



United Nations  
Educational, Scientific and  
Cultural Organization

# **Freedom of Information: A Comparative Legal Survey**

■ by  
Toby Mendel

■ Second Edition  
Revised and Updated

# **Freedom of Information:** **A Comparative Legal Survey**

■ by  
Toby Mendel

■ Second Edition  
Revised and Updated

The author is responsible for the choice and the presentation of the facts contained in this book and for the opinions expressed therein, which are not necessarily those of UNESCO and do not commit the organization. The designations employed and the presentation of material throughout this publication do not imply the expression of any opinion whatsoever on the part of UNESCO concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

Published in 2008 by the United Nations Educational Scientific and Cultural Organization / Communication and Information Sector / Freedom of Expression, Democracy and Peace Division (contact: Mogens Schmidt, Director, Deputy Assistant Director-General for Communication and Information, [m.schmidt@unesco.org](mailto:m.schmidt@unesco.org); Andrea Cairola, [a.cairola@unesco.org](mailto:a.cairola@unesco.org); 1 rue Miollis, 75015, Paris, France).

**The full PDF version of this book as well as additional background material and laws on freedom of information can be downloaded at [www.unesco.org/webworld/en/foi](http://www.unesco.org/webworld/en/foi)**

# Acknowledgements

I would like to thank the following people, all of whom provided valuable comments on various chapters of this book: David Banisar, Deputy Director, Privacy International, London; Javier Casas, Legal Area Director, Instituto Prensa y Sociedad (IPYS), Peru; Mukelani Dimba, Deputy Chief Executive Officer, Open Democracy Advice Centre (ODAC), South Africa; Maurice Frankel, Director, Campaign for Freedom of Information, United Kingdom; Carolyn Gomes, Executive Director, Jamaicans for Justice; Rashid Hadjili, Director, Media Rights Institute, Azerbaijan; Helena Jäderblom, Chair of the Council of Europe's Group of Specialists on Access to Official Documents (DH-S-AC) and Judge in the Administrative Court of Appeal in Stockholm, Sweden; Alexander Kashumov, Head of the Legal Team, Access to Information Programme, Bulgaria; Maria Lisitsyna, President of the Youth Human Rights Group, Kyrgyzstan; Laura Neuman, Access to Information Project Manager, Assistant Director, Americas Program, The Carter Center; Issa Luna Pla, Director, Centro Transparencia, Mexico; Miguel Pulido, Coordinator, FUNDAR, Mexico; Lawrence Repeta, Professor, Omiya Law School, Japan; Daniel Simons, Legal Officer, ARTICLE 19; Shekhar Singh, National Campaign for People's Right to Information, India; Thomas M. Susman, Partner, Ropes & Gray LLP, United States; and Patrick Tumwine, Advocacy, Information and Research Officer, HURINET, Uganda. I would also like to thank UNESCO for inspiring and supporting me in the production of this second edition of my book, and to extend particular thanks to Mr. Wijayananda Jayaweera, Director, Division for Communication Development, UNESCO, who inspired the first edition.

III

I would like to dedicate this book to my wife Lilani and my three sons, Caleb, Nathan and Ilan, who provide me with constant support and encouragement in my work, as well as much needed diversion in between.

# Table of Contents

## Foreword and Note to the Second Edition ..... 1

*by Abdul Waheed Khan, Assistant Director-General  
for Communication and Information, UNESCO*

## Introduction ..... 3

## International Standards and Trends ..... 7

### The United Nations ..... 8

### Regional Standards ..... 9

Organization of American States ..... 10

Council of Europe ..... 11

African Union ..... 12

### The Commonwealth ..... 12

### International Jurisprudence ..... 13

Inter-American Court of Human Rights ..... 13

European Court of Human Rights ..... 14

### Information in Specific Areas ..... 16

Information on the Environments ..... 16

Information on Human Rights ..... 18

The Right to Political Participation ..... 19

The Fight Against Corruption ..... 20

**National Developments ..... 20**

Constitutional Interpretation ..... 20  
Specific Constitutional Provisions ..... 21  
Right to information Legislation ..... 22

**Intergovernmental Organisations ..... 22**

**Features of an FOI Regime ..... 31**

**PRINCIPLE 1. MAXIMUM DISCLOSURE ..... 33**

Freedom of information legislation should be guided  
by the principle of maximum disclosure

**PRINCIPLE 2. OBLIGATION TO PUBLISH ..... 33**

Public bodies should be under an obligation to publish key information

**PRINCIPLE 3. PROMOTION OF OPEN GOVERNMENT ..... 33**

Public bodies must actively promote open government

**PRINCIPLE 4. LIMITED SCOPE OF EXCEPTIONS ..... 34**

Exceptions should be clearly and narrowly drawn and subject  
to strict "harm" and "public interest" tests  
The three-part test

VI

**PRINCIPLE 5. PROCESSES TO FACILITATE ACCESS ..... 37**

Requests for information should be processed rapidly and fairly  
and an independent review of any refusals should be available

**PRINCIPLE 6. COSTS ..... 38**

Individuals should not be deterred from making requests  
for information by excessive costs

**PRINCIPLE 7. OPEN MEETINGS ..... 39**

Meetings of public bodies should be open to the public

**PRINCIPLE 8. DISCLOSURE TAKES PRECEDENCE ..... 39**

Laws which are inconsistent with the principle of maximum disclosure  
should be amended or repealed

**PRINCIPLE 9. PROTECTION FOR WHISTLEBLOWERS ..... 40**

Individuals who release information on wrongdoing  
- whistleblowers - must be protected

# Country Chapters ..... 43

## **Azerbaijan ..... 43**

Introduction  
The Right of Access  
Procedural Guarantees  
Duty to Publish  
Exceptions  
Appeals  
Sanctions and Protections  
Promotional Measures

## **Kyrgyzstan ..... 74**

Introduction  
The Right of Access  
Procedural Guarantees  
Duty to Publish  
Exceptions  
Appeals  
Sanctions and Protections  
Promotional Measures

## **Thailand ..... 106**

Introduction  
The Right of Access  
Procedural Guarantees  
Duty to Publish  
Exceptions  
Appeals  
Sanctions and Protections  
Promotional Measures

## **Bulgaria ..... 51**

Introduction  
The Right of Access  
Procedural Guarantees  
Duty to Publish  
Exceptions  
Appeals  
Sanctions and Protections  
Promotional Measures

## **Mexico ..... 80**

Introduction  
The Right of Access  
Procedural Guarantees  
Duty to Publish  
Exceptions  
Appeals  
Sanctions and Protections  
Promotional Measures

## **Uganda ..... 111**

Introduction  
The Right of Access  
Procedural Guarantees  
Duty to Publish  
Exceptions  
Appeals  
Sanctions and Protections  
Promotional Measures

## **India ..... 55**

Introduction  
The Right of Access  
Procedural Guarantees  
Duty to Publish  
Exceptions  
Appeals  
Sanctions and Protections  
Promotional Measures

## **Peru ..... 88**

Introduction  
The Right of Access  
Procedural Guarantees  
Duty to Publish  
Exceptions  
Appeals  
Sanctions and Protections  
Promotional Measures

## **United Kingdom . 119**

Introduction  
The Right of Access  
Procedural Guarantees  
Duty to Publish  
Exceptions  
Appeals  
Sanctions and Protections  
Promotional Measures

VII

## **Jamaica ..... 62**

Introduction  
The Right of Access  
Procedural Guarantees  
Duty to Publish  
Exceptions  
Appeals  
Sanctions and Protections  
Promotional Measures

## **South Africa ..... 94**

Introduction  
The Right of Access  
Procedural Guarantees  
Duty to Publish  
Exceptions  
Appeals  
Sanctions and Protections  
Promotional Measures

## **United States .... 127**

Introduction  
The Right of Access  
Procedural Guarantees  
Duty to Publish  
Exceptions  
Appeals  
Sanctions and Protections  
Promotional Measures

## **Japan ..... 69**

Introduction  
The Right of Access  
Procedural Guarantees  
Duty to Publish  
Exceptions  
Appeals  
Sanctions and Protections  
Promotional Measures

## **Sweden ..... 101**

Introduction  
The Right of Access  
Procedural Guarantees  
Duty to Publish  
Exceptions  
Appeals  
Sanctions and Protections  
Promotional Measures

<b>Comparative Analysis</b> .....	<b>141</b>
<b>Introduction</b> .....	<b>141</b>
<b>The Right of Access</b> .....	<b>141</b>
<b>Procedural Guarantees</b> .....	<b>144</b>
<b>Duty to Publish</b> .....	<b>146</b>
<b>Exceptions</b> .....	<b>148</b>
<b>Appeals</b> .....	<b>151</b>
<b>Sanctions and Protections</b> .....	<b>152</b>
<b>Promotional Measures</b> .....	<b>153</b>
<b>VIII Conclusion</b> .....	<b>155</b>

# Foreword

by **Abdul Waheed Khan**  
Assistant Director-General  
for Communication and Information  
UNESCO

The free flow of information and ideas lies at the heart of the very notion of democracy and is crucial to effective respect for human rights. In the absence of respect for the right to freedom of expression, which includes the right to seek, receive and impart information and ideas, it is not possible to exercise the right to vote, human rights abuses take place in secret, and there is no way to expose corrupt, inefficient government. Central to the guarantee in practice of a free flow of information and ideas is the principle that public bodies hold information not for themselves but on behalf of the public. These bodies hold a vast wealth of information and, if this is held in secret, the right to freedom of expression, guaranteed under international law as well as most constitutions, is seriously undermined.

I

The importance of the right to access information held by public bodies, sometimes referred to as the right to know, has been recognised in Sweden for over 200 years. Importantly, however, over the last ten years it has gained widespread recognition in all regions of the world. This is reflected in authoritative statements signalling the importance of this right by a number of international bodies, including various UN actors and all three regional human rights systems, in specific guarantees for this right in many of the new constitutions adopted in countries undergoing democratic transitions and in the passage of laws and policies giving practical effect to this right by a rapidly growing number of countries and international organisations.

A fundamental value underpinning the right to know is the principle of maximum disclosure, which establishes a presumption that all information held by public bodies should be subject to disclosure unless there is an overriding public interest justification for non-disclosure. This principle also implies the introduction of effective mechanisms through which the public can access information, including request driven systems as well as proactive publication and dissemination of key material.

A number of questions face those tasked with drafting and/or promoting legislation guaranteeing the right to know in accordance with the principle of maximum disclosure. How should the regime of exceptions be crafted so as to strike an appropriate balance between the right to know and the need for secrecy to protect certain key public and private interests? How extensive should the obligation to publish and disseminate information be and how can the law ensure that this obligation grows in line with technological developments which significantly reduce publication costs? What procedures for requesting information can balance the need for timely, inexpensive access against the pressures and resource constraints facing civil servants? What right of appeal should individuals have when their requests for information have been refused? Which positive measures need to be taken to change the culture of secrecy that pervades the public administration in so many countries, and to inform the public about this right?

This book on Freedom of Information by Toby Mendel helps to answer some of these questions by describing the international standards which have been established in this area and some of the key features of effective freedom of information legislation. Importantly, it illustrates the way in which ten countries and two international organisations have dealt with these difficult issues. An attempt has been made to ensure that all regions of the world are represented, with a focus on those countries with effective legal guarantees for the right to information. The two intergovernmental organisations - the United Nations Development Programme (UNDP) and the World Bank - have been selected in part because of their longstanding policies on freedom of information and in part because of their leadership role in promoting this right among similar intergovernmental organisations.

I believe that this book makes a significant contribution to the existing literature on freedom of information and that it will be a valuable resource to the many people all over the world who wish to promote effective legal guarantees for the right to information. It provides an authoritative and yet accessible account of the law and practice regarding freedom of information, providing invaluable analysis of what is working and why. We urge readers to use this book to promote global acceptance of the principle of maximum disclosure and to ensure that it is effectively guaranteed in practice.

Paris, 2003

## **Note to the Second Edition, Revised and Updated**

2

The 2003 edition of this publication enjoyed widespread distribution and positive feed-back from readers and users, ranging from government representatives to civil society and scholars. The first edition was used on all continents and translated for use into a wide range of languages. Nevertheless, the recent evolution in international standards, principles and practices, as well as developments in the countries under study, required an updated and revised version of this book.

Furthermore, freedom of information and the principle of maximum disclosure are more important than ever as the latest ICTs provide more powerful means to gather, process and disseminate information and empower people to participate in the democratic process.

The goal of this new edition is to fuel the trend and encourage those who seek to defend and affirm these rights. Hopefully, *Freedom of Information: A Comparative Legal Survey* will continue to serve as an important tool to support the development of legislation that ensures freedom of information.

Paris, January 2008

**Abdul Waheed Khan**

# Introduction

The importance of the right to information or the right to know is an increasingly constant refrain in the mouths of development practitioners, civil society, academics, the media and even governments. What is this right, is it really a right and how have governments sought to give effect to it? These are some of the questions this book seeks to address.

There has been a veritable revolution in recent years in terms of the right to information, commonly understood as the right to access information held by public bodies. Whereas in 1990 only 13 countries had adopted national right to information laws, upwards of 70 such laws have now been adopted globally, and they are under active consideration in another 20-30 countries. In 1990, no inter-governmental organisation had recognised the right to information, now all of the multilateral development banks and a number of other international financial institutions have adopted information disclosure policies. In 1990, the right to information was seen predominantly as an administrative governance reform whereas today it is increasingly being seen as a fundamental human right.

Even the terminology is starting to change. The term 'freedom of information' has historically been common usage and this is reflected in the title of this book, retained from the first edition. However, the term 'right to information' is now increasingly being used not only by activists, but also by officials. It is, for example, reflected the title of title of the 2005 India law granting access to information held by public bodies. This version of the book, while retaining the original title, consistently refers to the right to information rather than freedom of information.

Since the first edition of this book was published in 2003, these changes, which were already well underway, have become more profound and widespread. The adoption of the first right to information law by a country in the Middle East, namely by Jordan in 2007,<sup>4</sup> so that the trend now extends to every commonly referenced geographic region of the world, is emblematic of this. Very significant developments in terms of recognition of access to information as a fundamental human right have also occurred since the first edition was published. These include the first decision by an international court recognising the right to information as an aspect of the general right to freedom of expression, along with decisions by superior courts along the same lines, and more and more emphatic statements by authoritative international bodies and officials about the status of this right.

The chapters on International Standards and Trends, Features of a Right to Information Regime and Comparative Analysis have all been updated in the second edition to reflect these developments. The second edition also surveys the laws of 14 countries in all regions of the world, up from the 10 surveyed in 2003 and covering more regions of the world. The country analyses are more detailed and based on a standardised template.

There are a number of good reasons for growing acceptance of the right to information. If anything, it is surprising that it has taken so long for such an important underpinning of democracy to gain widespread

recognition as a human right. The idea that public bodies hold information not for themselves but as custodians of the public good is now firmly lodged in the minds of people all over the world. As such, this information must be accessible to members of the public in the absence of an overriding public interest in secrecy. In this respect, right to information laws reflect the fundamental premise that government is supposed to serve the people.

A number of paradigmatic changes sweeping the globe have undoubtedly contributed to growing acceptance of the right to information. These include the transitions to democracy, albeit more or less successful, that have occurred in several regions of the world since 1990. They also undoubtedly include massive progresses in information technology which have changed the whole way societies relate to and use information, and which have, broadly, made the right to information more important to citizens. Among other things, information technology has generally enhanced the ability of ordinary members of the public to control corruption, to hold leaders to account and to feed into decision-making processes. This, in turn or, to be more precise, in parallel, has led to greater demands for the right to information to be respected.

There are a number of utilitarian goals underlying widespread recognition of the right to information, in addition to the principled and global reasons noted above. The international human rights NGO, ARTICLE 19, Global Campaign for Free Expression, has described information as, “the oxygen of democracy”.<sup>5</sup> Information is an essential underpinning of democracy at every level. At its most general, democracy is about the ability of individuals to participate effectively in decision-making that affects them. Democratic societies have a wide range of participatory mechanisms, ranging from regular elections to citizen oversight bodies for example of public education and health services, to mechanisms for commenting on draft policies, laws or development programmes.

Effective participation at all of these levels depends, in fairly obvious ways, on access to information, including information held by public bodies. Voting is not simply a political beauty contest. For elections to fulfil their proper function – described under international law as ensuing that “[t]he will of the people shall be the basis of the authority of government”<sup>6</sup> – the electorate must have access to information. The same is true of other forms of participation. It is difficult, for example, to provide useful input to a policy process without access to the thinking on policy directions within government, for example in the form of a draft policy, as well as the background information upon which that thinking is based.

Participation is also central to sound and fair development decision-making. The UNDP *Human Development Report 2002: Deepening Democracy in a Fragmented World* points to three key benefits of democratic participation: it is itself a fundamental human right which all should enjoy; it protects against economic and political catastrophes; and it “can trigger a virtuous cycle of development”.<sup>7</sup> Inasmuch as access to information underpins effective participation, it also contributes to these outcomes. A right to information can also help ensure a more balanced participatory playing field. Stiglitz, whose work on the economic implications of asymmetries of information won him a Nobel Prize, has noted that unequal access to information allows officials “to pursue policies that are more in their interests than in the interests of the citizens. Improvements in information and the rule governing its dissemination can reduce the scope for these abuses”.<sup>8</sup>

Democracy also involves accountability and good governance. The public have a right to scrutinise the actions of their leaders and to engage in full and open debate about those actions. They must be able to assess the performance of the government and this depends on access to information about the state of the economy, social systems and other matters of public concern. One of the most effective ways of addressing poor governance, particularly over time, is through open, informed debate.

The right to information is also a key tool in combating corruption and wrongdoing in government. Investigative journalists and watchdog NGOs can use the right to access information to expose wrongdoing and help root it out. As U.S. Supreme Court Justice Louis Brandeis famously noted: “A little sunlight is the best disinfectant.” Transparency International, an international NGO devoted to combating corruption, devoted an entire annual report to looking at the role of access to information can play in this struggle.<sup>9</sup>

Commentators often focus on the more political aspects of the right to information but it also serves a number of other important social goals. The right to access one’s personal information, for example, is part of respect for basic human dignity but it can also be central to effective personal decision-making.

Access to medical records, for example, can help individuals make decisions about treatment, financial planning and so on.

Finally, an aspect of the right to information that is often neglected is the use of this right to facilitate effective business practices. Commercial users are, in many countries, one of the most significant user groups. Public bodies hold a vast amount of information of all kinds, much of which relates to economic matters and which can be very useful for businesses. A right to information helps promote a fluid information flow between government and the business sector, maximising the potential for synergies. This is an important benefit of right to information legislation, and helps answer the concerns of some governments about the cost of implementing such legislation.

