continue advocating internally for amendments to the law, or perhaps outright abrogation of the law; and they are likely to continue arguing against disclosure when novel cases arise, or circumstances change.

This has important implications for anyone—including political leaders, citizens, and non-governmental organizations—interested in improving governmental openness. There is a strong temptation to think that the battle over transparency is won by the passage of an RTI law. Citizens and non-

7 Alasdair Roberts, “Two Challenges in the Administration of the Access to Information Act,” in *Research Studies Volume 2: The Public Service and Transparency*, ed. Commission of Inquiry into the Sponsorship Program and Advertising Activities (Ottawa: Commission of Inquiry into the Sponsorship Program and Advertising Activities, 2006).

8 Rick Snell, “Contentious Issues Management: The Dry Rot in FOI Practice?,” *Freedom of Information Review*, no. 102 (2002): 62-65.

9 Nicky Hager, *A Researcher's View of New Zealand's Official Information Act: Comments to the International Symposium on Freedom of Information and Privacy* (Auckland, New Zealand: Office of the Privacy Commissioner, 2002).

10 Irish Examiner, “Govt Made FOI Concept ‘Almost Useless’: Labour,” *Irish Examiner*, May 16, 2004.

11 See: Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age* (New York: Cambridge University Press, 2006), Chapter 4.; Sean O'Neill, “Freedom to Interfere? No Minister, It's Too Sensitive,” *The Times of London*, October 3, 2005, 5.



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governmental organizations may turn their attention to other issues, and philanthropies may direct their money to other projects. But the battle does not end with the adoption of a law; indeed, it has hardly begun. We can see that the struggle over access to information will continue even decades later. The challenge is to maintain the interest and commitment of a transparency coalition over a very long period of time.

CHANGES IN THE STRUCTURE OF GOVERNMENT

In the future, advocates of transparency should expect to encounter other difficulties in promoting the entrenchment of the right to information, as profound changes in the structure of government will complicate the campaign for openness. I will describe three of these problematic trends.

Privatization

One of the most important of these trends is the transfer of governmental functions to private and nonprofit organizations. This is a result of the radical change in philosophies of governance which swept the globe over the last quarter-century. Private enterprise has entered areas that were once regarded as the core of the public sector.

In the United States, for example, one company, Edison Schools, boasts that it operates so many elementary and secondary schools that it could be counted as one of the largest school systems in the United States. Around the world, the business of providing water and sewer systems is now dominated by three French and German firms—Ondeo, Veolia, and RWE Thames Water. A British firm, Group 4 Securicor, operates a network of prisons and detention centers spanning four continents. An Australian

business, Macquarie Infrastructure, has developed a lucrative business in building and operating and toll highways and bridges around the world.¹² Even the defense sector—surely the most basic state function—has been laid open for business. It is estimated that the private military industry earned \$100 billion in global revenue in 2003.¹³ So many contractor employees were at work in occupied Iraq in 2004—by some estimates, twenty thousand or more—that analysts suggested that it was the private military industry, and not the United Kingdom (with only ten thousand troops in the field), that should be counted as the second-largest contributor to the war effort.¹⁴

This process of restructuring already has posed a substantial threat to existing RTI laws, and this will surely grow in coming years. The threat arises because

of a weakness in our traditional thinking about governmental openness. Most disclosure laws build on a classical liberal conception of the social and political world, which draws a sharp distinction between public and private spheres of activity, and which regards one

of the main aims of political action as being the defense of the private sphere from incursions by the public sphere.¹⁵ Disclosure laws typically articulate the distinction by establishing rights to information held by organizations in the governmental sphere. As a result, contractors and private firms are often excluded from RTI laws.

One of the most important of these trends is the transfer of governmental functions to private and nonprofit organizations . . . Private enterprise has entered areas that were once regarded as the core of the public sector.

12 Alasdair Roberts, *Transborder Service Systems: Pathways for Innovation or Threats to Accountability?* (Washington, DC: IBM Center for the Business of Government, 2004).

13 P.W. Singer, "Warriors for Hire in Iraq," *Salon.com*, April 15, 2004.

14 Ian Traynor, "The Privatisation of War," *The Guardian*, December 10, 2003, 1.

15 Michael Walzer, "Liberalism and the Art of Separation," *Political Theory* 12, no. 3 (1984): 315-330.



Two countries have attempted to introduce more radical responses to the problems created by privatization. The South African RTI law, adopted in 2000, largely abandons the distinction between “public” and “private” spheres, and establishes a right to information held by any person or organization “that is required for the exercise or protection of any rights.”¹⁶ The new Indian law takes a different approach, encompassing “information relating to any private body which can be accessed by a public authority under any other law.”¹⁷ Given the number of regulatory laws remaining on the Indian statute books, this might allow a broad expansion of the scope of the right to information. However, these provisions of the South African and Indian laws are largely untested.