These rationales for right to information legislation apply equally, if not with more force, to less developed as to more developed countries. Democracy is not the preserve of a few select countries but a right of citizens everywhere. Every country in the world needs adequate checks and balances on the exercise of public power, including through the right to information and the public oversight this enables. The right to information can be particularly effective in exposing corruption where there are few other safeguards, as grassroots experience in India with this right has amply demonstrated.<sup>10</sup>

The right to information is most commonly associated with the right to request and receive information from public bodies. This is a key modality by which the right is fulfilled but it is not the only one. Most right to information laws also place an obligation on public bodies to publish information on a proactive or routine basis, even in the absence of a request. The scope of this varies but it usually extends to key information about how they operate, their policies, opportunities for public participation in their work and how to make a request for information. 'Pushing' information out in this way is increasingly being recognised as one of the more effective ways to enhance access to information held by public bodies.

One further aspect of this right is slowly starting to emerge. Unlike the other two aspects of the right, which relate to information already held by public bodies, this third aspect posits a positive obligation on States to ensure that certain key categories of information are available. ARTICLE 19, for example, has long argued that States are under a substantive positive obligation to ensure that citizens have access to information about human rights violations.<sup>11</sup> The 'right to truth' has also been recognised by international courts in the human rights context, and also in the context of environmental threats.<sup>12</sup> This is of particular importance in the aftermath of a period of serious human rights violations, as part of a renewed commitment to democracy and to respect rights. In such cases, it may not be enough simply to provide access to information already held by public bodies; it may be necessary to go further and collect and compile new information to ascertain the truth about the past abuses. The importance attached to this is reflected, among other things, in the truth commissions that have been appointed in a number of countries.

The first chapter of this book, International Standards and Trends, analyses the international basis for claiming the right to information as a fundamental human right. The analysis reviews authoritative international statements, and the decisions of international courts and quasi-judicial bodies, as well as relevant national developments. The second chapter probes the specific implications of the various standards for right to information legislation, analysing this within the framework of nine right to information principles.

These chapters are followed by analyses of the laws of 14 different countries from all regions of the world, namely Azerbaijan, Bulgaria, India, Jamaica, Japan, Kyrgyzstan, Mexico, Peru, South Africa, Sweden, Thailand, Uganda, the United Kingdom and the United States. The choice of countries was based on a number of factors including geographic distribution, progressive and/or long-standing legislation and the familiarity of the author with the country/legislation. Each country section is organised under the same set of headings. A brief introduction is followed by headings on the right of access, procedural guarantees, the duty to publish, exceptions, appeals, sanctions and protections, and promotional measures.

The country/intergovernmental organisation sections are followed by a chapter on Comparative Analysis which highlights similarities and differences in the various laws, following the same structure as the country chapters. It describes, in particular, the main approaches for implementing the principles underpinning the right to information, as well as some of the more innovative systems that have been tried in different countries.

This book aims to provide legal professionals, NGO activists, academics, media practitioners and officials with international and comparative information about the right to information in a relatively easily accessible format. It focuses on the comparative practice in terms of national legislation, but also provides information on international standards and principles underpinning the right to information. It is hoped that this second edition, by covering more countries, in more detail, and by updating the international standards, will prove to be a useful resource to those struggling to promote best practice approaches to implementing the right to information.

---

## Notes

4. Formally this was preceded by Israel's adoption of a right to information law in 1998.
5. *The Public's Right to Know: Principles on Freedom of Information Legislation* (London: June 1999), Preface.
6. *Universal Declaration of Human Rights*, UN General Assembly Resolution 217 A (III), 10 December 1948, Article 21.
7. UNDP, *Human Development Report 2002: Deepening Democracy in a Fragmented World*, (Oxford: Oxford University Press, 2002), p. 3.
8. Stiglitz, J., "Transparency in Government", in World Bank Institute, *The Right To Tell: The Role of the Mass Media in Economic Development*, (Washington, D.C.: 2002), p. 28.
9. Transparency International, *Global Corruption Report 2005: Special Focus: Access to Information* (London: Profile Books, 2003).
10. See ARTICLE 19, Centre for Policy Alternatives, Commonwealth Human Rights Initiative and Human Rights Commission of Pakistan, *Global Trends on the Right to Information: A Survey of South Asia* (London: 2001), under 2.8.1 India, The MKSS Movement, pp. 72-75.
11. *Who Wants to Forget? Truth and Access to Information about Past Human Rights Violations* (London: ARTICLE 19, 2000), p. 5. Online at [www.article19.org/docimages/869.htm](http://www.article19.org/docimages/869.htm)

# International Standards and Trends

The original version of this book, published in 2003, tentatively stated that, collectively, the evidence, primarily international statements by authoritative bodies, supported the conclusion that the right to information had been internationally recognised. Since that time, there have been a number of important developments. A number of new and more emphatic statements to the effect that access to information held by public bodies is a fundamental human right have been issued. Very significantly, for the first time, an international court, the Inter-American Court of Human Rights, has specifically held that the general right to freedom of expression, as guaranteed under international law, encompasses the right to information.

7

In 2003, the idea that the right to information had been internationally recognised as a fundamental human right was a bold claim, and so the claim was phrased somewhat tentatively. This is no longer the case and there is very widespread support for this contention. While there are no doubt those who would dispute this claim, they are flying in the face of history and in the face of increasing evidence to the contrary.

As noted, numerous international bodies with responsibility for promoting and protecting human rights have authoritatively recognised the fundamental human right to access information held by public bodies, as well as the need for effective legislation to secure respect for that right in practice. These include the United Nations, regional human rights bodies and mechanisms at the Organization of American States, the Council of Europe and the African Union, and other international bodies with a human rights mandate, such as the Commonwealth.

The primary basis identified in these statements for the right to information is as an aspect of the general guarantee of freedom of expression, and this is the main focus of this chapter. In addition to setting out international standards on the right to information, this chapter also outlines key developments at the national level, on the basis that these demonstrate general recognition of the human rights status of access to information. There is a growing consensus at the national level that access to information is a human right, as well as a fundamental underpinning of democracy. This is reflected in the inclusion of the right to information among the rights and freedoms guaranteed by many modern constitutions, as well as the dramatic increase in the number of countries which have adopted legislation giving effect to this right in recent years.

The right to information has also been linked to the right to the environment, to information about human rights and to the right to take part in public affairs. A right to access information held by public bodies has also been linked to pragmatic social objectives, such as controlling corruption. All of these are discussed briefly in this chapter.

## The United Nations

The notion of 'freedom of information' was recognised early on by the UN. In 1946, during its first session, the UN General Assembly adopted Resolution 59(1), which stated:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.<sup>13</sup>

Although some of the early laws guaranteeing a right to access information held by public bodies were called freedom of information laws, it is clear from the context that, as used in the Resolution, the term referred in general to the free flow of information in society rather than the more specific idea of a right to access information held by public bodies.

The *Universal Declaration of Human Rights* (UDHR), adopted by the UN General Assembly in 1948,<sup>14</sup> is generally considered to be the flagship statement of international human rights. Article 19, binding on all States as a matter of customary international law,<sup>15</sup> guarantees the right to freedom of expression and information in the following terms:

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

The *International Covenant on Civil and Political Rights* (ICCPR), a legally binding treaty, was adopted by the UN General Assembly in 1966<sup>16</sup> and, as of July 2007, had been ratified by 160 States. The ICCPR guarantees the right to freedom of opinion and expression, also at Article 19, and in very similar terms to the UDHR.

8

These international human rights instruments did not specifically elaborate a right to information and their general guarantees of freedom of expression were not, at the time of adoption, understood as including a right to access information held by public bodies. However, the content of rights is not static. The European Court of Human Rights, for example, has held: "[T]he [European Convention on Human Rights] is a living instrument which ... must be interpreted in the light of present-day conditions."<sup>17</sup> Similarly, the Inter-American Court of Human Rights has held that international "human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions."<sup>18</sup>

Those responsible for drafting international human rights treaties were farsighted in their framing of the right to freedom of expression, including within its ambit the right not only to impart but also to seek and receive information and ideas. They recognised the important social role of not just freedom to express oneself – freedom to speak – but also of the more profound notion of a free flow of information and ideas in society. They recognised the importance of protecting not only the speaker, but also the recipient of information. This recognition is now being understood as including the right to information in the sense of the right to request and be given access to information held by public bodies.

### UN Special Rapporteur on Freedom of Opinion and Expression

In 1993, the UN Commission on Human Rights<sup>19</sup> established the office of the UN Special Rapporteur on Freedom of Opinion and Expression.<sup>20</sup> Part of the Special Rapporteur's mandate is to clarify the precise content of the right to freedom of opinion and expression and he has addressed the issue of the right to information in most of his annual reports to the Commission since 1997. After receiving his initial statements on the subject in 1997, the Commission called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications."<sup>21</sup>

In his 1998 Annual Report, the Special Rapporteur stated clearly that the right to freedom of expression includes the right to access information held by the State: "[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with

regard to information held by Government in all types of storage and retrieval systems. ...”<sup>22</sup> His views were welcomed by the Commission.<sup>23</sup>

The UN Special Rapporteur significantly expanded his commentary on the right to information in his 2000 Annual Report to the Commission, noting its fundamental importance not only to democracy and freedom, but also to the right to participate and to realisation of the right to development.<sup>24</sup> He also reiterated his “concern about the tendency of Governments, and the institutions of Government, to withhold from the people information that is rightly theirs”.<sup>25</sup> Importantly, at the same time, the Special Rapporteur elaborated in detail on the specific content of the right to information.<sup>26</sup> In his subsequent reports, the Special Rapporteur has focused more on implementation of the right to information than on further development of standards.

The UN Special Rapporteur has been supported in his views on the right to information by official mandates on freedom of expression established by other IGOs. In November 1999, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – came together for the first time under the auspices of the human rights NGO, ARTICLE 19, Global Campaign for Free Expression. They adopted a Joint Declaration which included the following statement:

**Implicit in freedom of expression is the public’s right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people’s participation in government would remain fragmented.**<sup>27</sup>

The mandates now issue a Joint Declaration annually on different freedom of expression themes. In their 2004 Joint Declaration, they elaborated further on the right to information, stating:

**The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.**<sup>28</sup>

The statement went on to elaborate in some detail on the specific content of the right.

The other main UN body with responsibility for the right to freedom of expression is the UN Human Rights Committee (HRC), established under the ICCPR and given responsibility for oversight of its implementation. The HRC both reviews and comments on the regular reports States are required to provide to it on implementation of their ICCPR obligations, and hears individual complaints about human rights abuses from States which have ratified the (first) Optional Protocol to the ICCPR.<sup>29</sup> The HRC has so far declined to comment on the right to information in the context of regular State reports, although this may be partly because these are largely reactive in nature. So far, no individual case on the right to information has been decided by the HRC although it is understood that cases on this are currently pending before it.

## Regional Standards

All three main regional human rights systems – at the Organization of American States, the Council of Europe and the African Union – have formally recognised the right to information. The following section describes the development of these standards.

## Organization of American States

Article 13 of the *American Convention on Human Rights* (ACHR),<sup>30</sup> a legally binding treaty, guarantees freedom of expression in terms similar to, and even stronger than, the UN instruments. In 1994, the Inter-American Press Association, a regional NGO, organised the Hemisphere Conference on Free Speech, which adopted the Declaration of Chapultepec, a set of principles which elaborate on the guarantee of freedom of expression found at Article 13 of the ACHR.<sup>31</sup> The Declaration explicitly recognises the right to information as a fundamental right, which includes the right to access information held by public bodies:

1. Every person has the right to seek and receive information, express opinions and disseminate them freely. No one may restrict or deny these rights.
2. The authorities must be compelled by law to make available in a timely and reasonable manner the information generated by the public sector...

Although the Declaration of Chapultepec originally had no formal legal status, as Dr Santiago Canton noted when he was OAS Special Rapporteur for Freedom of Expression, it “is receiving growing recognition among all social sectors of our hemisphere and is becoming a major point of reference in the area of freedom of expression.”<sup>32</sup> To date, the Heads of State or Government of some 30 countries in the Americas, as well as numerous other prominent persons, have signed the Declaration.<sup>33</sup>

The Special Rapporteur, whose Office was established by the Inter-American Commission on Human Rights in 1997,<sup>34</sup> has frequently recognised the right to information as a fundamental right, which includes the right to access information held by public bodies. In his 1999 Annual Report to the Commission he stated:

IO

The right to access to official information is one of the cornerstones of representative democracy. In a representative system of government, the representatives should respond to the people who entrusted them with their representation and the authority to make decisions on public matters. It is to the individual who delegated the administration of public affairs to his or her representatives that belongs the right to information. Information that the State uses and produces with taxpayer money.<sup>35</sup>

In October 2000, in an important development, the Commission approved the *Inter-American Declaration of Principles on Freedom of Expression*,<sup>36</sup> which is the most comprehensive official document to date on freedom of expression in the Inter-American system. The Preamble reaffirms the aforementioned statements on the right to information:

CONVINCED that guaranteeing the right to access to information held by the State will ensure greater transparency and accountability of government activities and the strengthening of democratic institutions; ...

The Principles unequivocally recognise the right to information:

3. Every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

The OAS General Assembly has followed up on the Principles by adopting resolutions on access to public information every year since 2003. These resolutions highlight Member States' obligation to “respect and promote respect for everyone’s access to public information”, which is deemed to be “a requisite for the

very exercise of democracy.” The resolutions also call on States to “promote the adoption of any necessary legislative or other types of provisions to ensure [the right’s] recognition and effective application.”<sup>37</sup>

In the Declaration of Nueva León, adopted in 2004, the Heads of State of the Americas stated:

Access to information held by the State, subject to constitutional and legal norms, including those on privacy and confidentiality, is an indispensable condition for citizen participation and promotes effective respect for human rights. We are committed to providing the legal and regulatory framework and the structures and conditions required to guarantee the right of access to information to our citizens.<sup>38</sup>

## Council of Europe

The Council of Europe (COE) is an intergovernmental organisation, currently composed of 47 Member States, devoted to promoting human rights, education and culture. One of its foundational documents is the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR),<sup>39</sup> which guarantees freedom of expression and information as a fundamental human right, at Article 10. Article 10 differs slightly from guarantees found in Articles 19 of the UDHR and ICCPR, and Article 13 of the ACHR, in that it protects the right to “receive and impart”, but not the right to “seek”, information.

The political bodies of the Council of Europe have made important moves towards recognising the right to information as a fundamental human right. In 1981, the Committee of Ministers, the political decision-making body of the Council of Europe (composed of Member States’ Ministers of Foreign Affairs) adopted Recommendation No. R(81)19 on Access to Information Held by Public Authorities, which stated:

- I. Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities ...<sup>40</sup>

II

In 1994, the 4<sup>th</sup> European Ministerial Conference on Mass Media Policy adopted a Declaration recommending that the Committee of Ministers consider “preparing a binding legal instrument or other measures embodying basic principles on the right of access of the public to information held by public authorities.”<sup>41</sup> Instead, the Committee of Ministers opted for a recommendation, which it adopted on 21 February 2002. The Recommendation includes the following provision:

### III

#### General principle on access to official documents

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

The rest of the Recommendation elaborates in some detail on the content of the right. Principle IV, for example, delineates the legitimate scope of restrictions on access to information, while Principles V and VI address matters of procedure. The Recommendation also addresses forms of access (Principle VII), costs (Principle VIII), the right to have any refusal of access reviewed (Principle IX), promotional measures (Principle X) and proactive publication (Principle XI).

In May 2005, the Committee of Ministers tasked a group of experts with “drafting a free-standing legally binding instrument establishing the principles on access to official documents.”<sup>42</sup> The Group of Specialists on Access to Official Documents (known by the acronym DH-S-AC), presented a draft European Convention on Access to Official Documents to the Council of Europe’s Steering Committee for Human Rights. The Convention, once adopted, would be a formally binding instrument recognising an individual right of

access to official documents. The Steering Committee will consider the draft treaty at its next meeting in March 2008.<sup>43</sup>

The *Charter of Fundamental Rights of the European Union*,<sup>44</sup> adopted in 2000 by the (now) 27-member European Union, sets out the human rights to which the Union is committed. Article 42 of the Charter grants a right of access to documents held by European Union institutions in the following terms:

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

Originally just a 'political' document, the Charter is set to become legally binding by virtue of Article 6 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Reform Treaty).<sup>45</sup> The Reform Treaty is expected to be signed by European Heads of State in December 2007, after which it will be open for ratification. The Charter is based on the constitutional traditions of Member States, so its recognition of the right to information suggests that this right has not only become ubiquitous, but is widely perceived as a fundamental right by European Union States.

## African Union

Developments on the right to information at the African Union have been a more modest. However, the African Commission on Human and Peoples' Rights adopted a *Declaration of Principles on Freedom of Expression in Africa* in October 2002.<sup>46</sup> The Declaration is an authoritative elaboration of the guarantee of freedom of expression found at Article 9 of the *African Charter on Human and Peoples' Rights*.<sup>47</sup> The Declaration clearly endorses the right to access information held by public bodies, stating:

### IV

#### *Freedom of Information*

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

The same Principle goes on to elaborate a number of key features of the right to information.

## The Commonwealth

The Commonwealth has taken important concrete steps to recognise human rights and democracy as a fundamental component of the system of shared values which underpin the organisation. In 1991, it adopted the *Harare Commonwealth Declaration*, which enshrined its fundamental political values, including respect for human rights and the individual's inalienable democratic right to participate in framing his or her society.<sup>48</sup>

The importance of the right to information was recognised by the Commonwealth nearly three decades ago. As far back as 1980, the Law Ministers of the Commonwealth, meeting in Barbados, stated that "public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information."<sup>49</sup>

More recently, the Commonwealth has taken a number of significant steps to elaborate on the content of that right. In March 1999, the Commonwealth Secretariat brought together a Commonwealth Expert

Group to discuss the right to information. The Expert Group adopted a document setting out a number of principles and guidelines on 'freedom of information', including the following:

Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.<sup>50</sup>

These principles and guidelines were endorsed by the Commonwealth Law Ministers at their May 1999 Meeting in Port of Spain, Trinidad and Tobago. At the same time, the Ministers formulated a number of key principles governing the right to information.<sup>51</sup> They also called on the Commonwealth Secretariat to take steps to promote these principles, including by assisting governments through technical assistance and sharing of experiences.