Furthermore, it’s likely that an attempt to introduce comparably broad legislation elsewhere would probably fail. The mere contemplation of a “universal” RTI policy, covering the whole of the public and private sectors, would trigger a well-organized and broad-based lobby by businesses and other non-governmental organizations. It would be regarded as an unwarranted attack on the integrity of the private sector. Businesses would also argue—with some justification—that a push to entrench a general principle of access ignores the specific mechanisms that have evolved to encourage transparency in particular sectors, such as reporting requirements imposed by securities exchanges for publicly traded corporations, or imposed by tax authorities for charitable organizations. (A 1995 proposal to extend the Australian Freedom of Information Act to the private sector was rebuffed for this reason.¹⁸)

In the United States, the difficulties that would beset an attempt to establish such a “universal” right to information are illustrated by the prolonged failure to establish a mere right to personal information held by private organizations. By the turn of the century, many OECD countries had adopted privacy laws (also known as data protection laws) that control the use of personal information in the private sector, and include a right to access personal information held by the private sector. The United States, by contrast, has

faced intense resistance from business leaders to the adoption of a comprehensive privacy law. As a result, privacy advocates have been compelled to fight a series of smaller battles for legislation on the handling of specific types of personal data held in certain industries—such as credit, educational or health information.¹⁹ Even in these smaller battles, privacy advocates have faced fierce resistance from industry lobbies.²⁰

This is likely the future that will confront transparency advocates as well. It is practically impossible to do to the private sector what most democracies have in the past done to their public sectors—that is, impose a general RTI scheme that affects the whole of the private sector.

The fragmentation of the public sector has had the effect of breaking up the old coalition that could once be relied upon to push for stronger transparency rules. It may be true that businesses often resist the disclosure of information which they have provided to government agencies; but it is also true that businesses are the dominant users of disclosure laws in many countries.²¹ So long as government had an expansive role in regulation and provision of services, businesses had an interest in assuring their own ability to access government information quickly.

16 The new rules are contained in the Promotion of Access to Information Act, Act No. 2 of 2000, Part 3.

17 Section 2(f), Right to Information Act, 2005.

18 Australian Law Reform Commission, *Open Government: A Review of the Federal Freedom of Information Act 1982*, 77 (Canberra: Australian Law Reform Commission, 1995), Para. 15.15.

19 David Banisar and Simon Davies, “Global Trends in Privacy Protection,” *John Marshall Journal of Computer and Information Law* 18, no. 1 (1999): 1-112, 13-14 and 108-111, Robert Gellman, “Does Privacy Law Work?,” in *Technology and Privacy: The New Landscape*, ed. Philip Agre and Marc Rotenberg (Cambridge, Massachusetts: MIT Press, 1998), Charles Sykes, *The End of Privacy* (New York: St. Martin’s Press, 1999), 74-75.

20 The struggle over adoption of rules on the handling of medical information by private sector organizations is one illustration: Amitai Etzioni, *The Limits of Privacy* (New York: Perseus Books, 1999), 149.

21 Statistics for the United States are not easily obtained. In Canada, almost half of all requests filed under the Access to Information Act are filed by businesses.



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The transfer of public functions to non-governmental organizations will break up this commonality of interest—and put in its place novel conflicts between citizens and the new private providers of public services. If the principle articulated in the South African law is to be carried forward in other countries, it will be done incrementally, through a succession of battles to establish information rights for specific types of information, or for specific sets of organizations. The work of mobilizing coalitions to establish information rights will be difficult, and they will often face well-organized and better-funded industry resistance.

Globalization of Policymaking

A second important transformation in governance has been the growing influence of international bodies such as the International Monetary Fund, World Bank and World Trade Organization. The last two decades have witnessed broad and sometimes violent public protests against the role which these organizations have played in the restructuring of national governments and economies. Protest leaders have often challenged the legitimacy of these bodies—and these challenges are built upon complaints about the secretive ways in which decisions were made, about policy formulated “behind closed doors” in Washington or Geneva. The central claim is that these organizations, steeped in the secretive cultures of diplomacy and central banking, have ignored the norm of transparency.²²

Ironically, these organizations often say that their own objectives are to improve openness in governance. At its first meeting of ministers in Singapore in 1996, the WTO affirmed that one of its main aims was to achieve “the maximum possible level of transparency,” so far as national trade practices were

concerned.²³ For example, many WTO agreements also establish an obligation for governments to publish laws, regulations, judicial decisions, administrative rulings, and intergovernmental agreements that affect international trade. Similarly, the International Monetary Fund boasts that it has also undergone a “transparency revolution.”²⁴ This “revolution” refers mainly to the extension of the IMF’s effort to monitor the behavior of its member states. This was motivated by a widespread perception that the financial crises of the 1990s had been caused by ignorance about the

state of financial sectors in the crisis countries, and that governments in those countries had been (in the words of a senior IMF official) “economical with the truth” in reporting their financial positions.²⁵

The sort of “transparency” promoted by the WTO and IMF has

two distinctive features. First, it is principally about the imposition of transparency requirements on member states, and not on the WTO and IMF themselves. Second, it is also a kind of transparency that has a narrow purpose: advancing the project of global economic liberalization. As Ann Florini has observed:

The sort of “transparency” promoted by the WTO and IMF . . . is principally about the imposition of transparency requirements on member states, and not on the WTO and IMF themselves.

²² See Roberts, *Blacked Out: Government Secrecy in the Information Age*, Chapter 8.

²³ World Trade Organization, *Singapore Ministerial Declaration* (Geneva: World Trade Organization, 1996).

²⁴ Stanley Fischer, *Farewell to the IMF Board* (Washington: International Monetary Fund, 2001).