The Law Ministers' Communiqué was considered by the Committee of the Whole on Commonwealth Functional Co-operation whose report, later approved by the Heads of Government,<sup>52</sup> stated:

The Committee took note of the Commonwealth Freedom of Information Principles endorsed by Commonwealth Law Ministers and forwarded to Heads of Government. It recognized the importance of public access to official information, both in promoting transparency and accountable governance and in encouraging the full participation of citizens in the democratic process.<sup>53</sup>

The Commonwealth Secretariat has taken some concrete steps to promote the right to information in member countries. It has, for example, drafted model laws on the right to information and on privacy.<sup>54</sup>

## International Jurisprudence

### Inter-American Court of Human Rights

In a 1985 Advisory Opinion, the Inter-American Court of Human Rights, interpreting Article 13, referred to the dual nature of the right to freedom of expression, which protected both the right to impart, as well as to seek and to receive, information and ideas, noting:

Article 13 ... establishes that those to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds. ... [Freedom of expression] requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.<sup>55</sup>

The Court also stated: "For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinion", concluding that "a society that is not well-informed is not a society that is truly free."<sup>56</sup> Although the Court did not go so far, at that time, as to recognise the right to access information held by public bodies, it did provide a solid jurisprudential basis for such recognition.

In an extremely significant development, the Inter-American Court of Human Rights, in a decision rendered on 19 September 2006, specifically held that the general guarantee of freedom of expression at Article 13 of the ACHR protects the right to access information held by public bodies. Specifically, the Court stated:

77. In respect of the facts of the present case, the Court considers that article 13 of the Convention, in guaranteeing expressly the rights to “seek” and “receive” “information”, protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention. Consequently, the said article encompasses the right of individuals to receive the said information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised by the Convention, the State may limit the access to it in the particular case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied.<sup>57</sup>

Inherent in the quotation above are some key attributes of the right to information, namely that restrictions on the right of access may only be imposed consistently with Article 13 and that no reasons need to be provided to access information. The Court went on to elaborate in some length on the legitimate scope of restrictions on the right to information, stating that they should be provided by law, aim to protect a legitimate interest recognised under the ACHR and be necessary in a democratic society to protect that interest.<sup>58</sup>

The Court unanimously held that the respondent State, Chile, had breached the right to freedom of expression guaranteed by Article 13 of the ACHR. Significantly, the Court, also unanimously, required Chile not only to provide the information to and compensate the victims, and to publish the judgment, all fairly routine remedies, but also to adopt the necessary measures through national legislation to give effect to the right to information, and even to provide training to public officials on this right.<sup>59</sup>

## European Court of Human Rights

The European Court of Human Rights has also considered claims for a right to receive information from public bodies. It has looked at this issue in a number of cases, including *Leander v. Sweden*,<sup>60</sup> *Gaskin v. United Kingdom*,<sup>61</sup> *Guerra and Ors. v. Italy*,<sup>62</sup> *McGinley and Egan v. United Kingdom*,<sup>63</sup> *Odièvre v. France*,<sup>64</sup>

*Sîrbu and others v. Moldova*,<sup>65</sup> and *Roche v. United Kingdom*.<sup>66</sup> In the cases which presented a claim based on the right to freedom of expression as guaranteed by Article 10 of the ECHR,<sup>67</sup> the Court held that this did not include a right to access the information sought. The following interpretation of the scope of Article 10 from *Leander* either features directly or is referenced in all of these cases:

[T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access... nor does it embody an obligation on the Government to impart... information to the individual.<sup>68</sup>

By using the words, “in circumstances such as those of the present case”, the Court has not absolutely ruled out the possibility of a right to information under Article 10. However, these cases involve a wide range of different fact patterns so that, taken together, the rejection of an Article 10 right to access information in all of them presents a high barrier to such a claim. As a Grand Chamber of the Court stated in *Roche* when rejecting the Article 10 claim of a right to access information: “It sees no reason not to apply this established jurisprudence.”<sup>69</sup>

The Court did not, however, refuse to recognise a right of redress in these cases. Rather, it found that to deny access to the information in question was a violation of the right to private and/or family life, guaranteed

by Article 8 of the Convention.<sup>70</sup> In most of these cases, the Court held that there was no *interference* with the right to respect for private and family life, but that Article 8 imposed a *positive obligation* on States to ensure respect for such rights:

[A]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life.<sup>71</sup>

This positive obligation could include granting access to information in certain cases.

In the first case, *Leander*, the applicant was dismissed from a job with the Swedish government on national security grounds, but was refused access to information about his private life, held in a secret police register, which had provided the basis for his dismissal. The Court held that the storage and use of the information, coupled with a refusal to allow the applicant an opportunity to refute it, was an interference with his right to respect for private life. The interference was, however, justified as necessary to protect Sweden's national security.<sup>72</sup> It is interesting to note that it ultimately transpired that Leander was in fact fired for his political beliefs, and he was offered an apology and compensation by the Swedish government.

In *Gaskin*, the applicant, who as a child had been under the care of local authorities in the United Kingdom, had applied for but was refused access to case records about him held by the State. The Court held that the applicant had a right to receive information necessary to know and understand his childhood and early development, although that had to be balanced against the confidentiality interests of the third parties who had contributed the information. Significantly, this placed a positive obligation on the government to establish an independent authority to decide whether access should be granted if a third party contributor was not available or withheld consent for the disclosure. Since the government had not done so, the applicant's rights had been breached.<sup>73</sup>

In *Guerra*, the applicants, who lived near a "high risk" chemical factory, complained that the local authorities in Italy had failed to provide them with information about the risks of pollution and how to proceed in event of a major accident. The Court held that severe environmental problems may affect individuals' well-being and prevent them from enjoying their homes, thereby interfering with their right to private and family life. As a result, the Italian authorities had a positive obligation to provide the applicants with the information necessary to assess the risks of living in a town near a high risk chemical factory. The failure to provide the applicants with that essential information was a breach of their Article 8 rights.<sup>74</sup> The decision was particularly significant as it appears that the State did not actually hold the information requested, so that it would actually need to go out and collect it.

In *McGinley and Egan*, the applicants had been exposed to radiation during nuclear testing in the Christmas Islands, and claimed a right of access to records regarding the potential health risks of this exposure. The Court held that the applicants did have a right to access the information in question under Articles 6 and 8 of the ECHR, regarding, respectively, the right to a fair hearing and respect for private and family life. However, the government had complied with its positive obligations through the establishment of a process by which access to the information could be obtained, which the applicants had failed to make use of.<sup>75</sup>

In *Odièvre*, the issue was access to information about the natural mother of the applicant. The Court accepted that this was covered by the right to private life, as guaranteed by Article 8, but held that the refusal by the French authorities to provide the information represented an appropriate balance between the interests of the applicant and the interests of her mother, who had expressly sought to keep her identity secret.<sup>76</sup>

*Sîrbu* was slightly different from the other cases inasmuch as the request to access information was really secondary to the main complaint about a failure of the State to apply a domestic ruling to the effect that the applicants were entitled to certain back-pay. The domestic 'Decision' upon which the entitlement to back-pay was based had been classified as secret and the applicants were denied access to it. Notwithstanding this, a domestic court awarded each of the applicants the back-pay due to them, but the government simply refused to provide it, resulting in a fairly obvious breach of Article 6, guaranteeing the right to a fair and public hearing.

In *Roche*, which like *McGinley and Egan* involved claims of medical problems resulting from military testing, the Court held that Article 6 of the ECHR, regarding a fair hearing, was not applicable.<sup>77</sup> Article 8, however, was and in this case the Court held that there had been a breach of the right since the government did not have reasonable grounds for refusing to disclose the information. Significantly, the Court held that the various disclosures that were made in response to requests by the applicant did not constitute the “kind of structured disclosure process envisaged by Article 8”.<sup>78</sup> This appears to elevate the status of the right beyond the very particular instances previously recognised.

Although these decisions of the European Court recognise a right of access to information, they are problematic. First, the Court has proceeded cautiously, making it clear that its rulings were restricted to the facts of each case and should not be taken as establishing a general principle.<sup>79</sup> Second, and more problematical, relying on the right to respect for private and/or family life places serious limitations on the scope of the right to access information. This is clear from the *Guerra* case, where it was a considerable leap to find, as the Court did, that severe environmental problems would affect the applicants’ right to respect for their private and family life. Although the Court made that leap in *Guerra*, based on overriding considerations of justice and democracy, this is hardly a satisfactory approach. Furthermore, it is fundamentally at odds with the notion of a right to information as expressed by other international actors, which is not contingent on deprivation of another right. In effect, the Court appears to have backed itself into a corner by refusing to ground the right to information on Article 10.

At the same time, there are indications that the Court may be changing its approach. In *Sdruženi Jihočeské Matky v. Czech Republic*,<sup>80</sup> the Court held that a refusal to provide access to information did represent an interference with the right to freedom of expression as protected by Article 10 of the ECHR. The decision included the quotation noted above from *Leander*, and also noted that it was ‘difficult’ to derive from the ECHR a general right to access administrative documents. However, the Court also noted that the case concerned a request to consult administrative documents in the possession of the authorities and to which access was provided for under conditions set out in article 133 of the law on construction. In those circumstances, the Court recognized that the refusal to grant access represented an interference with the right of the applicant to receive information.<sup>81</sup>

The Court ultimately rejected the application as inadmissible due to the fact that the refusal to disclose the information was consistent with Article 10(2), allowing for restrictions on freedom of expression. In its Article 10(2) analysis, the Court referred to various factors, including national security, contractual obligations and the need to protect economic confidentiality. But the crucial point was that the refusal was an interference, which had to be justified by reference to the standards for such restrictions provided for in Article 10(2). It is hard to assess why the Court engaged in such a different analysis in this case. In some of the other cases noted above, the information was not actually held by the State, an important difference on the facts from the *Matky* case. But in others the State did hold the information. Another possible difference was the presence of a law which, under certain circumstances, did provide for access to information. This, however, seems a shaky basis for engaging Article 10 directly (as opposed, perhaps, to Article 10 in conjunction with Article 14, prohibiting discrimination in the application of rights).<sup>82</sup>

## Information in Specific Areas

### Information on the Environment

During the last 15 years, there has been increasing recognition that access to information on the environment is key to sustainable development and effective public participation in environmental governance. The issue was first substantively addressed in Principle 10 of the 1992 Rio Declaration on Environment and Development:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to

information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. ...<sup>83</sup>

In 1998, as a follow-up to the Rio Declaration, Member States of the United Nations Economic Commission for Europe (UNECE) and the European Union signed the legally binding *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (the Aarhus Convention).<sup>84</sup> The Preamble, which sets out the rationale for the Convention, states in part:

Considering that, to be able to assert [the right to live in a clean environment] citizens must have access to information ...

Recognizing that, in the field of environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns ...

The Convention, which came into force in October 2001, requires State Parties to take legal measures to implement its provisions on access to environmental information.<sup>85</sup> Most of those provisions are set out in Article 4, which begins by stating:

(1) Each Party shall ensure that ... public authorities, in response to a request for environmental information, make such information available to the public ...

(a) Without an interest having to be stated.

The Convention recognises access to information as part of the right to live in a healthy environment,<sup>86</sup> rather than as a free-standing right. However, it is the first legally binding international instrument which sets out clear standards on the right to information. Among other things, it requires States to adopt broad definitions of “environmental information” and “public authority”,<sup>87</sup> to subject exceptions to a public interest test,<sup>88</sup> and to establish an independent body with the power to review any refusal to disclose information.<sup>89</sup> As such, it represents a very positive development in terms of establishing the right to information.

A number of specific instruments require the disclosure of information on genetically modified organisms (GMOs), which have been the subject of particular public concern. For example, the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*<sup>90</sup> requires States Parties to promote and facilitate public awareness, education, and participation relating to the safe transfer, handling and use of GMOs. Specifically, States are required to:

Endeavour to ensure that public awareness and education encompass access to information on living modified organisms identified in accordance with this Protocol that may be imported.<sup>91</sup>

A European Union directive on the release of GMOs into the environment<sup>92</sup> requires Member States to provide public information on GMO releases. Before marketing any GMO, a notification must be provided containing detailed information about the product and the competent authority within any State where the product is to be marketed must produce an assessment, including as to whether the GMO should be placed on the market and under what conditions. The public must be provided with a summary of the notification and the part of the assessment described above, and be given 30 days to comment.<sup>93</sup> Confidential information is protected, but this may not include any general description of the GMO, the name and address of the entity providing the notification, the location or purpose and intended uses of the release, monitoring methods and plans for emergency responses, and environmental risk assessments.<sup>94</sup>

In an analogous development, the African Union has issued draft model legislation on biotechnology and safety. Where there is an application to release GMOs, State officials are required to make relevant information – including the name of the applicant, the type of GM crop involved and its location – publicly available, subject to confidentiality interests, again excluding the types of information noted in the European Union directive.<sup>95</sup>

## Information on Human Rights

There have also been moves within the international community to recognise specifically the right to information in relation to human rights. In 1998, the UN General Assembly adopted the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* [the Declaration on Human Rights Defenders].<sup>96</sup> Article 6 specifically provides for access to information about human rights:

Everyone has the right, individually and in association with others:

- (a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how these rights and freedoms are given effect in domestic legislative, judicial or administrative systems;
- (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms...

Article 6 recognises that the right to know, seek, obtain, receive, hold and disseminate information on human rights is fundamental to the effective promotion and protection of human rights.

These provisions are, for the most part, aimed at securing access to information the State holds regarding human rights and human rights abuse, as well as the right to disseminate this sort of information. They hint, however, at a more profound obligation, one which ARTICLE 19 has long argued in favour of, namely that States are under a substantive positive obligation in this area, including to ensure the availability of information about human rights violations. This is signalled, for example, by the word 'know' in Article 6(a). ARTICLE 19 has, for example, argued that the right to freedom of expression, "long recognised as crucial in the promotion of democratic accountability and participation, also places an obligation upon governments to facilitate the uncovering of information about past human rights violations."<sup>97</sup> In other words, it is not enough for individuals simply to have access to whatever information the State already holds. The State must also ensure that information about past human rights violations is readily available, including by collecting, collating, preserving and disseminating it, where necessary.

The 'right to truth' has also started to be recognised by international tribunals. In the case of *Barrios Altos v. Peru*,<sup>98</sup> for example, the Inter-American Court of Human Rights took steps towards recognising this right. It noted the strong finding of the Commission in this regard, stating:

The Commission alleged that the right to truth is founded in Articles 8 and 25 of the Convention [guaranteeing the right to a fair trial and the right to judicial protection for human rights], insofar as they are both "instrumental" in the judicial establishment of the facts and circumstances that surrounded the violation of a fundamental right. It also indicated that this right has its roots in Article 13(1) of the Convention [guaranteeing freedom of expression], because that article recognises the right to seek and receive information. With regard to that article, the Commission added that the State has the positive obligation to guarantee essential information to preserve the rights of the victims, to ensure transparency in public administration and the protection of human rights.<sup>99</sup>

The Court did not go quite so far but did note:

[I]n the circumstances of the instant case, the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention.<sup>100</sup>

The *Guerra* case at the European Court of Human Rights also represents an important step in this direction. While the information involved was not formally classified as being human rights related, many would argue that information about environmental risks does fall into this category. Importantly, the Court recognised an obligation on the State to provide information on matters of public importance.

## The Right to Political Participation

International law guarantees citizens the right to participate in political affairs. Article 25 of the ICCPR, for example, guarantees the right of citizens, “[t]o take part in the conduct of public affairs, directly or through freely chosen representatives” as well as, specifically to vote in periodic elections which guarantee “the free expression of the will of the electors”.<sup>101</sup>

It is clear that a free flow of information is essential to the ability of individuals to participate. ARTICLE 19 has described information as the “oxygen of democracy”.<sup>102</sup> The UNDP’s Human Development Report 2002, “Deepening Democracy in a Fragmented World”, describes informed debate as the “lifeblood of democracies” and states:

Perhaps no reform can be as significant for making democratic institutions work as reform of the media: building diverse and pluralistic media that are free and independent, that achieve mass access and diffusion, that present accurate and unbiased information.<sup>103</sup>

This has also been recognised by international courts. The IACHR has noted that “a society that is not well-informed is not a society that is truly free.”<sup>104</sup> The European Court of Human Rights has repeatedly stated:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.<sup>105</sup>

It has further stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.<sup>106</sup>

The UN Human Rights Committee has also stressed the importance of freedom of expression to the political process:

[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.<sup>107</sup>

In a very significant development in Australia, the courts have found an implied right to freedom of political communication based on the democratic system of government, even though the constitution does not include a bill of rights or explicit protection for human rights.<sup>108</sup>

These decisions do not, for the most part, refer specifically to the right to information or the right to obtain information from public bodies. At the same time, it seems clear that it is not possible to judge the actions of a government that operates in secrecy, or to participate in public affairs in the absence of access to information held by public bodies. As the Indian Supreme Court has stated, in finding a right to information as part of the general guarantee of freedom of expression:

Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing.<sup>109</sup>

This therefore provides a strong supplementary basis for the idea of a right to information.

## The Fight Against Corruption

The need for access to information held by public bodies as a tool to help tackle the very serious and difficult problem of fighting corruption has been widely recognised. In 2003, Transparency International's annual publication, the *Global Corruption Report*, included a special focus on access to information, highlighting its importance in combating corruption.<sup>110</sup> In the introduction to the report, Eigen notes that access to information is "perhaps the most important weapon against corruption."<sup>111</sup>

This now finds formal expression in the UN *Convention Against Corruption*.<sup>112</sup> The Convention is redolent with references to transparency and openness. It variously calls on States Parties to ensure public transparency generally (Articles 5(1) and 10(a)), openness in relation to civil servants and funding for electoral candidates (Articles 7(1)(a) and (3)), and transparency in public procurement and finances (Articles 9(1)(a) and (2)). Significantly, its provisions on public participation are almost entirely devoted to issues of transparency and information (Article 13). It also has a provision on corporate openness (Article 12(2)(c)).

Article 10 of the Convention provides:

[E]ach State Party shall ... take such measures as may be necessary to enhance transparency in its public administration.... Such measures may include, inter alia:

- (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;

20

Similarly, the African Union's *Convention on Preventing and Combating Corruption*, adopted in 2003,<sup>113</sup> provides, at Article 9:

Each State Party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences.

This is backed up by a number of other references to transparency in public affairs, including a call for the media to be "given access to information in cases of corruption and related offences" (Article 12(4)).

## National Developments

The proposition that the right to information is a fundamental human right finds strong support in a number of national developments. In many countries, the right to information finds specific constitutional recognition, while in others leading courts have interpreted general guarantees of freedom of expression as encompassing a right to information. The latter is of particular significance as national interpretations of constitutional guarantees of freedom of expression are of some relevance to understanding the content of their international counterparts. The importance of right to information is also reflected in a massive global trend towards adoption of national laws giving effect to this right.

## Constitutional Interpretation

A number of senior courts in countries around the world have held that the right to access information is protected by a general constitutional guarantee of freedom of expression. As early as 1969, the Supreme

Court of Japan established in two high-profile cases the principle that *shiru kenri* (the “right to know”) is protected by the guarantee of freedom of expression in Article 21 of the Constitution.<sup>114</sup>

In 1982, the Supreme Court of India, in a case involving the government’s refusal to release information regarding transfers and dismissals of judges, ruled that access to government information was an essential part of the fundamental right to freedom of speech and expression, guaranteed by Article 19 of the Constitution:

The concept of an open Government is the direct emanation from the right to know which seems implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosures of information in regard to the functioning of Government must be the rule, and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the Court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.<sup>115</sup>

In South Korea, the Constitutional Court ruled in two seminal cases in 1989 and 1991 that there was a “right to know” inherent in the guarantee of freedom of expression in Article 21 of the Constitution, and that in certain circumstances the right may be violated when government officials refuse to disclose requested documents.<sup>116</sup>

In an August 2007 ruling, the Constitutional Court of Chile also ruled that the right to access information held by public officials was protected by the general guarantee of freedom of expression. In a case based on an application by a private company for information held by the Customs Department, the Court held that public bodies must first consult with interested third parties before refusing to provide access to information provided by them. It also held that the overall public interest in disclosure needed to be taken into account before any refusal to disclose might be justified.<sup>117</sup>

In some countries, national courts have been reluctant to accept that the guarantee of freedom of expression includes the right to access information held by the State. The US Supreme Court, for example, has held that the First Amendment of the Constitution, which guarantees freedom of speech and of the press, does not “[mandate] a right to access government information or sources of information within government’s control.”<sup>118</sup> However, this may be because the First Amendment is cast in exclusively negative terms, requiring Congress to refrain from adopting any law which abridges freedom of speech.<sup>119</sup> International, and most constitutional, protection for freedom of expression is more positive in nature, recognising that in some cases State action is necessary to ensure respect in practice for this key democratic right.

## Specific Constitutional Provisions

The constitutions of a growing number of countries provide specific protection for the right to information. Sweden is an interesting example, as the whole of its Freedom of the Press Act, adopted in 1766, has constitutional status. This Act includes comprehensive provisions on the right to information.<sup>120</sup> During the last decade, many countries which have recently adopted multi-party systems, or are otherwise in transition to democracy, have explicitly included the right to right to information in their constitutions. A few examples from different regions of the world include Bulgaria (1991 Constitution, Article 41), Estonia (1992 Constitution, Article 44), Hungary (1949 Constitution, Article 61(1)), Lithuania (1992 Constitution, Article 25(5)), Malawi (1994 Constitution, Article 37), Mexico (1917 Constitution, Article 6), the Philippines (1987 Constitution, Article III(7)), Poland (1997 Constitution, Article 61), Romania (Constitution of 1991, Article 31), South Africa (1996 Constitution, Section 32) and Thailand (2007 Constitution, Section 56).

In Latin America, constitutions have tended to focus on one important aspect of the right to information, namely the petition of *habeas data*, or the right to access information about oneself, whether held by public or private bodies and, where necessary, to update or correct that information. For example, Article 43 of the Constitution of Argentina states:

Every person shall have the right to file a petition (of *habeas data*) to see any information that public or private data banks have on file with regard to him and how that information

is being used to supply material for reports. If the information is false or discriminatory, he shall have the right to demand that it be removed, be kept confidential or updated, without violating the confidentiality of news sources.

Inclusion of the right to information among the constitutionally guaranteed rights and freedoms is a clear indication of its status as a fundamental human right in these countries. It is particularly significant that so many modern constitutions include this as a guaranteed right, illustrating the growing recognition of it as such.

## Right to information Legislation

Right to information laws, giving practical effect to the right to access information, have existed for more than 200 years, but few are more than 20 years old. However, there is now a veritable wave of right to information legislation sweeping the globe and, in the last fifteen years, numerous such laws have been passed in countries in every region of the world, while a large number of other countries have made a commitment to adopt right to information legislation.

The history of right to information laws can be traced back to Sweden where, as noted above, a law on this has been in place since 1766. Another country with a long history of right to information legislation is Colombia, whose 1888 Code of Political and Municipal Organization allowed individuals to request documents held by government agencies or in government archives. The USA passed a right to information law in 1967 and this was followed by legislation in Denmark (1970), Norway (1970), France (1978), the Netherlands (1978), Australia (1982), Canada (1982) and New Zealand (1982).

22

A 2006 Report lists 69 countries with right to information laws, along with another five countries with national right to information regulations and rules.<sup>121</sup> Since then, a number of laws have been adopted including in China,<sup>122</sup> Jordan and Nepal. It is now the case that countries in every region of the world have adopted right to information laws. There is, therefore, a very significant global trend towards adopting right to information legislation. The growing imperative to pass right to information legislation is indicative of its status.

## Intergovernmental Organisations

These national developments find their parallel in the adoption of information disclosure policies by a growing number of inter-governmental organisations (IGOs). Many IGOs, which for most of their existence operated largely in secret, or disclosed information purely at their discretion, are now acknowledging the importance of public access to the information that they hold. A significant milestone in this process was the adoption of the 1992 Rio Declaration on Environment and Development, which put enormous pressure on international institutions to implement policies on public participation and access to information.

Since the adoption of the Rio Declaration, the World Bank<sup>123</sup> and all four regional development banks – the Inter-American Development Bank,<sup>124</sup> the African Development Bank Group,<sup>125</sup> the Asian Development Bank<sup>126</sup> and the European Bank for Reconstruction and Development<sup>127</sup> – have adopted information disclosure policies. These policies, although for the most part flawed in important respects, are an important recognition of the right to access information. Furthermore, a series of rolling reviews at most of these institutions has led to more information being made available over time.

A civil society movement, the Global Transparency Initiative (GTI), has adopted a Transparency Charter for International Financial Institutions: Claiming our Right to Know, setting out the GTI's demands for IFI openness.<sup>128</sup> Over time, many international financial institutions are accepting at least some of the key

Charter standards and gradually amending their policies to bring them more closely into line with these standards.

In 1997, the United Nations Development Programme (UNDP) also adopted a Public Information Disclosure Policy, on the basis that information is key to sustainable human development and also to UNDP accountability.<sup>129</sup> The Policy enumerates specific documents that shall be made available to the public and provides for a general presumption in favour of disclosure, subject to a number of exceptions.<sup>130</sup> In terms of process, the Policy establishes a Publication Information and Documentation Oversight Panel which can review any refusal to disclose information. The Panel consists of five members – three UNDP professional staff members and two individuals from the not-for-profit sector – appointed by the UNDP Administrator.<sup>131</sup> However, implementation has been problematical.<sup>132</sup>

In May 2001, the European Parliament and the Council of the European Union adopted a regulation on access to European Parliament, Council and Commission documents.<sup>133</sup> Article 2(1) states:

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

The Regulation has several positive features, including a narrow list of exceptions, all of which are subject to a harm test. The Regulation also provides for an internal review of any refusal to disclose information, as well as an appeal to the courts and/or the Ombudsman.<sup>134</sup> However, there are also problems with the Regulation. For example, some key exceptions are not subject to a public interest override.<sup>135</sup> Furthermore, the Regulation allows a Member State to require other States not to disclose documents without its prior approval.<sup>136</sup>

---

## Notes

12. See the section on Information on Human Rights in the chapter on International Standards and Trends.
13. 14 December 1946.
14. UN General Assembly Resolution 217 A (III), 10 December 1948.
15. For judicial opinions on human rights guarantees in customary international law, see, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); and *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). Generally, see M.S.McDougal, H.D.Lasswell, L.C.Chen, *Human Rights and World Public Order*, (1980: Yale University Press, Princeton), pp. 273-74, 325-27.
16. UN General Assembly Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976.
17. *Tyrer v. United Kingdom*, 25 April 1978, Application No. 5856/72, para. 31. See also *Christine Goodwin v. United Kingdom*, 11 June 2002, Application No. 28957/95, para. 74.
18. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 31 August 2001, Series C, No. 79, para. 146. See also *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion of 1 October 1999, OC-16/99, Series A, No. 16 (Inter-American Court of Human Rights) and, in particular, the Concurring Opinion of Judge A.A. Cancado Trindade.

19. The Commission was established by the UN Economic and Social Council (ECOSOC) in 1946 to promote human rights and was, until 2006, when it was replaced by the Human Rights Council, the most authoritative UN human rights body. UN General Assembly Resolution 60/251, 3 April 2006, establishing the Council, is available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N05/502/66/PDF/N0550266.pdf?OpenElement>.
20. Resolution 1993/45, 5 March 1993.
21. Resolution 1997/27, 11 April 1997, para. 12(d).
22. Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14.
23. Resolution 1998/42, 17 April 1998, para. 2.
24. Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 42.
25. *Ibid.*, para. 43.
26. *Ibid.*, para. 44. See the chapter on Features of a Right to Information Regime for more detail about the standards promoted by the Special Rapporteur.
27. 26 November 1999. Available at: <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-1999.pdf>.
28. Adopted on 6 December 2004. Available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/0/9A56F80984C8BD5EC1256F6B005C47F0?opendocument>.
29. The (first) Optional Protocol represents acceptance by States of an individual complaints procedure. While not formally binding, the views of the HRC in such cases are very persuasive and many States accept them as such.
30. Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, entered into force 18 July 1978.
31. Mexico City, 11 March 1994.
32. *Annual Report of the Inter-American Commission on Human Rights 1998, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression*, 16 April 1999, OEA/Ser. L/V/II.102, Doc. 6 rev., Chapter III.
33. The countries are Antigua and Barbuda, Argentina, The Bahamas, Bolivia, Belize, Brazil, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, St. Vincent and The Grenadines, Suriname, Trinidad and Tobago, Uruguay and the United States of America. Information available at: [http://www.declaraciondechapultepec.org/english/presidential\\_sign.htm](http://www.declaraciondechapultepec.org/english/presidential_sign.htm).
34. See IACHR Press Release No. 2/98, 6 March 1998, paras. 14-15.
35. Note 32, p. 24.
36. 108th Regular Session, 19 October 2000. Available at: <http://www.iachr.org/declaration.htm>.
37. See Resolution 1932 (XXXIII-O/03) on Access to Public Information: Strengthening Democracy, adopted on 10 June 2003; Resolution 2057 (XXXIV-O/04) on Access to Public Information: Strengthening Democracy, adopted on 8 June 2004; Resolution 2121 (XXXV-O/05) on Access to Public Information: Strengthening Democracy, adopted on 26 May 2005; Resolution 2252 (XXXVI-O/06) on Access to Public Information: Strengthening Democracy, adopted on 6 June 2006; and Resolution 2288 (XXXVII-O/07) on Access to Public Information: Strengthening Democracy, adopted on 5 June 2007. See paras. 1 and 2 of the 2007 Resolution.
38. Declaration of Nuevo León, 13 January 2004, Heads of State and Government of the Americas, during the Special Summit of the Americas, held in Monterrey, Nuevo León, Mexico. Available at: [http://iica.int/cumbres/CumbresdlasAmericas/DeclaracionLeon\\_eng.pdf](http://iica.int/cumbres/CumbresdlasAmericas/DeclaracionLeon_eng.pdf).
39. E.T.S. No. 5, adopted 4 November 1950, entered into force 3 September 1953.
40. 25 November 1981, p. 2.
41. Declaration on Media in a Democratic Society, DH-MM (95) 4, 7-8 December 1994, para. 16.
42. Decision No. CM/866/04052005. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=857569&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FDC864>.

43. Report of the 65th Meeting of the Steering Committee for Human Rights from 6-9 November 2007, CDDH(2007)023, 22 November 2007. On file with the author.
44. Adopted 7 December 2000, Official Journal of the European Communities, 18 December 2000, C 364/01. Available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/2004/4/29/Charter%20of%20fundamental%20rights%20of%20the%20European%20Union.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/2004/4/29/Charter%20of%20fundamental%20rights%20of%20the%20European%20Union.pdf).
45. The draft Reform Treaty is available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf>.
46. 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, The Gambia. Available at: [http://www.achpr.org/english/declarations/declaration\\_freedom\\_exp\\_en.html](http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html).
47. Adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986. Article 9 is somewhat weaker in its formulation than its counterparts in other regional systems, but the African Commission has generally sought to provide positive interpretation of it.
48. Commonwealth Heads of Government Meeting, 20 October 1991, paras. 4 and 9. See also the Millbrook Commonwealth Action Programme, Commonwealth Heads of Government Meeting, 12 November 1995.
49. Quoted in "Promoting Open Government: Commonwealth Principles and Guidelines on the Right to Know", background paper for the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development (London: 30-31 March 1999).
50. Quoted in *Promoting Open Government: Commonwealth Principles and Guidelines on the Right to Know*, background paper for the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development (London: 30-31 March 1999).
51. *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).
52. The *Durban Communiqué* (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 57.
53. *Communiqué*, Commonwealth Functional Co-operation Report of the Committee of the Whole (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 20.
54. The Freedom of Information Act is available at: [http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/%7BAC090445-A8AB-490B-8D4B-F110BD2F3AB1%7D\\_Freedom%20of%20Information.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BAC090445-A8AB-490B-8D4B-F110BD2F3AB1%7D_Freedom%20of%20Information.pdf) and the Privacy Act is available at: [http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/%7B82BDA409-2C88-4AB5-9E32-797FE623DFB8%7D\\_protection%20of%20privacy.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B82BDA409-2C88-4AB5-9E32-797FE623DFB8%7D_protection%20of%20privacy.pdf).
55. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, para. 30.
56. *Ibid.*, paras. 32 and 70.
57. *Claude Reyes and Others v. Chile*, 19 September 2006, Series C No. 151, para. 77 (Inter-American Court of Human Rights). Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_151\\_ing.doc](http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc).
58. *Ibid.*, paras. 88-92.
59. *Ibid.*, para. 174.
60. 26 March 1987, Application No. 9248/81, 9 EHRR 433.
61. 7 July 1989, Application No. 10454/83, 12 EHRR 36.
62. 19 February 1998, Application No. 14967/89.
63. 9 June 1998, Application Nos. 21825/93 and 23414/94.
64. 13 February 2003, Application No. 42326/98.
65. 15 June 2004, Applications Nos. 73562/01, 73565/01, 73712/01, 73744/01, 73972/01 and 73973/01.
66. 19 October 2005, Application No. 32555/96.
67. Neither *McGinley* nor *Odièvre* involved Article 10 complaints. Both cases were, rather, based on other articles, including Article 8.
68. *Leander*, para. 74.
69. *Roche*, para. 172.
70. In *Sirbu*, there was no holding on the claim of access to information.

71. *Guerra*, para. 58.
72. *Leander*, paras. 48, 67.
73. *Gaskin*, para. 49.
74. *Guerra*, para. 60.
75. *McGinley and Egan*, paras. 102-103.
76. *Odièvre*, paras. 44-49.
77. *Roche*, para. 125.
78. *Roche*, para. 166.
79. See, for example, *Gaskin*, para. 37.
80. Decision of 10 July 2006, Application No. 19101/03.
81. The original French judgment states: “En l’occurrence, la requérante a demandé de consulter des documents administratifs qui étaient à la disposition des autorités et auxquels on pouvait accéder dans les conditions prévues par l’article 133 de la loi sur les constructions, contesté par la requérante. Dans ces conditions, la Cour admet que le rejet de ladite demande a constitué une ingérence au droit de la requérante de recevoir des informations.”
82. For an interesting analysis of the case see Hins, W. and Voorhoof, D. “Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights”. Available at: [www.ivir.nl/publications/hins/EuConst\\_Hins\\_Voorhoof.pdf](http://www.ivir.nl/publications/hins/EuConst_Hins_Voorhoof.pdf).
83. UN Doc. A/Conf.151/26 (vol. 1).
84. UN Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the “Environment for Europe” process, 25 June 1998, entered into force 30 October 2001. As of September 2007, there were 41 Parties to the Convention. The text of the Convention in various languages is available at: <http://www.unece.org/env/pp/treatytext.htm>.
85. *Ibid.*, Article 3(1).
86. *Ibid.*, Article 1.
87. *Ibid.*, Articles 2(2)-(3).
88. *Ibid.*, Article 4(4).
89. *Ibid.*, Article 9.
90. ICCP, EM-I/3. As of November 2007, the Protocol had 143 parties and another 17 signatories. Available at: <http://www.cbd.int/biosafety/protocol.shtml>.
91. Article 23(1)(b).
92. Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC. Available at: [http://ec.europa.eu/environment/biotechnology/pdf/dir2001\\_18.pdf](http://ec.europa.eu/environment/biotechnology/pdf/dir2001_18.pdf).
93. Article 24, in conjunction with Articles 13 and 14(3)(a).
94. Article 25.
95. OAU, *African Model National Law on Safety in Biotechnology*, endorsed by the AU Council of Ministers in July 2001. See Articles 5 and 12. Available at: [http://www.africabio.com/policies/MODEL%20LAW%20ON%20BIOSAFETY\\_ff.htm](http://www.africabio.com/policies/MODEL%20LAW%20ON%20BIOSAFETY_ff.htm).
96. Resolution 53/144, 8 March 1999.
97. *Who Wants to Forget? Truth and Access to Information about Past Human Rights Violations* (London: ARTICLE 19, 2000), p. 5. Online at <http://www.article19.org/pdfs/publications/freedom-of-information-truth-commissions.pdf>.
98. 14 March 2001, Series C, No. 75.
99. Para. 45.
100. Para. 48.
101. See also Article 23 of the ACHR.
102. *The Public’s Right to Know: Principles on Freedom of Information Legislation* (London: June 1999), Preface.
103. UNDP, *Human Development Report 2002: Deepening Democracy in a Fragmented World* (2002: Oxford University Press, New York and Oxford), p. 75. Available at: <http://hdr.undp.org/reports/global/2002/en/>.
104. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 55, para. 70.