²⁵ Thomas Dawson, IMF Director of External Relations: Thomas Dawson, *Transparency and the IMF: Toward Second Generation Reforms* (Washington, DC: International Monetary Fund, 2003). On the lack of knowledge about conditions in crisis countries, see: Louis Pauly, *Who Elected the Bankers?* (Ithaca, New York: Cornell University Press, 1997), 124, Group of Independent Experts, *External Evaluation of IMF Surveillance* (Washington, DC: International Monetary Fund, 1999), 99, Rachel Glennerster and Yongseok Shin, *Is Transparency Good for You, and Can the IMF Help?*, Working Paper 03/132 (Washington, DC: International Monetary Fund, 2004), 2.



To date, most of the demands for transparency are coming from intergovernmental organizations in the form of new financial and macroeconomic disclosure standards. Their primary purposes are to improve global economic efficiency and to reduce the volatility of international capital flows... [T]hey are aimed at improving efficiency and safeguarding international investors... So far, calls for transparency are not aimed directly at improving equity and promoting the welfare of the poor.²⁶

This a program for improving transparency that is quite distinct from that typically promoted by domestic advocates of open government, who are more often interested in access to information about the conduct of police or military forces; personal files collected by intelligence forces; information about the disbursement of public money for schools or local public works; information about decisions of government officials on entitlements to healthcare or education; or information about financial contributions to political parties.²⁷

Furthermore, there has been no “transparency revolution” insofar as the internal processes of the international financial institutions themselves are concerned. It is true that these institutions now publish more information than they did fifteen years ago (although it must be noted again that much of this information is the work-product from surveillance of member states). Indeed both the WTO and IMF have asserted that they publish nearly all documents. In saying this, they usually mean all “official” documents intended for broad distribution—a caveat that makes the assertion less meaningful, and also tautological. No international institution²⁸ has adopted a “right to information” policy comparable to the rules contained in national RTI laws, which establish a general right to documents and procedures for dealing with requests for documents. Essentially, the international financial institutions have produced what the British call “publication schemes”—carefully circumscribed lists of documents that have been prepared for release. Many countries have strongly resisted efforts to impose an RTI policy on these institutions.

A strong argument can be made that the many international institutions which now shape domestic policy should be required to live by the same disclosure rules that are imposed on national governments. Nevertheless, a campaign for adoption of such rules will prove difficult, for several reasons. One is the fact that there are multiple targets: many institutions, each of which must be encouraged to adopt a similar policy. Most of these institutions also operate on a model of consensual decision-making that makes changes in policy very difficult. There are, in addition, legitimate concerns among weaker states that disclosure policies might work to the advantage of better-organized business interests from the developed world. All of these considerations suggest that a campaign to establish a right to information within the community of international institutions will be very difficult.

Developments in the Security Sector

A third transformation in governance is also likely to complicate the campaign for openness. This largely unappreciated change is occurring within the “security sector” of government—the collection of departments and agencies responsible for defense, intelligence and policing.

The security sector is the one area of government where predispositions toward secrecy are most firmly entrenched. Throughout the Cold War, the security establishments of most nations successfully resisted demands for increased openness. In authoritarian states, this secretiveness was justified under the “doctrine of national security,” which said that openness and the other democratic virtues had to be subordinated in the drive to suppress imminent and

26 Ann Florini, *Transparency in the Interests of the Poor* (Washington, DC: World Bank Summer Research Workshop on Poverty, 1999).

27 United Nations Development Program, *Human Development Report 2002: Deepening Democracy in a Fragmented World* (New York: Oxford University Press, 2002).

28 With the exception of European Union institutions.



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substantial threats to the state.²⁹ Even democratic states had their own, more benign version of the national security doctrine, which said that the power to address security threats ought to be concentrated in the hands of well-meaning but secretive elites. In any case, the effect was to transform the security establishment into an enclave of secrecy—a realm in which the usual logic of transparency (a calculus of the benefits and risks of openness) did not apply. Security was an absolute trump over any demand for openness.

As the Cold War ended, this preoccupation with absolute secrecy seemed also to wane. Throughout Latin America, the collapse of military regimes was followed by efforts to open the archives of security services and document abuses of human rights. Similar experiments with post-transition openness were undertaken in Africa, most prominently in South Africa after the end of the apartheid government in 1994,³⁰ and also throughout the former Communist Bloc. The newly-unified German government allowed its citizens to obtain records of persecution by the Stasi, the former East German secret police. Other nations in the former Communist Bloc later emulated, with varying degrees of rigor, the German policy of opening secret police files.

This global phenomenon of disclosure seemed to provide powerful evidence of the dangers of absolute secrecy in the security sector. Throughout the 1990s, many human rights advocates asserted a new norm—“a right to know the truth,” validated in international law, which had to be weighed against security concerns.³¹ Many countries emerging from authoritarian rule attempted to entrench this proposition by adopting constitutional or statutory provisions that affirmed, in general terms, a right to information. These actions, one observer suggested, reflected a “critical transformation” of the terms in which citizens related to the state, which would limit the potential for abuses of state power in the future.³²

In fact, it is probably an overstatement to say that there has been “critical transformation” of attitudes about secrecy in the security sector. The “right to

know the truth” was a right that applied to collapsed regimes or historical records of fading relevance; openness served as a tool for achieving “transitional justice,” to use a phrase widely applied by legal scholars.³³ Jon Elster characterized access to the files of security organizations as one way of “closing the books”—an unfortunate turn of phrase, perhaps, as the difficulty lay largely in the fact that the books had never been open.³⁴ But it conveys the reality: once accounts were settled, security organizations quickly reverted to old norms of secrecy.