105. See, for example, *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.
106. *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.
107. UN Human Rights Committee General Comment 25, 12 July 1996.
108. See *Australian Capital Television v. The Commonwealth, State of New South Wales v. The Commonwealth* (1992) 177 CLR 106 (High Court) and *Nationwide News Pty Ltd v. Wills* (1992) 108 ALR 681 (High Court).
109. *S.P. Gupta v. President of India* [1982] AIR (SC) 149, p. 232.
110. Transparency International, *Global Corruption Report 2003: Special Focus: Access to Information* (London: Profile Books, 2003).
111. *Ibid.*, p. 6.
112. UN General Assembly Resolution 58/4 of 31 October 2003, in force 14 December 2005. As at the time of writing, the Convention had 104 States Parties and 140 signatories. See <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>. The text of the Convention is available at: <http://www.unodc.org/unodc/en/treaties/CAC/index.html>. The Council of Europe has also adopted both a *Civil Law Convention on Corruption*, 4 November 1999, ETS No. 174 and a *Criminal Law Convention on Corruption*, 27 January 1999, ETS No. 173, although neither provide for public access to information. Similarly, the 1996 *Inter-American Convention Against Corruption* does not provide for access to information.
113. Available at: [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Convention%20on%20Combating%20Corruption.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf). As of October 2007, the Convention had been ratified by 24 countries. It came into force in August 2006.
114. Repeta, Lawrence, *Local Government Disclosure Systems in Japan*, National Bureau of Asian Research, Paper Number 16, October 1999, p. 3.
115. *S.P. Gupta v. President of India*, note 109, p. 234.
116. Sung Nak-in, *Korea Country Report* (English summary), presented at the Asian Conference on Civil Society and Access to Government-Held Information, Tokyo, Japan, 13-14 April 2001.
117. *Casas Cordero et al v. The National Customs Service*. A Spanish version of the decision is available at: [http://www.justiceinitiative.org/db/resource?res\\_id=103745](http://www.justiceinitiative.org/db/resource?res_id=103745).
118. *Houchins v. KQED, Inc.*, 438 US 1 (1978), p. 15.
119. The relevant part of the First Amendment states: "Congress shall make no law ... abridging the freedom of speech, or of the press, or of the right of the people to peacefully assemble, and to petition the Government for a redress of grievances."
120. See the chapter on Sweden.
121. Banisar, D., *Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws* (Privacy International, 2006), Appendix A. Available at: <http://www.privacyinternational.org/foi/foisurvey2006.pdf>.
122. Technically a regulation and not a law but still with binding legal force.
123. The World Bank Policy on the Disclosure of Information (Washington, D.C.: World Bank, 1994). The most recent version dates from 2002 and is available at: <http://www1.worldbank.org/operations/disclosure/documents/disclosurepolicy.pdf>.
124. OP-102 Disclosure of Information, Inter-American Development Bank, December 1994. The latest version, entitled Disclosure of Information Policy and effective January 2004, is available at: <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=781675>.
125. Disclosure of Information Policy, African Development Bank Group. The latest version, entitled Policy on Disclosure of Information, is dated October 2005 and is available at: [http://www.afdb.org/pls/portal/docs/PAGE/ADB\\_ADMIN\\_PG/DOCUMENTS/NEWS/AFDB%20GROUP%20POLICY%20ON%20DISCLOSURE%20OF%20INFORMATION.DOC](http://www.afdb.org/pls/portal/docs/PAGE/ADB_ADMIN_PG/DOCUMENTS/NEWS/AFDB%20GROUP%20POLICY%20ON%20DISCLOSURE%20OF%20INFORMATION.DOC).
126. Confidentiality and Disclosure of Information, Asian Development Bank, August 1994. The latest version, entitled Public Communications Policy, came into effect in March 2005 and is available at: <http://www.adb.org/Documents/Policies/PCP/PCP-R-Paper.pdf>.
127. Policy on Disclosure of Information, European Bank for Reconstruction and Development, 1996. The latest version, entitled Public Information Policy and approved May 2006, is available at: <http://www.ebrd.com/about/policies/pip/pip.pdf>.

128. The Charter is available in various languages at: [http://www.ifitransparency.org/activities.shtml?x=44474&cals\[select\]=44474](http://www.ifitransparency.org/activities.shtml?x=44474&cals[select]=44474).
129. Public Information Disclosure Policy, UNDP, 1997. See para. 3. Available at: <http://www.undp.org/idp/>.
130. Paras. 6, 11-15.
131. Paras. 20-23.
132. See the criticism of the application of the policy by ARTICLE 19 in a press release available at: <http://www.article19.org/pdfs/press/undp-disclosure-policy.pdf>.
133. Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. Available at: [http://www.europarl.europa.eu/register/pdf/r1049\\_en.pdf](http://www.europarl.europa.eu/register/pdf/r1049_en.pdf).
134. Articles 7 and 8.
135. Article 4(1).
136. Articles 4(5) and 9. The Regulation has been harshly criticised by some freedom of information watchdog groups. See, for example, European Citizens Action Service, European Environmental Bureau, European Federation of Journalists, the Meijers Committee, and Statewatch, "Open letter from civil society on the new code of access to documents of the EU institutions," 2 May 2001.

# Features of a Right to Information Regime

It was argued in the previous chapter that the right to information, and particularly the right to access information held by public bodies, is a fundamental human right, guaranteed under international law as an aspect of the right to freedom of expression. This chapter probes in detail into the framework of standards that should underpin right to information legislation. A number of important interpretative principles have been established in the context of the right to freedom of expression. Further insight into the specific content of the right to information may be gleaned from the various international statements and legal judgments on the right to information noted in the previous chapter. These sources may be supplemented, where appropriate, by established comparative practice on the right to information.

The general guarantee of the right to information under international law, noted in the previous chapter, establishes a general presumption in favour of the disclosure of information held by public bodies. This implies not only that States should guarantee the right to information, but also that effective systems be put in place to give practical effect to it. As Article 2(2) of the *International Covenant on Civil and Political Rights* (ICCPR),<sup>137</sup> notes:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

International jurisprudence on the general right to freedom of expression makes it clear that positive measures may be required to implement this right. For example, international courts have often held that States must not only refrain themselves from engaging on attacks on the media but that they are also under a positive obligation to prevent such attacks from taking place.<sup>138</sup> Positive obligations have also been established in relation to employment situations<sup>139</sup> and various other contexts.<sup>140</sup> The cases noted in the previous chapter establishing a right to information all relied on a positive obligation of States to implement human rights.

At the same time, the right to information permits of some restrictions. Article 19(3) of the ICCPR states:

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

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

Similar rules on restrictions are recognised in regional human rights treaties and many national constitutions. Pursuant to this provision, restrictions must meet a strict three-part test.<sup>141</sup> International jurisprudence makes it clear that this test presents a high standard which any interference must overcome. The European Court of Human Rights, for example, has stated:

Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.<sup>142</sup>

First, any restriction on the right to information must be provided for by law. Restrictions that do not have a legal basis – for example because they occur as a result of the simple exercise of administrative discretion – are not legitimate. This requirement will be met only where the law in question is accessible. Furthermore, it must be “formulated with sufficient precision to enable the citizen to regulate his conduct.”<sup>143</sup> Unduly vague rules, or rules which allow excessive discretion in implementation, will not pass muster. Second, the restriction must pursue a legitimate aim listed in Article 19(3) of the ICCPR. This list is exclusive, albeit quite broad, so that restrictions which pursue other aims, for example to prevent embarrassment to government, are not legitimate.

Third, the restriction must be necessary to ensure protection of the aim. International courts have held that the word “necessary” means that there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be “proportionate to the aim pursued.”<sup>144</sup> Restrictions which go beyond what is necessary, for example by rendering more information secret than is strictly required to protect the legitimate aim, will not pass this part of the test. Furthermore, restrictions must be carefully designed so as to undermine the right as little as possible. Where the aim may be protected by a less intrusive means, that approach must be preferred.

A number of the international standards and statements noted above provide valuable insight into the precise content of the right to information, over and above these general principles. In his 2000 Annual Report, the UN Special Rapporteur on Freedom of Opinion and Expression set out in detail the standards to which right to information legislation should conform (UN Standards).<sup>145</sup> The 2002 Recommendation of the Committee of Ministers of the Council of Europe (COE Recommendation) is even more detailed, providing, for example, a list of the legitimate aims which might justify exceptions to the right of access.<sup>146</sup> Other useful standard-setting documents include the Joint Declaration adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression in 2004 (Joint Declaration),<sup>147</sup> the principles adopted by the Commonwealth Law Ministers (Commonwealth Principles),<sup>148</sup> the *Declaration of Principles on Freedom of Expression in Africa* (African Declaration),<sup>149</sup> the *Inter-American Declaration of Principles on Freedom of Expression* (Inter-American Declaration),<sup>150</sup> the Aarhus Convention<sup>151</sup> and the September 2006 decision by the Inter-American Court of Human Rights affirming a right to information.<sup>152</sup>

Although right to information regimes in different countries vary considerably, there are also a remarkable number of similarities. Where the practice is sufficiently consistent, it may be described as accepted practice which provides further insight into common standards in this area.

A key underlying principle governing the right to information is the principle of maximum disclosure, which flows directly from the primary international guarantees of the right to information. This principle involves a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only where there is an overriding risk of harm to a legitimate public or private interest. Other key standards are that systems and processes should be established to give practical effect to the right to information and that public bodies should make all reasonable efforts to facilitate access. Furthermore, independent appeals systems should be put in place to prevent undue administrative discretion in interpreting the scope of exceptions to the right of access, as well as other aspects of the Law.

ARTICLE 19 has published a set of principles, *The Public's Right To Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles),<sup>153</sup> setting out best practice standards on right to information legislation. These Principles are based on international and regional law and standards, evolving State practice (as reflected, *inter alia*, in national laws and judgments of national courts) and the general

principles of law recognised by the community of nations. ARTICLE 19 has also published *A Model Freedom of Information Law*,<sup>154</sup> which translates the Principles into legal form. This chapter is organised around the nine primary principles set out in *The Public's Right To Know*.

## **PRINCIPLE 1. MAXIMUM DISCLOSURE**

### **Freedom of information legislation should be guided by the principle of maximum disclosure**

As noted above, the principle of maximum disclosure may be derived directly from primary guarantees of the right to information and it encapsulates the core meaning of the right to information. A version of this is explicitly stated as an objective in a number of national laws. The principle of maximum disclosure implies that the scope of the right to information should be broad as concerns the range of information and bodies covered, as well as the individuals who may claim the right.

At a very general level, Commonwealth Principle 2 states: "There should be a presumption in favour of disclosure". The Joint Declaration of the special mandates on freedom of expression contains a strong and explicit statement on maximum disclosure:

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

More specifically, the UN Standards note: "Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; 'information' includes all records held by a public body, regardless of the form in which it is stored". The Aarhus Convention also defines information very broadly to include "any information in written, visual, aural, electronic or any other material form", although its scope is, in accordance with its purpose, limited to environmental information (Article 2(3)). The COE Recommendation takes a more cautious approach, defining 'official documents' widely as "all information recorded in any form, drawn up or received and held by public authorities" but limiting the scope of this to information linked to "any public or administrative function" and excluding documents under preparation (Principle I). In practice, most national laws do define information pretty broadly, while a minority restrict the scope of information covered on the basis of the use which is made of the information.

An important distinction may be noted here between a right to information (as in the Aarhus Convention) and to documents or records (as in the COE Recommendation). The UN Standards refer to both information and records, although the primary right they reference is to access information. This can have a number of important implications, depending on how the rules are applied. Most countries do not impose an obligation on public bodies to create information, although some do give a right of access to information public bodies are obliged to hold, even if they do not, at the time of the request, actually hold it. The extent to which public bodies are required to extract information from records they hold, for example using electronic information technologies or by searching through different records for the information sought, is not settled law, although some effort to extract is clearly required.

A different issue is whether requests for information must identify an actual document or other record, or simply the information sought. Given that most individuals will not be in a position to identify the actual document, the right should be understood as extending to information. In some extreme cases, however, requests have been refused based on a distinction between a right to access information and to access documents.<sup>155</sup>

Principle IV(1) of the African Declaration sets out the underlying rationale for a broad definition of public bodies, stating: “Public bodies hold information not for themselves but as custodians of the public good”. Both the Aarhus Convention and the COE Recommendation define the scope of public bodies widely to include government at the national, regional and other levels, and “natural or legal persons insofar as they perform public functions or exercise administrative authority and as provided for by national law”.<sup>156</sup> Aarhus supplements this by also including: “Any other natural or legal persons having public responsibilities or functions, or providing public services” (Article 2(2)).

Neither the Aarhus Convention nor the COE Recommendation include the judicial or legislative branches of government, a distinction that is also reflected in some national laws, in part based on constitutional divisions of power. Principle II of the COE Recommendation does, however, recognise the importance of access to information held by these public bodies, stating:

However, member states should examine, in the light of their domestic law and practice, to what extent the principles of this recommendation could be applied to information held by legislative bodies and judicial authorities.

International law applies regardless of internal structures, including constitutional rules; States are bound to implement their human rights obligations. This may require special measures – for example, it may be that courts need to implement their own right to information rules, instead of coming under rules passed by the legislature and binding on the executive – but the obligation remains. Furthermore, the experience of countries that do include judicial and legislative authorities, including some that have very strong separation of powers rules, shows that this is perfectly possible.

The ARTICLE 19 Principles take a robust approach, in line with the practice of more progressive right to information laws, to the idea that access to information is a human rights, calling for the definition of public bodies to focus on the type of service provided, rather than formal designations, based on a recognition that every legitimate secrecy interest can be addressed through an appropriate regime of exceptions. Principle 1 calls for the definition of public bodies to meet the following standards:

[The definition] should include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organisations), judicial bodies, and private bodies which carry out public functions (such as maintaining roads or operating rail lines). Private bodies themselves should also be included if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health. Inter-governmental organisations should also be subject to freedom of information regimes based on the principles set down in this document.

In South Africa, even private bodies are required to disclose information which is needed for the protection or exercise of any right. This is also reflected in Principle IV(2) of the African Declaration, which states: “[E]veryone has the right to access information held by private bodies which is necessary for the exercise or protection of any right”. Given present trends to privatise more and more functions which were once considered to be public in nature, this is an important development for the right to information.

International standards also make it very clear that everyone has a right to access information. The UN Standards, as noted above, provide that “every member of the public” has a right to receive information. Similarly, Principle IV(2) of the African Declaration refers to ‘everyone’, while Principle 4 of the Inter-American Declaration refers to ‘every individual’. Principle 3 of the COE Recommendation also refers to ‘everyone’ and goes on to note specifically: “This principle should apply without discrimination on any ground, including that of national origin.” Some national laws do, however, discriminate, applying only to citizens, although many also apply to everyone.

## PRINCIPLE 2. OBLIGATION TO PUBLISH

### Public bodies should be under an obligation to publish key information

To give practical effect to the right to information, it is not enough simply to require public bodies to accede to requests for information. Effective access for many people depends on these bodies actively publishing and disseminating key categories of information even in the absence of a request. This is reflected in a number of international statements. The UN Standards, for example, state:

Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public....<sup>157</sup>

Principle IV(2) of the African Declaration supports this, stating that, “public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest”. Principle XI of the COE Recommendation also calls on every public body, “at its own initiative and where appropriate”, to disseminate information with a view to promoting transparency of public administration, administrative efficiency and informed public participation. Similarly, the Aarhus Convention places extensive obligations on public bodies to disseminate environmental information.<sup>158</sup> Significantly, the COE Recommendation also calls on public bodies to, “as far as possible, make available information on the matters or activities for which they are responsible, for example by drawing up lists or registers of the documents they hold” (Principle X). A few national right to information laws do indeed require public bodies to produce lists of public information although the majority, unfortunately, do not.

The scope of this obligation depends to some extent on resource limitations, but the amount of information covered should increase over time, particularly as new technologies make it easier to publish and disseminate information. The Joint Declaration of the special mandates specifically calls for progressive increases in the scope of pro-active disclosure: “Systems should be put in place to increase, over time, the amount of information subject to such routine disclosure.” The longer term goal should be to make information available proactively, so as to minimise the need for individuals to have to resort to requests to access it.

## PRINCIPLE 3. PROMOTION OF OPEN GOVERNMENT

### Public bodies must actively promote open government

In most countries, there is a deep-rooted culture of secrecy within government, based on long-standing practices and attitudes. Ultimately, the right to information depends on changing this culture since it is virtually impossible to *force* civil servants to be open, even with the most progressive legislation. Rather, longer-term success depends on convincing public officials that openness is not just an (unwelcome) obligation, but also a fundamental human right, and central to effective and appropriate governance. A range of promotional measures may be needed to address the culture of secrecy and to ensure that the public are aware of the right to information and its implications for them.

The UN Standards recognise the need for both measures to inform the public about their right to information and to “to address the problem of a culture of secrecy within Government”. Commonwealth Principle 2 recognises this as a positive need, namely to “promote a culture of openness”. The Joint Declaration of the special mandates calls on the government to “take active steps to address the culture of secrecy that still prevails in many countries within the public sector”. It also calls for steps to be taken “to promote broad public awareness of the access to information law” and generally for “the allocation of necessary resources and attention” to ensure proper implementation of right to information laws. Principle X of the

COE Recommendation includes the most detailed provisions on what it calls ‘complementary measures’, which should include measures to inform the public and to train officials.

The specific promotional measures needed vary from country to country. The allocation of central responsibility for various measures – for example to a dedicated oversight body such as an information commissioner, ombudsman or human rights commission, or to a central government department – will provide a locus of responsibility for ensuring that adequate attention and resources are paid to this important matter.

A wide variety of measures may be taken to educate the public. The media can play a key role here; the broadcast media can play a particularly important role in countries where newspaper distribution is low or illiteracy widespread. Another useful tool, provided for in many right to information laws, is the publication of a simple, accessible guide on how to lodge an information request.

An important tool to tackle the culture of secrecy is to provide for penalties for those who wilfully obstruct access to information in any way, including by destroying records or inhibiting the work of the oversight body. The Joint Declaration specifically refers to sanctions for those who obstruct access. Such penalties may be administrative, civil or criminal in nature, or some combination of all three. In some countries, for example, there is general provision for damage claims for losses suffered as a result of a breach of the law. The experience with criminal penalties in some countries with longer-standing right to information laws suggests that prosecutions tend to be rare but that these rules still send an important message to officials that obstruction will not be tolerated. Other means that have been tried to address the culture of secrecy include providing incentives for good performers and exposing poor performers, and ensuring legislative oversight of progress through annual reports on the performance of public bodies in implementing the right to information.

In many countries, one of the biggest obstacles to accessing information is the poor state in which records are kept. Officials often do not know what information they have or, even if they do know, cannot locate records they are looking for. Good management of official documents is not only central to effective implementation of the right to information. Information management is one of the key functions of modern government and doing this well is crucial to the effective delivery of every public service goal.

The Joint Declaration of the special mandates calls for systems to be put in place to improve record management, stating: “Public authorities should be required to meet minimum record management standards. Systems should be put in place to promote higher standards over time.” Commonwealth Principle 4 also recognises that “Governments should maintain and preserve records”. Principle X of the COE Recommendation calls on States to ensure the proper management of records so as to facilitate access, as well as a need for “clear and established rules for the preservation and destruction of their documents”. A number of national laws do address this, for example by giving a minister or the independent oversight body a mandate to set and enforce standards for record maintenance.

34

## **PRINCIPLE 4. LIMITED SCOPE OF EXCEPTIONS**

**Exceptions should be clearly and narrowly drawn and subject to strict “harm” and “public interest” tests**

Assessing the legitimate scope of exceptions to the right to access information is complicated. On the one hand, an overbroad system of exceptions can seriously undermine the right. In some cases, otherwise very effective right to information laws are largely undermined by an excessively broad or open regime of exceptions. On the other hand, it is obviously important that all legitimate secrecy interests are adequately catered to, otherwise public bodies will legally be required to disclose information even though this may cause disproportionate harm.

The complexity and yet importance of this issue is reflected in international standards. At a very general level, Commonwealth Principle 3 states that exceptions to the right of access should be 'limited' and 'narrowly drawn'. Similarly, the Inter-American Principles note that limits to the right of access should be 'exceptional', previously established by law, and respond to "a real and imminent danger that threatens national security in democratic societies" (Principle 4). This seems to ignore the many other interests that are widely recognised to warrant limitations on the right of access, such as personal privacy and law enforcement.

The UN Standards also call for exceptions to be established by law and narrowly drawn, providing:

A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest.

Exceptions must conform to the standards under international law for restricting freedom of expression. This is clear from general principles and was also the subject of extensive elaboration in the September 2006 decision of the Inter-American Court of Human Rights which recognised a right to information as part of the more general right to freedom of expression.<sup>159</sup> This means that exceptions must be provided for by law and protect an interest recognised as legitimate under international law, both of which are specifically recognised in several of the international statements.

Different right to information laws recognise different legitimate aims which may be the subject of an exception to the right of access, and this is a subject of some controversy. The COE Recommendation provides a detailed and exclusive list of the possible grounds for restricting the right to information in Principle IV, titled "*Possible limitations to access to official documents*", as follows:

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
  - i. national security, defence and international relations;
  - ii. public safety;
  - iii. the prevention, investigation and prosecution of criminal activities;
  - iv. privacy and other legitimate private interests;
  - v. commercial and other economic interests, be they private or public;
  - vi. the equality of parties concerning court proceedings;
  - vii. nature;
  - viii. inspection, control and supervision by public authorities;
  - ix. the economic, monetary and exchange rate policies of the state;
  - x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

It is clear from both general principles and from the various authoritative statements on the right to information that it is not legitimate to refuse access to information simply because it relates to one of the interests noted above. The ARTICLE 19 Principles set out a three-part test for exceptions as follows:

**The three-part test**

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and
- the harm to the aim must be greater than the public interest in having the information.

Several international statements specifically mention the need for a risk of harm, as well as the possibility of release in the public interest notwithstanding such a risk, including the Inter-American Principles and UN Standards noted above. Principle IV(2) of the COE Recommendation recognises both the need for harm and the public interest override, stating:

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

The Aarhus Convention similarly permits requests for information to be refused only if “disclosure would adversely affect” a number of listed interests (Article 4(4)). The Aarhus Convention also recognises a form of public interest override, providing:

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment. (Article 4(4))

The dual ‘harm’ and ‘public interest override’ approach finds clear support in the Joint Declaration of the special mandates, which states:

The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information.

Complex legal analysis is not required to see that exceptions should be limited to situations where disclosure of the information would pose a risk of harm; this is simply common sense. The defence forces hold a lot of information that is tangential to their operations, for example relating to purchases of food or pens. It is clearly not legitimate to deny access to this information on the basis that it simply relates to defence spending, since disclosure would not harm a defence interest.

36

In a small number of cases, harm is implicit on the nature of the exception. This is the case, for example, for protection of legally privileged information or where disclosure would represent a breach of confidence. However, the vast majority of exceptions which do not include a specific reference to harm – sometimes referred to as class exceptions – do not have such in-built harm and therefore fail to pass muster under this part of the test.

In some countries, exceptions are themselves subject to limits (exceptions to exceptions) to take into account cases where there will be no harm to the legitimate aim. An example of this is where the information is already publicly available, in which case any harm will already have been done, or where an affected third party has consented to disclosure, in which case the harm is effectively waived.

No matter how carefully a regime of exceptions is crafted, there will always be some cases where the larger public interest is served by disclosure of the information, even though this does cause some harm to a protected interest. This is so in part because it is not possible to draft exceptions so as to take into account all overriding public interests and in part because particular circumstances at the given time may mean that the overall public interest is served by disclosure. An example would be sensitive military information which exposed corruption in the armed forces. Although disclosure may at first sight appear to weaken national defence, eliminating corruption in the armed forces may, over time, actually strengthen it.

It is also well-established in practice that where only part of a record is confidential, the rest should still, if possible, be disclosed. This finds support not only in very widespread national practice but also in Principle VII of the COE Recommendation and Article 4(6) of the Aarhus Convention.

Although not strictly part of the three-part test set out above, overall time limits on withholding information help ensure that ‘stale’ harms do not serve to keep information secret indefinitely. In many cases, the risk of harm which originally justified a limitation disappears or is substantially reduced over time. For example, most right to information laws provide some sort of protection for internal deliberative processes or the

provision of advice within government. While this may be justified in the short-term, the risk of disclosure in 15 or 20 years can hardly be expected to exert a chilling effect on the free and frank provision of advice, a key interest protected by this exception. Hard 'historical disclosure' time limits create a presumption that the original harms no longer pertain, after which continued withholding of the information needs to be specially justified.

## **PRINCIPLE 5. PROCESSES TO FACILITATE ACCESS**

### **Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available**

Guaranteeing the right to information effectively in practice requires not only proactive disclosure by public bodies (the obligation to publish) but also that anyone be able to request and to receive any information they hold, subject to the exceptions. This, in turn, requires that clear procedures be established according to which public bodies process requests for information. It also requires a system for independent review of internal decisions by public bodies.

Processes for accessing information are complex and this normally occupies a large part of right to information laws. At the same time, this is not as high profile as some other right to information standards and so occupies relatively less prominence in international statements on the right to information. The UN Standards call for a requirement for public bodies "to establish open, accessible internal systems for ensuring the public's right to receive information", specifically referring, in this regard, to the need for "strict time limits for the processing of requests for information" and for notice to be given for any refusal to provide access which includes "substantive written reasons for the refusal(s)". The Joint Declaration of the special mandates calls for procedures to "be simple, rapid and free or low-cost".

37

The COE Recommendation contains by far the most detail on processes, establishing a number of specific standards, including the following:

- requests should be dealt with by any public body which holds the information, on an equal basis and with a minimum of formality;
- applicants should not have to provide reasons for their requests;
- requests should be dealt with promptly and within established time limits;
- assistance should be provided "as far as possible";
- reasons should be given for any refusal to provide access; and
- applicants should be given access in the form they prefer, either inspection of the record or the provision of a copy (Principles V-VII).

Most of these standards are reflected in the provisions of the Aarhus Convention (see, in particular, Article 4).

It is also well-established that any refusal by a public body to disclose information, or any failure to deal with requests in the prescribed manner, should be subject to appeal. Many national laws provide for an internal appeal to a higher authority within the same public body to which the request was made. This is a useful approach, which can help address mistakes, build confidence among lower-ranking officials to disclose information and ensure internal consistency.

It is, however, crucial that a right of appeal to an independent body be available to review decisions made by public bodies. Absent this, individuals cannot really be said to have a *right* to access information held by public bodies, but merely a right to have their requests for information considered. Absent independent review, much information, for example revealing corruption or incompetence, may never be disclosed.

While the various international statements on the right to information right to clearly call for independent review, they are somewhat less clear as to the nature of that review and, in particular, whether review by a dedicated, independent oversight body – such as an information commission, ombudsman or human rights commission – is required or whether review by the courts – which in many countries oversee government actions by default – is sufficient. Some of the standards seem to refer implicitly to an oversight body and some refer to both an independent body and the courts.

Commonwealth Principle 5 simply calls for decisions to refuse to disclose to be “subject to independent review”, while the Joint Declaration of the special mandates calls for a right to appeal such refusals “to an independent body with full powers to investigate and resolve such complaints”, suggesting that something other than the courts may be envisaged. The COE Recommendation refers to the right to appeal to a “court of law or another independent and impartial body established by law”. The same language is reflected in Article 9 of the Aarhus Convention. Principle IV(2) of the African Declaration, for its part, refers to two levels of appeal, “to an independent body and/or the courts”.

In practice, the more progressive right to information laws do provide for an appeal to an independent oversight body. This is far more accessible to ordinary people seeking information than the courts and has a proven track record as an effective way of ensuring the right to information. It does not matter whether a new body is established for this purpose or the task allocated to an existing body, such as a human rights commission or an ombudsman. What is important is that the body be adequately protected against political interference. There is also merit in providing for an appeal from the oversight body to the courts. Only the courts really have the authority to set standards of disclosure in controversial areas and to ensure the possibility of a full, well-reasoned approach to difficult disclosure issues.

An important aspect of appeals, also widely respected in better practice national laws, is that public bodies seeking to deny access to information should bear the onus of proving that such a denial is legitimate. This flows from, indeed is central to, the idea that access to information is a right and also to the presumption of openness which should, at a minimum, dictate that the burden of proof should lie on the party seeking to deny access. Few international standards address this issue; the Joint Declaration of the special mandates, however, states: “The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions.”

## **PRINCIPLE 6. COSTS**

### **Individuals should not be deterred from making requests for information by excessive costs**

The charging of fees for gaining access to information is another difficult issue. On the one hand, if fees are excessive, they will pose a barrier to access, and hence undermine the right. On the other hand, the provision of access does impose costs on public bodies which they should have some means of recouping. Several of the international statements on the right to information touch on this issue. The UN Standards, for example, note that the cost of access “should not be so high as to deter potential applicants and negate the intent of the law itself”. Principle VII of the COE Recommendation is more specific, calling for consultation of documents to be free and any fees charged for copies not to exceed the actual costs incurred.

The Aarhus Convention has reasonably detailed rules on fees, with Article 4(8) stating:

Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.

In practice, there is wide variance in the way that different countries approach the question of fees for access to information.

## **PRINCIPLE 7. OPEN MEETINGS**

### **Meetings of public bodies should be open to the public**

The ARTICLE 19 Principles include the idea of open meetings. The rationale underlying the right to information applies, as a matter of principle, not only to information in recorded form, but also to meetings of public bodies. In other words, it should make little difference whether the information in question is transmitted via a permanent record or orally during a meeting. The UN Standards support this, stating: "The [right to information] law should establish a presumption that all meetings of governing bodies are open to the public".

In practice it is rare, although not unknown, for right to information laws to require meetings of public bodies to be open. Some countries have separate laws on this.

39

## **PRINCIPLE 8. DISCLOSURE TAKES PRECEDENCE**

### **Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed**

International law does not dictate how States implement its rules, including in the area of fundamental human rights, and this is also true of the right to information. As a result, it is up to States to determine how to address the issue of exceptions to the right of access. At the same time, almost all States have a range of secrecy laws on their books, many of which fail to conform to the standards noted above, in particular in relation to exceptions. They are, therefore, under an obligation to put in place some mechanism to address this problem.

Over time, a commitment should be made to review all laws which restrict the disclosure of information, with a view to bringing them into line with the right to information law. As Principle IV(2) of the African Declaration states: "[S]ecrecy laws shall be amended as necessary to comply with freedom of information principles".

However, this is in most cases at least a medium-term solution. A more short-term solution, which allows for more-or-less immediate effect to be given to the right to information, is to provide that the law establishing the right to information shall take precedence over secrecy laws. Where possible, this should be achieved through applying a restrictive interpretation of secrecy laws. However, where a more serious conflict which cannot be resolved in this way presents itself, the right to information law may override the conflicting secrecy law.

This is not as controversial as it may at first sound. The Joint Declaration of the special mandates provides: "The access to information law should, to the extent of any inconsistency, prevail over other legislation." Furthermore, many right to information laws take this approach. Most right to information laws include a comprehensive set of exceptions which protect all legitimate confidentiality interests (indeed, many may be criticised for being over-inclusive in this regard), so there should be no need for this to be extended by secrecy laws. Some system of resolving conflicts is certainly necessary to avoid placing civil servants in a position where they are prohibited from divulging information under a secrecy law and yet required to do so under a right to information law. Resolving this in favour of openness is consistent with the basic presumption underlying the right to information.

The issue of classification of records should, in principle, be relatively simple to deal with. Classification is simply the assessment of an individual official as to the sensitivity of a record and it should never be treated as an independent ground for refusing to provide access to that record. Instead, the actual contents of the record should, at the time of any request relating to those contents, be assessed against the exceptions. In practice, however, many right to information regimes do effectively recognise classification as a separate exception.

## **PRINCIPLE 9. PROTECTION FOR WHISTLEBLOWERS**

### **Individuals who release information on wrongdoing – whistleblowers – must be protected**

40

If officials may be subject to sanction, for example under a secrecy law, for mistakenly releasing information pursuant to the right to information, they will be likely to exhibit a tendency to err in favour of secrecy, which they are anyway more familiar with. As a result, many right to information laws provide protection from liability for officials who, in good faith, disclose information pursuant to right to information legislation. This protection is important to change the culture of secrecy within government and to foster a climate of openness.

Similar protection is provided in many countries to individuals who release information on wrongdoing, or whistleblowers. It is often unclear whether disclosure of information on wrongdoing is warranted under the law, even if that law includes a public interest override, and individuals seeking to disclose information in the public interest cannot be expected to undertake a complex balancing of the different interests which might come into play. Providing them with protection helps foster a flow of information to the public about various sorts of wrongdoing. Principle IV(2) of the African Declaration states:

[N]o one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society.

The UN Standards also call for protection from "any legal, administrative or employment-related sanctions for releasing information on wrongdoing". They define wrongdoing as "the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body". The ARTICLE 19 Principles add to this definition of wrongdoing the exposure of a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not.

---

## Notes

137. UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.
138. See, for example, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, October 1995, Communication No. 74/92 (African Commission on Human and Peoples' Rights); *Miranda v. Mexico*, 13 April 1999, Report No. 5/99, Case No. 11.739 (Inter-American Commission on Human Rights) and *Özgür Gündem v. Turkey*, 16 March 2000, Application No. 23144/93 (European Court of Human Rights).
139. See, for example, *Fuentes Bobo v. Spain*, 29 February 2000, Application No. 39293/98 (European Court of Human Rights); and *Wilson and the NUJ and others v. the United Kingdom*, 2 July 2002, Application Nos. 30668/96, 30671/96 and 30678/96 (European Court of Human Rights).
140. See, for example, *Vgt Verein gegen Tierfabriken v. Switzerland*, 28 June 2001, Application No. 24699/94 (European Court of Human Rights); *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*, 19 December 1994, Application No. 15153/89 (European Court of Human Rights); and *Plattform Ärzte für das Leben v. Austria*, 25 May 1988, Application No. 10126/82 (European Court of Human Rights).
141. See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991 (UN Human Rights Committee), para. 9.7.
142. *Thorgeirson v. Iceland*, 25 June 1992, Application No.13778/88, para. 63.
143. *The Sunday Times v. United Kingdom*, 26 April 1979, Application No.13166/87, 2 EHRR 245, para. 49 (European Court of Human Rights).
144. *Lingens v. Austria*, 8 July 1986, Application No.9815/82, 8 EHRR 407, paras. 39-40 (European Court of Human Rights).
145. Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.
146. Recommendation R(2002)2 the Committee of Ministers to Member States on access to official documents, 21 February 2002.
147. Adopted on 6 December 2004. Available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/0/9A56F80984C8BD5EC1256F6B005C47F0?opendocument>.
148. *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).
149. 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, The Gambia. Available at: [http://www.achpr.org/english/declarations/declaration\\_freedom\\_exp\\_en.html](http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html).
150. Adopted by the Inter-American Commission on Human Rights at its 108th Regular Session, 19 October 2000. Available at: <http://www.iachr.org/declaration.htm>.
151. *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, UN Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the "Environment for Europe" process, 25 June 1998, entered into force 30 October 2001.
152. *Claude Reyes and Others v. Chile*, 19 September 2006, Series C No. 151.
153. (London: 1999). Available at: <http://www.article19.org/pdfs/standards/righttoknow.pdf>.
154. (London: 2001). Available at: <http://www.article19.org/pdfs/standards/modelfoilaw.pdf>.
155. The UNDP, for example, has, absurdly, refused requests on the basis that their policy does not give access to documents other than those already published. See a protest letter on this by ARTICLE 19, available at: <http://www.article19.org/pdfs/press/undp-disclosure-policy.pdf>.
156. See COE Recommendation,.
157. See note 145.
158. See, for example, Article 5.
159. *Claude Reyes and Others v. Chile*, 19 September 2006, Series C No. 151. See, in particular, paras. 88-92.

# Country Chapters

## Azerbaijan

43

### Introduction

Article 50(I) of the 1995 Azerbaijani Constitution provides: "Every person shall have the right to legally seek, get, pass, prepare and spread information." The Law on Right to Obtain Information was signed into law by the President in December 2005.<sup>160</sup> This was preceded by a 1998 Law on Information, Informatization and Protection of Information,<sup>161</sup> which is mostly about how government should organise information internally, although it does create a right to access one's own personal data, as well as a separate 1998 Law on Freedom of Information which set out general principles relating to information but did not create a right of access.<sup>162</sup>

The law was developed by a working group which included both government and civil society representatives in what was a comparatively highly consultative process for developing legislation in Azerbaijan. It is a progressive piece of legislation which improved throughout the drafting process, demonstrating positive political will. It includes provision for an independent administrative oversight body (a sort of information commissioner), strong process provisions and extensive proactive publication obligations. At the same time, the regime of exceptions is overbroad, the Law lacks sanctions for obstruction of access and protection for good faith disclosures, and few promotional measures are provided for.