This has been evident in the treatment of security organizations under newly adopted RTI laws. For example, the Ecuadorian law adopted in 2004 prohibits the disclosure of classified national security information except with the approval of the military-dominated Consejo de Seguridad Nacional.³⁵ India’s 2002 law did not apply to nineteen of the country’s security and intelligence organizations. This, as activists have noted, created a philosophical contradiction on the law: on one hand, the law mandated

29 The power of the doctrine of national security in Latin American is discussed in: Lawrence Weschler, *A Miracle, a Universe: Settling Accounts with Torturers* (New York: Pantheon Books, 1990).

30 Truth commissions have also been established in Chad, Sierra Leone and Rwanda.

31 Priscilla Hayner, “Fifteen Truth Commissions,” *Human Rights Quarterly* 16, no. 4 (1994): 597-655. In 2005, a working group established by the Office of the United Nations High Commissioner for Human Rights continued to work on a “normative instrument” that would acknowledge a “right to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person.”

32 Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), 100-102. There is also an argument to be made that excessive secrecy in the security sector actually undermines national security. There is no space to make this argument here, but readers can find the argument made in Chapter One of *Blacked Out*, referenced earlier, or in the following paper, which can be downloaded from <http://www.aroberths.us>: Alasdair Roberts, “National Security and Open Government,” *Georgetown Public Policy Review* 9, no. 2 (2004): 69-85.

33 Teitel, *Transitional Justice*.

34 Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (New York: Cambridge University Press, 2004), 117.

35 Carlos Osorio and Kathleen Costar, *Ecuador Enacts Transparency and Access to Information Law* (Washington, DC: freedominfo.org, May 20, 2004 [Accessed July 3, 2004]), available from <http://www.freedominfo.org/news/ecuador/20040520.htm>. The law allows decisions on the classification of information to be extended indefinitely.



the immediate disclosure of information when it concerned the “life and liberty of a person;” on the other, it did not impose this mandate on the agencies most often accused of violating civil liberties.³⁶ In 2005, the Indian government amended the law to accommodate this criticism, but only providing a limited right to information from security and intelligence agencies in cases of alleged human rights abuses. In 2003, South African intelligence authorities persuaded the government to delay the full application of the country’s disclosure law, and lobbied for a permanent exemption from its requirements. Human rights advocates have complained that security agencies destroyed or hid records for several years after the transition to majority rule.³⁷

Other established democracies have also proved reluctant to press transparency in the security sector, as the United Kingdom has recently demonstrated. In 1997, Britain’s newly elected Labour government published a discussion paper on their plans for the country’s first Freedom of Information Act. Although the paper was widely hailed for its progressive attitude on openness, its liberality had sharp limits: several key security organizations were totally excluded from the law.³⁸ As added protection, the new law also excludes any information held by other parts of government that is supplied by these agencies, or even relates to them. For other parts of the security establishment, British cabinet ministers are allowed to sign certificates to prevent independent review bodies from overruling their judgment about whether national security interests are at stake.³⁹

Other countries take a similar approach. For example, Australia’s Freedom of Information Act—one of the oldest outside the United States—also excludes key intelligence and counterintelligence services, and gives ministers the power to block courts

from questioning their claim that disclosure of information would harm national security.⁴⁰ Governments in New Zealand and Canada may also issue such certificates. In western Europe, some countries simply exclude information from their disclosure laws if it has been classified by government officials for national security reasons.⁴¹ Even in the United States, the security establishment enjoys a special level of protection against demands for openness. The Freedom of Information Act denies a right of access to classified information, and courts are very reluctant to challenge executive branch judgments on the classification of documents.⁴²

Despite the protection already given to classified information, four intelligence agencies have lobbied successfully to have files completely excluded from the law.⁴³

This persistent tendency toward secrecy in the security sector is now aggravated by the trend toward increased “networking” of defense, intelligence and law enforcement agencies.

36 Siddarth Varadarajan, “Secret Society,” *The Times of India*, March 27, 2004.

37 Verne Harris, “NIA: A Friendlier Big Brother?,” *Natal Witness*, March 15, 2004.

38 United Kingdom, *Your Right to Know: The Government’s Proposals for a Freedom of Information Act*, para. 2.3. The excluded organizations include the country’s domestic security service, MI5; its overseas intelligence service, MI6; its signals intelligence agency, GCHQ; and its special military forces, the SAS and the SBS.

39 Freedom of Information Act 2000, sections 23 and 24.

40 Australian Law Reform Commission, *Protecting Classified and Security Sensitive Information*, Discussion Paper 67 (Canberra: Australian Law Reform Commission, 2004), 61-63.

41 For example, Belgium and Spain.

42 United States Department of Justice, *Freedom of Information Act Guide* (Washington, DC: U.S. Department of Justice, Office of Information and Privacy, 2004).

43 The Central Intelligence Agency, National Reconnaissance Office, National Imagery and Mapping Agency, and National Security Agency. A fifth organization—the Defense Intelligence Agency—attempted unsuccessfully to obtain a similar exemption in 2000. It made the same proposal again in 2005.