Furthermore, implementation has been very weak. At the time of going to print, no information commissioner had yet been appointed although this should have been done by June 2006. According to a report by the Media Rights Institute,<sup>163</sup> no State body has yet provided for a registry of documents, as required by the Law, the information available on public websites falls far short of what is required under the Law and few public bodies have appointed information officers. Significantly, of 441 requests Media Rights Institute lodged with 186 different public bodies, only 125 were responded to at all, only 32 of the responses provided all the information requested, and only 17 did so within the seven working day deadline established by the Law. These are extremely poor results by any measure.

## The Right of Access

The right of access under the Azerbaijani RTI Law is set out primarily in Article 2.3, which provides that anyone applying for information is entitled to obtain it freely, and on an unrestricted and equal basis, if the public body holds that information. This is supported by Article 2.2, which provides that any person is entitled to apply directly or via his or her representative to public bodies for information, and to stipulate the manner and form of obtaining that information. Article 2.1 further provides that access to information 'is free'.

Article 1 sets out the purpose of the RTI Law, which is to establish a legal framework for ensuring free, unrestricted and equal access to information in accordance with Article 50 of the Constitution, based on an open society, and to create conditions for citizen oversight of the exercise of public functions. A long list of principles of access to information is provided in Article 6 including, in addition to the principles noted, the obligation of public bodies to disclose information, maximum transparency, the rapid processing of requests for information, protection for confidential information, judicial protection for the right of access, access for free, except as otherwise provided in the Law, responsibility of public bodies for violating the right to information and that classification should not be unduly extensive. In principle this should provide a good interpretive base for the law.

Information is defined in Article 3.0 as any "facts, opinions, knowledge, news or other sort of information" irrespective of the date of production, form or classification. Private information is information which could, directly or indirectly, facilitate the identification of a person, while public information is information acquired during the performance of legal duties. This is supplemented by Article 7, which defines documented information as information of any sort recorded on a "tangible data medium in the form of text, voice or picture; irrespective of its source, place of storage, official status, type of ownership and whether or not it has been produced by the entity which it belongs to". Formally, the right of access applies primarily to 'information' held by public bodies, so the relevance of the more restrictive definition of public information, which is qualified by the notion of legal duties, is unclear. There is also some possibility of confusion between the definitions of information and documented information but both are broad.

44

Article 3.0 also defines public bodies ('information owner') as "state authorities, municipalities, legal entities irrespective of the ownership type, and individuals as determined by Article 9". Article 9 defines public bodies as State authorities, municipalities and legal entities implementing public functions, as well as private legal entities operating in the spheres of "education, healthcare, cultural and social sphere based on legal acts or contracts". The obligations of private legal entities, however, are limited to information produced or acquired as a result of their public duties (see also Article 21.2.2). It is not clear whether the spheres listed – education, healthcare, etc. – are considered to be inherently public duties. This is potentially a very broad definition as it is linked to function rather than form, although this would depend on how the Law is interpreted.

Fully or partly State-owned or subsidised bodies, as well as legal entities holding dominant or exclusive market positions or rights, or operating in natural monopoly areas, are also considered to be public bodies in relation to certain types of information, including "offers and prices of goods as well as the services and changes in such terms and prices". The latter part of this is a progressive innovation not found in many right to information laws. At the same time, State-owned or subsidised bodies are under similar disclosure obligations as all public bodies in many countries.

As noted, the right of access applies to every person, not limited by nationality, residence or other conditions.

## Procedural Guarantees

Article 11.2 provides generally that public bodies are required to organise themselves regarding provision of access to information. Article 2.5 provides that applicants may use the information they obtain from public

bodies for any purpose, including commercial purposes. Requests may be submitted orally either directly or over the phone, or in writing via direct delivery, post, fax or email (Article 13.1). A request shall include the name of the applicant, contact details, a description of the information sought and the form in which the applicant would prefer to access the information. Requests for private information should also be accompanied by the applicant's identification document. Where a request is deficient the applicant should be informed within five working days. Failure to identify the requested information sufficiently clearly is a ground for refusing a request. Reasons are not required to be given except in certain cases, such as where official confirmation of provision of the information is needed for purposes of exercising a right or where the information is sought on an urgent basis (Articles 15, 21.1 and 24.4).

Public bodies are generally required to secure everyone's "free, unrestricted and equal" right to access information (Article 10.1). More specifically, they are required to inform applicants about the "terms, policies and methods" of making requests, to assist applicants locate information they do not hold, to assist applicants to define the information sought sufficiently clearly and to provide assistance as necessary to applicants who cannot produce a written request, for example due to illiteracy or disability (Article 17).

Requests for information must be registered upon receipt unless they are anonymous or verbal, although provision of a request on letterhead or with even a single contact detail is enough to engage the obligation of registration (Article 18). Every properly submitted written request must be processed (Article 15.7). The manner in which a request has been dealt with – either through provision of the information or rejection of the request – shall be entered into the register, along with the name of the official, the date, and the details of any provision of information or grounds for refusing a request (Article 28). These are progressive provisions which, if followed, will ensure a good paper trail for any appeals.

Article 24 provides that requests must be answered as soon as possible and in any case within seven working days (see also Article 10.4.1). Where more time is needed to prepare the information, to define the request or to search through a large number of documents, the response time may be extended by an additional seven working days, in which case the applicant shall be informed within five working days (Article 25). Where the information is needed more quickly, requests shall be processed immediately or, where this is impractical, within 24 hours. Where the information is needed to prevent a threat to life, health or freedom, it should be provided within 48 hours (Article 24). Providing for quick timelines where the information is needed quickly is an interesting innovation which may be particularly useful for journalists.

Where a public body does not hold the information requested, it should try to determine which public body does hold the information and transfer the request to that body within five working days. This obligation does not apply to private bodies covered by the law, but they shall inform applicants within five working days if they do not hold the information sought (Article 23).

The Azerbaijani RTI Law does not address the question of notification of third parties. Article 27 provides that a request is considered satisfied when the information has been provided, the request has been forwarded and the applicant notified, the applicant has been advised on how to access the information, or the applicant receives a "grounded notification on the refusal" to provide information. This is supplemented by Article 21.3, which provides that the response to any refusal to provide information should be 'explicit' and indicate the specific legal provisions upon which it is based. These provisions could be further improved by requiring details regarding the right of appeal to be provided where a request is refused.

Article 14.1 addresses the question of form of disclosure of information, while Article 10.4.1 provides generally that requests must be answered in the manner most appropriate for the applicant. Applicants may specify various forms of access including inspection of a document, an opportunity to make a copy of a document, being provided with a certified copy, transcription of coded information, or provision in electronic form. The specified form of access may be refused where the public body lacks the technical means to comply, where the form in which the information is held makes this impossible, where to do so would interfere with the normal operation of the public body, or where this would cause damage to the record. In these cases, the public body determines the form of access (Articles 14.5, 16.1 and 16.2). Article 16.2 describes when a verbal response may be provided, such as where a request is made in the form of a direct appeal to officials. Where information is available in many languages, it should be provided in the language preferred by the applicant (Article 16.5).

Access to information shall be free where it is via inspection of the record, the applicant copies it himself or no technical support is provided by the public body, presumably including when provision is electronic. It shall also be free if the information is already public. Otherwise, a charge may be levied which shall not exceed the costs incurred to prepare and present the information to the applicant. Within three years, the administrative body responsible for information shall prepare a list of chargeable services, payment procedures and other matters relating to fees. Until that time, these shall be determined by each public body internally (Articles 26 and 57.2). Where a public body provides incomplete or inaccurate information, the supplementary or correct information should be provided free of charge (Article 22.3). These are reasonably progressive fee provisions although they would be strengthened by the inclusion of fee waivers in certain cases. Also, costs of preparing the information are not chargeable in many right to information systems, as this largely depends on how well the relevant public body maintains its own records.

## Duty to Publish

Article 10.4.3 establishes a general duty on public bodies to provide the public with information on the activities they have undertaken to implement their mandate. Chapter IV deals in detail with proactive disclosure. Article 29 lists some 34 categories of information that must be disclosed proactively, including statistical data, budgetary and detailed financial information and forecasts, information on staff, including salaries, information on the environment, legal documents, planning documents, services provided, and, significantly, a list of secret documents. This is a long and progressive list of proactive disclosure obligations.

Article 30 provides for disclosure via the Internet, the mass media, official publications, and libraries and other public information centres. Article 31 provides generally that disclosure should be in a manner that allows everyone to access the information as soon as possible. Where a special means of disclosure is envisaged by a law or international agreement, it shall be respected. Information relating to a threat to life, health, property, the environment or other matters of significant public interest must be disclosed immediately via the mass media and Internet, with a view to mitigating any risk.

Articles 32 places an obligation on public bodies to establish Internet "information resources" (websites or similar) to facilitate disclosure of the information described in Article 29. Private bodies undertaking public functions are, pursuant to Article 33, also required to take measures to ensure access to information over the Internet, including by placing up-to-date and 'effective' information online.

Pursuant to Article 12, public bodies are required to establish accessible public electronic registers of key documents they hold, whether they produce or acquire them. This can be a very useful tool to assist those seeking to identify information. A number of documents – such as accounting records, greetings, correspondence and memos – are not required to be registered. The "respective executive authority", presumably the minister responsible for the RTI Law, shall establish policies governing the creation, maintenance and updating of the register. In addition to the actual document, the following information must be recorded: the mode of receipt and/or dispatch of the document, where relevant; the type of document; and, as applicable, limitations on access to it.

## Exceptions

Overall, the regime of exceptions in the RTI Law, while respecting international standards in some respects, is one of the weaker aspects of the Law. It includes a comprehensive list of types of information that should be kept secret, divided into two main grounds: 'official use' and privacy. It would appear that the Law also doubles as a secrecy law, in the sense that confidential information may not be disclosed (in addition to the public not having a right to access it). Article 41, for example, provides that public bodies must take measures to protect information intended for 'official use'.

The relationship between the RTI Law and secrecy legislation is not very clear. On the one hand, Article 4.2.1 provides that the RTI Law does not apply to secrets established by law (Article 21.1.1 reiterates this). On the other hand, Article 5.2 provides that other laws cannot contradict the requirements of the RTI Law. It seems likely that the combined effect of these provisions is that the RTI Law does not extend to documents which are expressly rendered secret according to other legislation.

The RTI Law provides for certain blanket exclusions to which it simply does not apply. These include proposals, claims and complaints regulated by the law governing citizen complaints, as well as limitations determined by international agreements. The RTI Law also does not apply to documents which have been archived in accordance with the law governing the National Archives, although presumably this law incorporates its own system of disclosure (Article 4.2).

Further general grounds for refusing to provide information are set out in Article 21, including where the applicant is “not duly authorized to acquire” the information, the applicant has already been provided with the information, responding to the request would undermine the ability of the public body to discharge its obligations, due to the volume of information sought, it is impractical to respond to the request at that time, or responding to the request requires “systematization, review and documentation” of the information (which may be assumed to mean that the information as such is not held but could be created by the public body from existing documents). Some of these – in particular the rule on it being impractical to respond to a request at that time – appear to give wide latitude to public bodies to refuse to process requests.

Many of the exceptions do not incorporate a harm test but, instead, set out blanket categories of information that may not be disclosed. At the same time, most such exceptions include an internal time limit on secrecy. For example, information collected “during the effecting of state control” is secret only until a decision has been made. For those exceptions which do include a harm test, the standard is usually low, with the term ‘will or may’ frequently being employed. The combined effect of this is that information may be confidential even where disclosure would not cause any harm, although usually not for very long. The Law does not envisage certificates of confidentiality being issued, but these may be provided for in other laws.

Article 35.4 appears to provide for something like the opposite of a public interest override, providing that information may be kept confidential where the harm from disclosure exceeds the public interest in accessing the information. However, since this is limited in application to ‘official information’ as defined by Article 35.2, in other words information which is *prima facie* confidential, it may in fact be a proper public interest override. Article 39.1 does provide for a limited public interest override in relation to information on accidents or offences, as long as this would not impede an investigation.

Article 22.2 provides for partial disclosure of documents whereby, when only part of a document is subject to disclosure, that part shall be severed from the rest, which shall be kept confidential. This rule is repeated in Article 39.3 in relation to information which cannot be regarded as classified on grounds of official use (see below).

Pursuant to Article 40, information intended for official use can only be classified as long as the grounds for confidentiality remain and in any case for not longer than five years. For private information the limitation period is 75 years, or 30 years after the person concerned has died, or, in a rather strange rule, 110 years after a person’s birth, should death not be verified.

The RTI Law sets out two main categories of information which may be treated as confidential, namely “information intended for official use”, and private information and information on family life. Article 35 sets out a long list of categories of information falling within the ambit of the first, including:

- information on criminal or administrative violations, until the case is filed with a court or terminated;
- information collected “during the effecting of state control”, until a decision has been made;
- information the disclosure of which may impede the formulation of policy, until a decision has been made;

- information the disclosure of which may undermine testing or a financial audit, until these processes have been completed;
- information the disclosure of which may undermine the free and frank exchange of ideas within a public body;
- information the disclosure of which may adversely affect management of the economy, until the activity in question has been completed;
- information the disclosure of which may undermine the administration of justice, until a decision has been made;
- documents regarded as confidential by foreign States and intergovernmental organisations;
- information the disclosure of which might harm the environment;
- information the disclosure of which might harm the interests of the public body;
- where confidentiality has been agreed with a private body undertaking public functions;
- draft decrees, resolutions and orders, until these have been submitted for approval; and
- legal documents on the obligations of private bodies engaged in monopoly activities, until these have been signed.

The categories on this list are, for the most part, recognised in many right to information laws. However, a combination of no or a weak harm test means that the list remains significantly overbroad.

All of these documents must be marked confidential and the expiry date of this confidentiality must be indicated (Article 36). The Law does also contain a long list of types of documents which may not be considered confidential, including a range of economic and financial information, information on any benefits provided to members of the public, opinion polls, information on disasters, the environment, healthcare, etc., and a list of information considered to be secret (which, list as noted above, is itself subject to proactive disclosure). Private bodies which constitute a monopoly cannot keep secret the terms of offers, prices of goods and services or any changes to these, while private bodies operating under a public subsidy cannot keep secret the terms or use of those subsidies (Article 37).

Article 38 lists information which may be kept confidential on the basis that it is private or concerns family life, including the following categories:

- information on political or religious views, ethnic or racial origin, health, individual features and abilities, or mental or physical disability;
- information collected as part of the investigation of a crime or other offence, until judgment is rendered, to protect children, morality, privacy, victims or witnesses, or as required to execute judgment;
- applications for social protection or services, registration of civil status, or adoption;
- tax information, except for outstanding debts; and
- information on sexual or family life.

The listed categories are somewhat peculiar. It may well be, for example, that an individual has made his or her religious or political views public, in which case they would not fall within the scope of private information.

Individuals are permitted to access their own information, except where this would reveal the origin of a minor, undermine the prevention of crime or apprehension of an offender, or where the information has been collected for purposes of State security. Furthermore, a wide range of individuals are permitted to access private and family information, including the parents and teachers of minors, those teaching disabled persons, officials as required for official duties, and employees of private companies and those working under legal contracts in the areas of education, health, culture to the extent required to perform these services. Article 8.3 also provides for the correction of personal data. This effectively constitutes a sort of mini-data protection regime. This is a complex area of law and far more detailed rules are needed to do it proper justice. It would be preferable if, as in many other States, these provisions were not included in the right to information law but, rather, were incorporated into a fully-fledged data protection law.

## Appeals

Anyone may lodge a complaint with the information commissioner or a court regarding an alleged failure in respect of a request for information. Such a complaint should include the name and address of the complainant, information about the request and a description of the alleged wrong, with supporting evidence including, as relevant, any response to the request from the concerned public body (Article 49). The information commissioner shall consider the complaint within ten working days, although this may be extended for an additional ten working days upon notice being provided in writing to the complainant, where additional clarifications, explanations or documents are needed to process the complaint (Article 50).

A complaint may be rejected where it is anonymous, does not relate to the activities of the concerned public body, is "repeated, groundless and biased", a court decision has been issued on the case, or the complainant has not made use of available mechanisms to rectify the problem internally. In all other cases, the complainant has a right to a reasoned decision on the complaint (Article 51).

Article 43 of the RTI Law provides for the appointment of an "authorized agent on information matters" (information commissioner) to be elected by the Milli Mejlis (parliament) from among three persons nominated by the relevant minister. Any citizen with higher education, experience in the field of education and 'extreme morality' may be elected information commissioner. Various exclusions are provided for in the Law, including individuals holding remunerative positions, other than scientific, pedagogical or creative work, under obligations to foreign States, with prison sentences that have not been discharged or whom a court has declared incapable. The information commissioner may not be involved in politics, represent any political party or hold a position in an NGO. An individual elected to the position of information commissioner has seven days to bring him- or herself into compliance with these rules. The term of office is five years and individuals may be re-elected but only once. In accordance with Article 44, the office has legal status and is funded from the State budget, but controls its own staff. It shall operate in accordance with regulations, presumably to be adopted by the responsible minister, although this is not made explicit.

Article 45 provides for the premature termination of an information commissioner, which shall be effected by the parliament, upon a representation to this effect being made by the responsible minister. This may happen when the commissioner fails to fulfil his or her obligations under the RTI Law, lacks capacity to discharge his or her duties, dies or leaves the position, or where this is ordered by a court. Where a commissioner is removed, a replacement must be found within fifteen days. In general, these rules provide good protection for the independence of the information commissioner although explicit provision for the involvement of civil society in the process would further strengthen this.

The information commissioner has the general power to ensure that public bodies respect their obligations under the RTI Law. He or she may initiate an investigation either upon receiving a complaint or pursuant to his or her own initiative. An investigation may enquire into a wide range of compliance issues including whether a request has been registered properly, whether the applicable procedures have been respected, whether any refusal to disclose information is legitimate, whether time limits on confidentiality of documents are proper, whether a public body has met its obligations of proactive disclosure, or whether appropriate steps

have been taken to disseminate information over the Internet (Article 46). The information commissioner thus has very wide powers to look into any failures by public bodies to implement the RTI Law.

In conducting an investigation, the information commissioner shall have the power to request and receive documents and clarifications from any public body, including confidential documents (Article 48). The information commissioner shall communicate any decision arising from an investigation to the public body concerned and the complainant, and shall also make the decision publicly available over the Internet (Articles 47.2 and 47.3). The public body concerned shall comply with any instructions from the information commissioner to remedy a problem within five days and notify the commissioner in writing of the steps taken, which notification shall be put on the Internet. A public body may, however, appeal a decision of the information commissioner to the courts (Article 53). Where a public body fails to take the required measures in time, the information commissioner may file a petition with the supreme governing body of the public body, or file the relevant documents with a court. In the former case, the governing body shall review the matter and report to the information commissioner on measures taken (Articles 48 and 54).