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This persistent tendency toward secrecy in the security sector is now aggravated by the trend toward increased “networking” of defense, intelligence and law enforcement agencies. The interlinking of agencies is not, by itself, problematic: on the contrary, better coordination promotes collective security. But much depends on the procedures that are adopted to guide the operation of these new “security networks.” And the rules on the handling of information within these networks are often designed to assure absolute secrecy, with scant regard for the interests of actors outside the network—such as legislators, public interest groups or citizens—who may wish to hold these powerful networks accountable for their actions.

A very old security network—the North Atlantic Treaty Organization (NATO)—provides an illustration of the difficulty. In its early years, NATO drafted rules which prevented any NATO country from divulging any information—classified or unclassified—which it had received through NATO channels. NATO countries were required to adopt strict laws and internal policies designed to maintain the confidentiality of such information.

NATO’s influence is observable even today. Over the last decade, countries throughout Central and Eastern Europe have been obliged to adopt strict laws on state secrecy in order to qualify for NATO membership. Public interest groups have often protested about the harshness of these laws, but governments have insisted that they are consistent with NATO requirements. NATO, for its part, has consistently refused to allow governments to release the unclassified documents that detail its requirements.⁴⁴ This provides one very direct illustration of the way in which strict rules about the handling of information within the network may corrode the accountability of governments to their citizens.

The NATO model is now being expanded in several different areas. For example, the United States has imposed similarly strict rules on governments who chose to collaborate on its ballistic missile defense

project. Intelligence agencies in many countries also insist on comparable restrictions on disclosure of shared information. These rules have created substantial obstacles for inquiries attempting to probe controversies such as the complicity of allied governments in the extraordinary rendition of suspected terrorists, or the alleged detention of suspected terrorists in secret prisons in Eastern Europe and elsewhere around the globe. National law enforcement agencies have also signed information-sharing agreements that restrict the dissemination of information. After the 9/11 attacks, similar agreements were negotiated between national, state and local law enforcement agencies within the United States. Essentially, a model that has been applied internationally is being replicated within national borders.⁴⁵

It is difficult for transparency advocates to deal with the impact of these agreements for two reasons. First, the agreements are often negotiated privately between bureaucracies; the rules that govern the handling of shared information may themselves be withheld from public view. Second, it can be extraordinarily difficult to modify rules that have been adopted by many governments. The bureaucratic procedures of several governments are interlocked over time; when one government wishes to change its rules, it must obtain the agreement of other governments. Similarly, new members of the network have little room for negotiating the terms on which they join: any adjustment would require the consent of all existing members of the network. In other words, strict rules about information sharing are likely to become even more deeply entrenched, and less easily modified, as these “security networks” continue to expand.

44 Alasdair Roberts, “Entangling Alliances: Nato’s Security Policy and the Entrenchment of State Secrecy,” *Cornell International Law Journal* 36, no. 2 (2003): 329-360.

45 See Roberts, *Blacked Out: Government Secrecy in the Information Age*, Chapter 6.



EFFECT OF NEW INFORMATION TECHNOLOGIES

Efforts to improve governmental transparency also will be complicated by the advent of new information technologies.⁴⁶ Computerization will eventually transform the structure of information held by public agencies in profound ways. The old mainstays of governmental record-keeping—paper documents, manila folders, steel file cabinets—will give way to information held in new forms, either as digitized documents stored on the hard drives of officials' computers, or massive databases containing millions of bits of information about government transactions.

We might think that new technologies would simplify the task of making government more transparent. After all, digitized information is easier to share: large volumes of information can be posted on the web, and vast amounts of data extracted from government databases can be stored on a single memory stick. And technological advances such as email actually create a record of transactions that might previously have gone uncaptured—in the form of a phone call, for example.

All this is true. And yet there are other difficulties that are likely to arise. First, the advent of new technologies will complicate the job of recordkeeping; it is a universal experience that technological improvements result in an exponential growth in the volume of recorded information (including, paradoxically, paper documents) held by government agencies. Agencies will need to be adept in managing this vast amount of information. Records which cannot be found, also cannot be released in response to a request under RTI law.

New technologies are also likely to demand greater sophistication on the part of individuals who make requests for information, and the officials who process those requests. Increasingly, a request for information will require some knowledge of the technologies that are used to store data within agencies; similarly, officials will need to know how to extract data from sophisticated databases. Responding to requests will no longer be a simple job of copying documents contained within a similar folder. Journalists and non-governmental organizations may also find that greater resources and technical skills are required to make sense of data that is extracted in bulk form from government databases.

In some jurisdictions, the advent of new technologies has also led to a reappraisal of old practices regarding access to government information. For example, it has been commonplace in some countries for decades to make certain documents, such as court or property records, routinely accessible to the public at courthouses or local government offices. These records

were “accessible in principle, but practically obscure,” in the words of a US court—which is to say, the documents could be obtained, but required a little trouble to obtain them. Practical considerations imposed a barrier to access.

New technologies eliminate these barriers, and raise new and troubling questions. Should court documents revealing embarrassing or intimate personal

New technologies are also likely to demand greater sophistication on the part of individuals who make requests for information, and the officials who process those requests.

⁴⁶ See *Ibid.*, Chapter 9.



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details be posted on the web? Should private firms be allowed to harvest this information in bulk, so that it can be resold to other companies? Many citizens are troubled by the threats to privacy that might be posed as a consequence of the adoption of new technologies. And as a consequence, governments are reconsidering the old notion that these records should be “accessible in principle.” They are reconstructing in law the limits on access that previously resulted from the limitations of old, paper-based technologies.

AN ONGOING CAMPAIGN

The situation confronting advocates of transparency can be summarized in this way. On one hand, a norm of transparency—a standard of behavior for government officials—is becoming widely accepted. There are an ever increasing number of laws and regulations that are intended to give effect to the norm of transparency. On the other hand, there are substantial forces that will compromise efforts to entrench that norm in everyday practice. Officials will continue to resist transparency requirements, and they may find more sophisticated and less easily detected ways of doing this. The structure of government will also change in ways that compromise openness. The advent of new information technologies will also make debates over transparency more complex.

As I have noted earlier, this implies that the struggle for transparency will not end after an RTI law is adopted. Battles over the control of information, or debates over the adaptation of RTI law to rapidly changing circumstances, will persist for decades. This implies the need for a well-organized coalition that is able to campaign for openness for years after an RTI law is adopted.

Such a coalition would have two important resources. The first is widespread public appreciation of the need for openness. The second is the remarkable transnational network of activists which has emerged over the last five years. It is easier than ever before for activists to call on colleagues in other countries for advice and moral support.

On the other hand, there are dangers. Critical partners, such as philanthropies or non-governmental organizations, may be unwilling to make commitments to long-term projects with uncertain results. The popular media, distracted by other news, may stop paying attention to the problem of government secrecy. Debates over openness may seem to become more complicated and technical.

Activists will have to devise clever ways of overcoming these problems, to build a robust and durable alliance for openness. Pressure to restore the walls of secrecy will persist—and so, therefore, must we. A strong democracy cannot be built without proper access to information about the workings of its major institutions.



ABOUT THE AUTHORS

Alicia Athié received her B.A. in International Relations from the Political and Social Science School of the National Autonomous University of Mexico (UNAM). She worked in the Miguel Hidalgo Delegation as the delegation chief's public relations advisor. Currently, she works at Fundar in the Transparency project as the communications coordinator.

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Richard Calland is the Executive Director of the Open Democracy Advice Centre in Cape Town, South Africa, and head of the Right to Know program at the Institute for Democracy in South Africa (IDASA), where he has worked since 1995. Mr. Calland was a leading member of the ten-organization Open Democracy Campaign Group that conducted extensive research and lobbied intensively in relation to what was then the Open Democracy Bill (now the Promotion of Access to Information Act 2000). Large parts of the bill were re-written by the Parliamentary

Committee as a result of the lobbying of the Campaign Group. The Open Democracy Advice Centre provides advice and support for organizations making requests for information under the Promotion of Access to Information Act and also conducts test case litigation.

Mr. Calland has written and spoken extensively on the issue of access to information legislation and implementation, and in 2002 published the book *The Right to Know, The Right to Live: Access to Information*. He has also published numerous books and articles in the field of South African politics, including *Real Politics — The Wicked Issues* and *Thabo Mbeki's World: The Politics & Ideology of the South African President*. His most recent book, *Whistleblowing Around the World: Law, Culture & Practice*, was published in April 2004. He serves as a member of Professor Joseph Stiglitz's International Task Team on Transparency.

Prior to coming to South Africa in 1994, Calland practiced at the London Bar for seven years, specializing in Public Law. He has an LLM in Comparative Constitutional Law from the University of Cape Town (1994) and is a feature commentator for the weekly Mail and Guardian newspaper.

Colin Campbell was born in the parish of Manchester and attended the St. Paul's Primary School before moving on to Munro College and Calabar High School. He pursued his Tertiary Education at the International Training Institute in Sydney, Australia.

As a journalist and communications expert, Colin Campbell joined the staff of the Jamaica Broadcasting Corporation in 1973, and became Acting Chief Television News Editor at age 24 after being one of the main directors of the nightly news from the tender age of 19. Colin, along with three (3) members of the Jamaica Broadcasting Corporation formed a Public Relations and Advertising Firm,



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Communication Services Limited in 1982. He served as Secretary and then Vice President of the Advertising Agencies Association of Jamaica and Treasurer of the Press Association of Jamaica.

Colin Campbell, Minister of Information and Development in the Office of the Prime Minister, has been instrumental in formulating and implementing policies towards achieving effective governance.

This is Mr. Campbell's second stint as Minister of Information. He previously served as Minister of State in the Ministries of Industry, Commerce and Technology; Local Government, Youth and Community Development and Public Utilities and Transport, following a stint as Parliamentary Secretary in the Ministry of Water and Transport.

He was Chairman of the Spectrum Management Authority from February 2003 to March 2006 and also Chairman of the Universal Access Fund Company Limited, created in May 2005 to provide financial support for the government's e-learning project.

Jimmy Carter (James Earl Carter, Jr.), thirty-ninth President of the United States, was born October 1, 1924, in the small farming town of Plains, Georgia. He was educated at Georgia Southwestern College and the Georgia Institute of Technology, and received a B.S. degree from the United States Naval Academy. He completed his graduate work at Union College in reactor technology and nuclear physics. In 1962, he was elected to the Georgia Senate. He lost his first gubernatorial campaign in 1966, but won the next election, becoming Georgia's 76th governor on January 12, 1971. He was the Democratic National Committee campaign chairman for the 1974 congressional and gubernatorial elections. Jimmy Carter served as President of the United States from January 20, 1977 to January 20, 1981. Significant foreign policy accomplishments of his administration included the Panama Canal treaties, the Camp David Accords, the treaty of peace between Egypt and Israel, the SALT II treaty with the Soviet Union, and the establishment of U.S. diplomatic relations with the

People's Republic of China. He championed human rights throughout the world.

In 1982, he was named a Distinguished Professor at Emory University in Atlanta, Georgia, and founded The Carter Center. Actively guided by President Carter, the nonpartisan and nonprofit Center addresses national and international issues of public policy. Carter Center fellows, associates, and staff join with President Carter in efforts to resolve conflict, promote democracy, protect human rights, and prevent disease and other afflictions. Through the Global 2000 programs, the Center advances health and agriculture in the developing world.

On October 11, 2002 the Norwegian Nobel Committee awarded the Nobel Peace Prize for 2002 to Mr. Carter "for his decades of untiring effort to find peaceful solutions to international conflicts, to advance democracy and human rights, and to promote economic and social development."

Meredith Cook is a Senior Advisor in the Information and Policy Compliance team at the BBC. After joining the corporation in July 2004, Meredith played a key role in preparing the BBC for the implementation of the FOIA. She now advises on compliance and policy issues and delivers the FOIA training programme.

Prior to joining the BBC, Meredith was a Research Fellow at the Constitution Unit, University College London. She managed a consultancy and research team and specialized in comparative international FOIA research. Her publications included *Balancing the Public Interest Test*, a paper for FOIA decision-makers. Meredith originally qualified as a solicitor in New Zealand and worked first in private practice before moving to a role in broadcasting policy in the New Zealand government.

Carlton Davis currently serves as Jamaica's Cabinet Secretary and Head of the Civil Service, a post he has held since July, 1993. Previously he held positions as Executive Director, Chairman, and Executive Chairman of the Jamaica Bauxite Institute from 1976



to 1993. Other previously held positions include chairman of the Clarendon Alumina Production Limited as well as Chairman of the National Housing Trust from 1989 to 1993. Dr. Davis has authored two books on the bauxite industry and has published some 60 papers on the chemistry and mineralogy of soils, clays and bauxite. He was educated at McGill University, in Montreal, Canada and the University of the West Indies.

Guy Dehn is a practicing barrister and a trustee of the Allen Lane Foundation. He was called to the bar in 1982 and practiced until 1986. From 1986 to 1993 he was the Legal Officer to the National Consumer Council. Currently, Mr. Dehn is the director of Public Concern at Work, the UK's whistleblowing charity. The charity, set up in 1993, has three key activities: Free help for individuals concerned about wrongdoing at work but unsure whether or how to raise the matter; professional services for organizations; and policy and campaign work on the public interest. The charity, which is now self-funding, was closely involved in settling the scope and detail of the Public Interest Disclosure Act 1998 and advises on comparable legislative initiatives in the international sphere.

Kevin Dunion was appointed as the first Scottish Information Commissioner in February 2003. He graduated with M.A. (Hons) in Modern History from the University of St Andrews and MSc in African Studies from the University of Edinburgh and his background is in the volunteer sector. He has worked as Campaigns Manager for Oxfam and later as Chief Executive of Friends of the Earth. From 1996 to 2000 he also served as Chairman of Friends of the Earth International. For this role he was awarded an OBE in 2000.

He has written extensively on Scottish politics, sustainability and environmental justice. He was the founding editor of *Radical Scotland* magazine from 1982 to 1986, and his research into environmental justice was conducted while he was an Honorary Senior Research Fellow at Strathclyde University. His

latest book *Troublemakers — the Struggle for Environmental Justice in Scotland* includes a chapter on the campaign for freedom of information in Scotland. He has been a Board Member of Scottish Natural Heritage and of the Cabinet Sub Committee on a Sustainable Scotland. He relinquished these appointments on taking up the role of Scottish Information Commissioner.

Carole Excell is The Carter Center Field Representative in Jamaica working on the Access to Information Project. She is responsible for the implementation of the project in Jamaica which involves working with various stakeholders in Government and civil society partners to encourage and support full and effective implementation and enforcement of the ATI Act. As part of the Access to Information project she has been involved in the development of materials on Access to Information, conducted research and analysis on legal and policy issues associated with the right to information and currently acts as the Secretariat to the Volunteer Attorneys Panel, a panel of lawyers who provide pro bono services to civil society organizations and indigent persons. Mrs. Excell is an Attorney-at-law with a LLB from the University of the West Indies and Certificate of Legal Education from the Norman Manley Law School, Mona. She has a Master's Degree in Environmental Law from the University of Aberdeen in Scotland. She has seven years working experience working for the Government of Jamaica on environmental and planning issues both at the Natural Resources Conservation Authority and then at its successor the National Environment and Planning Agency.

Carolyn Gomes is the Executive Director of Jamaicans For Justice, a non-profit, non-violent, non-partisan Citizens' Rights Action Group. Formed in 1999 JFJ's primary focus is advocacy against State Abuse of Rights and strengthening of existing protection for rights. The organization has become one of the premier Human Rights Advocacy organizations in



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Jamaica and forged important linkages with other local and international organizations working on issues of Abuse of Human Rights. In 2001 the organization took as a secondary focus of activity Access to Information. Carolyn Gomes has spearheaded JFJ's activities around Access to Information since 2001. These activities have included lobbying and advocacy around the development of an Access to Information Act, conducting public education activities and media campaigns, and monitoring and reporting on implementation.

A Medical Doctor by training Carolyn Gomes has worked to educate herself, members of JFJ and the wider community on the importance of the protection of human rights and proper accountability systems for breaches of these rights, as well as the benefits of Access to Information for the enjoyment and protection of all other rights. She has presented extensively in Jamaica and internationally on issues of Human Rights in Jamaica and on Access to Information issues and has written numerous articles and papers on these topics for local and international publication.

Laura Neuman is the Assistant Director for the Americas Program at The Carter Center. She is the Access to Information Project Manager and directs and implements Carter Center transparency projects, including projects in Jamaica, Bolivia, Nicaragua, and Mali. Ms. Neuman edited three widely distributed guidebooks on fostering transparency and preventing corruption and has presented at a number of international seminars relating to Access to Information legislation and implementation, most recently in Jamaica, Bolivia, Peru, Mexico, Argentina, Costa Rica, the United States, Canada, and Ecuador. Book and article publications include *Access to Information: A Key to Democracy*, *Using Freedom of Information Laws to Enforce Welfare Benefits Rights in the United States*, and co-authored *Compelling Disclosure of Campaign Contributions through Access to Information Laws: The South African Experience and Relevance for the Americas*. Ms. Neuman is a member of the Initiative for Policy

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Open Democracy Advice Centre (ODAC) The Open Democracy Advice Centre is a section 21 non-profit company based in Cape Town, South Africa. ODAC's mission is to promote open and transparent democracy, foster a culture of corporate and government accountability, and assist people in South Africa to realize their human rights. ODAC seeks to achieve its mission through supporting the effective implementation of rights and laws that enable access to, and disclosure of, information.

Alasdair Roberts is associate professor at the Maxwell School of Citizenship and Public Affairs at Syracuse University. He is also Director of the Campbell Public Affairs Institute at Syracuse University, and an Honorary Senior Research Fellow of the Constitution Unit, School of Public Policy, University College London. Professor Roberts began his B.A. in politics at Queen's University in 1979. He received a JD from the University of Toronto Faculty of Law in 1984, a Master's degree in Public Policy from the Kennedy School of Government at Harvard University in 1986, and a Ph.D. in Public Policy from Harvard University in 1994.

Professor Roberts is a member of the Board of Editors of *Public Administration Review*, *Public Management Review*, the *Journal of Public Administration Research and Theory*, *International Public Management Journal*, *International Review of Public Administration*, *Revue Governance*, *Open*



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Professor Roberts has two research interests: public sector restructuring and transparency in government. His work has been widely published. In 2005 he received the Johnson Award for Best Paper in Ethics and Accountability in the Public Sector. His book, *Blacked Out: Government Secrecy in the Information Age*, was published by Cambridge University Press in February 2006.

Martin Rosenbaum is an executive producer in the BBC's Political Programmes department, and has been leading the BBC's journalistic use of freedom of information. He has produced two Radio 4 documentaries on the subject. In 2004, he had a sabbatical away from the BBC at Oxford University, where he completed a research project on how journalists in Ireland and Sweden have used their FOI laws. He blogs about FOI at <http://www.bbc.co.uk/blogs/opensecrets/>.

Helen Rumbolt attended the University of the West Indies (UWI) Mona and the Royal Institute of Public Administration (RIPA) International. She has an MBA in Public Sector Management with Certificates in Records Management and Electronic Records Management. Ms. Rumbolt has been a Chairperson

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THE CARTER CENTER AT A GLANCE

Overview: The Carter Center was founded in 1982 by former U.S. President Jimmy Carter and his wife, Rosalynn, in partnership with Emory University, to advance peace and health worldwide. A non-governmental organization, the Center has helped to improve life for people in more than 65 countries by resolving conflicts; advancing democracy, human rights, and economic opportunity; preventing diseases; improving mental health care; and teaching farmers to increase crop production.

Accomplishments: The Center has observed 62 elections in 25 countries; helped farmers double or triple grain production in 15 African countries; worked to prevent and resolve civil and international conflicts worldwide; intervened to prevent unnecessary diseases in Latin America and Africa; and strived to diminish the stigma against mental illnesses.

Budget: \$46.8 million 2004-2005 operating budget.

Donations: The Center is a 501(c)(3) charitable organization, financed by private donations from individuals, foundations, corporations, and international development assistance agencies. Contributions by U.S. citizens and companies are tax-deductible as allowed by law.

Facilities: The nondenominational Cecil B. Day Chapel and other facilities are available for weddings, corporate retreats and meetings, and other special events. For information, (404) 420-5112.

Location: In a 35-acre park, about 1.5 miles east of downtown Atlanta. The Jimmy Carter Library and Museum, which adjoins the Center, is owned and operated by the National Archives and Records Administration and is open to the public. (404) 865-7101.

Staff: 150 employees, based primarily in Atlanta.



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