## Sanctions and Protections

The Azerbaijani RTI Law does not include any provisions either on sanctions for obstruction of access, or on protection of officials acting in good faith or whistleblowers. This is a significant lacuna in its provisions. However, a number of amendments to the "Code on Administrative Offences" relating to right to information issues partially redress this.<sup>164</sup> Article 181-3 of this law, for example, now provides that officials should be fined for unjustly limiting the right to information or for providing false information, for refusing to provide access to information, for refusing to receive a written request for information, for violating the rules on record management or for retaliating for the dissemination of information about offences which are a matter of public concern. No unified practice on applying these sanctions has yet developed.

50

## Promotional Measures

The RTI Law includes a relatively weak package of promotional measures. Article 8 provides very generally for a system of record management, stating that the responsible minister shall establish regulations on the "storage, filing and protection of information" and that public bodies are responsible for complying with those regulations.

Article 10.2 places an obligation on public bodies to appoint an information official or 'department'. Presumably the latter simply refers to a situation where more than one individual is given responsibility in this area. Article 10.3 provides that the appointment of an information officer shall not be grounds to deny access to information, although it is not clear why this provision was felt to be necessary. Article 10.5 sets out the duties of information officers, which include processing requests for information, liaising with the information commissioner, dealing with complaints and carrying out other obligations in relation to information. Some tasks normally carried out by information officers under other right to information laws, however, such as assisting applicants, are, pursuant to Article 10.4, allocated directly to public bodies.

Pursuant to Article 10.6, public bodies must report semi-annually to the information commissioner on information matters, or more often as required by the information commissioner. The information commissioner is then required to report annually to the parliament on implementation of the RTI Law, which report should include a summary of activities undertaken, and information on violations of the Law, complaints, decisions issued and so on. The report shall be disseminated over the Internet and through the mass media (Article 53).

The information commissioner is also given a number of general promotional roles, including to raise public awareness about the RTI Law, to provide legal assistance to people seeking information, to make recommendations to public bodies to promote more effective implementation of the Law, to undertake training and awareness raising activities, and to prepare a sample information request (Article 47).

# Bulgaria

## Introduction

Article 41(2) of the 1991 Constitution of the Republic of Bulgaria<sup>165</sup> guarantees the right to information in the following terms: "Citizens shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of others." The Bulgarian Access to Public Information Act (RTI Law)<sup>166</sup> was adopted on 22 June 2000 to implement in practice this constitutional guarantee. The Law has been amended a number of times, including significant changes in 2002 and then most recently in 2007. In addition, a secrecy law, the Law on the Protection of Classified Information,<sup>167</sup> was passed in April 2002. This is an important development given that the RTI Law leaves the definition of secret information to other legislation.

The Bulgarian Law has a number of positive features, including an innovative and progressive approach to proactive disclosure of information and good procedural guarantees. At the same time, a major weakness is the lack of inclusion of a fully fledged regime of exceptions, and other shortcomings are the absence of any administrative level of appeal and the limited promotional measures included in the Law.

There have been recent attempts to water down the otherwise progressive provisions of the RTI Law, including in 2007, although these were ultimately abandoned.<sup>168</sup> In its 2006 Annual Report, the Access to Information Programme (AIP), a respected Bulgarian NGO, noted: "Changes in the political leadership frequently result in the alteration of good practices, and sometimes in their elimination."<sup>169</sup> In other words, it has been a constant struggle to maintain a positive framework of openness over time. The courts have played a very important role in this process, in particular in interpreting exceptions.<sup>170</sup>

51

## The Right of Access

Pursuant to Article 4 of the Law, citizens, as well as foreigners inside the country and legal entities, are entitled to access 'public information' subject to the conditions and procedures set forth, unless another law provides for a special procedure for obtaining that information. The latter is unfortunate as it opens up the possibility of another law providing for less effective, or more expensive, access undermining the RTI Law.

The Law states its overall purpose as being the regulation of social relations governing access to public information (Article 1). Article 6 sets out the principles relating to access to information, which include ensuring openness and accuracy of information, securing conditions for equal access, protecting the right to access information, and guaranteeing the security of society and the State. Although this is a useful statement of the purposes of the Law, it does not provide much guidance as to how to balance competing interests of secrecy and openness when these present themselves.

Public information is defined in the Law as any information relating to social life which gives citizens an opportunity to form opinions about the public bodies which are covered by the Law, irrespective of how it is physically stored (Article 2(1)). Due to problems with subjective interpretation of the notion of social life, amendments to this were proposed in 2001 and even passed on first reading by the Parliament but they were ultimately abandoned. It would be better to include all information within the ambit of the Law without conditioning it by reference to social life or other qualifiers, and then to provide for a comprehensive regime of exceptions to protect any legitimate secrecy interests.

Article 3 defines two sets of public bodies. The first are "State bodies and local self-governance bodies" and the second are bodies which are subject to public law, and individuals and legal entities which are

funded from the consolidated budget, to the extent of that funding. This is a broad definition but it is not clear whether private bodies that undertake public functions but without public funding are included. The media are also included as subjects of the law, although it seems inappropriate to place special obligations on these particular private bodies, notwithstanding their important role in fostering a free flow of information in society. Certainly it is not the practice in other countries to subject the media to special information disclosure obligations.

## Procedural Guarantees

As noted, citizens or residents may make requests for information. Requests may be made in either oral or written form, provided that where an oral request is refused, it may be followed-up with a written request. This is presumably to avoid any disadvantage that might otherwise result from making an oral request. The request must contain the name and contact details of the applicant, as well as a sufficient description of the information sought and the form in which access is sought. Requests must be registered by the public body in question (Articles 24 and 25). Where the information sought is not sufficiently clearly described, the applicant shall be given up to 30 days to rectify the problem, and this time shall not be counted as part of the time limit for providing a response to the request (Article 29).

An applicant must be notified in writing of a decision regarding his or her request as quickly as possible but in any case within 14 days, unless the application is for a large number of documents and more time is needed to respond, in which case an extension of up to 10 days may be made, provided that the applicant must be notified of this (Articles 28 and 30). Actual access may be delayed until after the requisite fee has been paid (Article 35).

52

Where the body to whom the original request was made does not have the information, but knows that it is held by another public body, it shall forward the request to that other body within 14 days. If it does not know of another body which holds the information, it shall inform the applicant of this, again within 14 days (Article 32).

The Law sets out different time limits and procedures where the consent of a third party is required for disclosure of the information.<sup>171</sup> In that case, the time limit may be extended by another 14 days and the third party must be contacted within 7 days. Any disclosure must comply with any conditions imposed by the third party in giving his or her consent. Where a third party refuses to consent to the disclosure of the information, any part of the document which may be provided without affecting that party's interests shall be severed from the rest of the document and disclosed (Article 31).

Where access is being granted, the notice required to be provided shall state the scope of information being disclosed, the time within which the applicant must effect access, which shall be at least 30 days, the location for access, the form of access and any costs. Presumably a failure to access the information within the time given would simply mean that a new request would be needed to access that information. A refusal to grant access shall state the "legal and factual grounds for the refusal", as well as the date and the right of appeal. In both cases, the notice must either be signed for by the applicant or sent by registered post. This seems excessively formal, particularly where access is being granted, in which case notification by email or another simple form should be enough (Articles 34, 38 and 39).

The Law provides for information to be provided in four different forms, namely inspection of the record, a verbal explanation, a paper copy or another type of copy. An Order adopted by the Minister of Finance in January 2001 adds a written explanation to this list, and this is now being implemented in practice by public bodies. The information shall be provided in the form requested unless this is not technically feasible, results in an unjustified increase in costs or may lead to an infringement of copyright. The first two forms of access shall be provided free of charge, while charges for the latter two forms shall be according to a schedule determined by the Minister of Finance, which shall not exceed the actual costs incurred. The Law does not elaborate on what this might include, only replication and dissemination costs or also relevant staff costs, but the 2001 Order made it clear that only material costs and not staff time could be charged. The Order sets the rate for each page copied at 0.09 Bulgarian Leva (approximately USD0.07). A justification

must be provided to the applicant regarding any fees which are charged. Applicants must be informed on the spot about these forms of access and the charges relating thereto. Persons with disabilities may request access in a form that corresponds to their needs (Articles 20, 21, 26 and 27).

## Duty to Publish

The Bulgarian RTI Law includes strong provisions on the duty to publish. Public bodies must “promulgate” official information contained in their official documents, as well as other categories of information required to be published by law (Article 12). Public bodies must also disseminate information about their activities, either in published form or through announcements (Article 14). The Law also provides for the publication, on a regular basis, of information about the public body, including a description of its powers, structure, functions and responsibilities, a list of formal documents issued within the scope of its powers, and the name, contact details and working hours of the office authorised to receive requests for information (Article 15). The Minister of the State Administration is required to publish, on an annual basis, a summary of this information, which “shall be made available in every administration for review by the citizens” (Article 16).

Article 14(2) requires public bodies actively to disseminate information which may prevent a threat to life, health, security or property, which corrects previously disseminated information that was inaccurate, or which is required by another law to be disseminated. It also calls for the dissemination of information that could be of public interest. The precise scope of these obligations to publish is unclear. Information of ‘public interest’ could be a very broad term, depending on how it is interpreted in practice. This provision in the Law could be seen as a way of moving to the proactive publication of practically all information that anyone may want to access, now possible given advances in the area of information technology. The public interest override in relation to the duty to publish is an interesting innovation not found in most other laws. Interestingly, the Bulgarian RTI Law fails to provide for a public interest override in relation to requests for information.

53

## Exceptions

The Bulgarian RTI Law does not, unlike most right to information laws, include a comprehensive list of exceptions. Instead, information classified as secret pursuant to other laws is excluded from the definition of public information and the Law also specifically states that such information shall not be disclosed.<sup>172</sup> This is unfortunate and contrary to international standards, as well as the practice of most other countries. Although a number of laws from other countries do leave secrecy laws in place, most at least include their own set of exceptions. One problem with leaving secrecy laws in place is that they rarely conform to international or best practice standards on exceptions. In particular, few require a risk of harm before information may be withheld.

There is no public interest override in the Law or historical time limits on secrecy. The Law on Protection of Classified Information, however, prescribes time limits, depending on the level of classification, of 2, 5, 15 or 30 years (Article 34(2)). The RTI Law does, however, provide for severability of exempt information, stating that access may either be full or partial (Articles 7(2) and 37(1)).

The Law also includes a number of further exceptions scattered throughout its provisions. In general, these are not subject to harm tests and none of them are subject to a public interest override. Article 2(3) provides that the Law does not apply to personal data. This is unfortunate, particularly in the absence of a public interest override or other limitation. Public bodies hold a wide range of personal data and it would be preferable if the exception applied only to information the disclosure of which would actually harm a legitimate privacy interest. Article 8 excludes information that may be obtained in the course of the provision of administrative services and information which is kept in the State archives. The former, in particular, would cover a lot of information for which there was no legitimate secrecy interest.

Article 5 provides that the right of access may not be exercised in a manner which undermines others' rights or reputation, national security, public order, national health or moral standards. This is an extremely broad and vague prohibition which is inconsistent with the practice in other countries and potentially open to serious abuse, although in practice it has not proven to be an important obstacle to access. It also appears to be based on a misconception of the difference between access to information held by public bodies and freedom of expression, and the need for restrictions on the latter which are not necessary in relation to the former.

Article 13(2) sets out some restrictions on access to administrative public information, including where it relates to preparatory work on an official document and has no significance in itself (although the amendments now require such information to be published after the document has been adopted). The same article also excludes information relating to ongoing negotiations, which seems extremely broad and unrelated to any specific harm. As a result of the 2002 amendments, however, both exceptions are limited in time to 2 years.

Article 17 provides that access to information held by bodies subject to public law and private bodies funded through the consolidated budget shall be unrestricted, subject to Article 17(2), which allows for restrictions for commercial secrets whose disclosure would be likely to lead to unfair competition. Article 37 adds to these an exception in cases where the information affects the interests of a third party who has not given his or her consent (see above for a description of the procedural aspects of this). The scope of the term 'affect' is not defined but this could potentially be very broad. In many right to information laws, this exception is limited to information provided in confidence, the disclosure of which could harm a legitimate interest of the concerned third party.

Where information has already been published, the public body is required to direct the applicant to that information, rather than to provide it themselves (Article 12(4)).

On its face, the regime of exceptions provided for in the Bulgarian RTI Law is extremely broad. For the most part, it relies on exceptions in other laws, most of which cannot be expected to respect international standards relating to openness. Furthermore, it adds to these by elaborating a number of further exceptions, few of which are harm based and many of which are simply too broad to begin with. In some cases, the courts have narrowed down the scope of exceptions although in others – for example in relation to the protection of third party interests and trade secrets – the law has been interpreted more broadly.

## Appeals

The RTI Law does not provide for any internal or administrative appeal. This is a serious shortcoming, as it means the only option for applicants whose requests have been refused internally is to go to the courts, which is time consuming and expensive.

The Law provides for appeals to the courts, which have the power to repeal or amend the original decision and, where they do so, access shall be provided according to the court ruling. Where it so requests, the court may examine all evidence, including the information in question, *in camera* if necessary (Articles 40 and 41).

## Sanctions and Protections

The RTI Law provides for sanctions whenever a civil servant fails to respond within the applicable time limits, fails to respect a court order granting access, does not respect conditions in a third party consent or, in the case of bodies subject to public law and private bodies funded through the consolidated budget, fails to provide access to public information. The Law provides for various fines for these offences, unless they are already subject to a harsher penalty, presumably under some other law (Article 42).

The Law does not include any protections for good faith disclosures, either pursuant to the Law or under the guise of whistleblowing.

## Promotional Measures

The Law provides for few promotional measures. Certain public bodies, namely the first set defined in Article 3 – State bodies, their territorial units and local self-governance bodies – but apparently not others, are required, as a result of the 2007 amendments, to appoint information officers with responsibility for dealing with access requests.<sup>173</sup> It is not clear why this obligation has been limited in this way.

The Law does not include a number of other promotional measures found in many right to information laws, such as an obligation to produce a guide for the public on how to exercise their right to information, rules on record management, provision for training of public officials or reporting requirements to ensure transparency about how the Law is being implemented.

# India

## Introduction

The Constitution of India does not provide explicit protection for the right to know. In 1982, however, the Supreme Court ruled that access to information held by public bodies was implicit in the general guarantee of freedom of speech and expression, protected by Article 19 of the Constitution, and that secrecy was “an exception justified only where the strictest requirement of public interest so demands”.<sup>174</sup> Despite this clear ruling, it was some time before right to information legislation was adopted.

A national Freedom of Information Act, 2002,<sup>175</sup> was passed in December 2002, after many years of public debate and after right to information laws had been passed in a number of Indian States.<sup>176</sup> The law was weak and subjected to widespread criticism, and it never came into force due to the failure of the government to notify it in the Official Gazette. A concerted campaign by civil society, along with a change in government in 2004, led to the adoption of the Right to Information Act, 2005 (RTI Law),<sup>177</sup> which received Presidential assent in June of that year. In accordance with its own provisions, the Law was phased in but all provisions were in force by October 2005.

The difference between the two laws is perhaps signalled by their names, the latter using a term which is far more popular in India, particularly among those who had campaigned for the law, namely the right to information. The 2005 Law is significantly more progressive than its earlier counterpart. Important differences include a far more developed regime of proactive publication, the addition of an independent oversight body, the inclusion of strong promotional measures and a much narrower regime of exceptions. There are, at the same time, still weaknesses with the Law, such as the near total exclusion from its ambit of various intelligence and security bodies.

The Indian RTI Law is binding on both the national and state governments and this duality is reflected in a number of provisions. The Law provides, for example, for the appointment of both Central and State Public Information Officers, as well as the establishment of both Central and State Information Commissioners, the latter to be established in every state.

The initial indications are that implementation of the Law has been positive, although there are also persistent reports of bureaucratic resistance. A survey conducted by civil society after two years indicated three main problems with implementation: low levels of awareness about the Law among both citizens and officials; poor political and administrative will to implement the Law; and a lack of support from government for information commissions. At the same time, there were a number of positive findings, including that the Law is being used by a range of actors – from remote villagers to urban elites – and for a wide range of purposes – not only as an anti-corruption measure but also to solve personal problems and to address broad social and policy issues. Of particular interest was the fact that the Law was being used as a mechanism to address grievances. Indeed, the government has frequently responded to requests by resolving the underlying grievance within the 30-day period for responding to requests for information, so as to remove the motivation for pursuing the latter.<sup>178</sup>

## The Right of Access

Section 3 of the RTI Law states that, subject to its provisions, all citizens shall have the right to information. The right to information is defined in section 2(j) as the right to information accessible under the Law. Although rather a roundabout way of putting it, this is nevertheless a guarantee of the right to access information held by public bodies.

The Law does not include a statement of its purpose, although the full title of the Law refers to it as setting out a practical regime for realising the right to access information held by public bodies in order to promote transparency and accountability. The preamble, furthermore, recognises that transparency and an informed citizenry are vital to democracy, to controlling corruption and to ensuring public accountability. It also recognises that access to information is likely to conflict with other public interests and the need to “harmonise these conflicting interests while preserving the paramountcy of the democratic ideal”. Taken together, these are a strong and balanced statement of the importance of the right to information which provides a good interpretive background to the Law.

Information is defined in section 2(f) of the RTI Law broadly to include any material in any form, including information relating to any private body which can be accessed by a public body under any other law. This last appears to be somewhat limited and would presumably not apply, for example, to information which a public body could access under a contract, a not uncommon situation in the modern world of contracting out services. However, it does at least cover all information held directly by public bodies.

A long list of examples of possible forms of recording information – including memos, emails, advices, logbooks, electronically held data and even samples – is provided. A record is separately defined in section 2(i) as any document or manuscript, microfilm or facsimile, reproduction or any material produced by a computer. This is distinctly narrower than the definition of information – for example it would not appear to include samples – but since the primary right of access as defined by the Law applies to information, this should not limit the right of access in practice.

A public body (“public authority” is the term used in the Law) is defined in section 2(h) as any “authority or body or institution of self-government” established by or under the constitution, any law passed by either the parliament or a state legislature, or any notification made by government, and includes any body owned, controlled or substantially financed by government, including a non-governmental organisation. This is again a broad definition, although it does not, as some right to information laws do, include private bodies undertaking public functions without public funding.

As noted above, the right of access is limited in scope to citizens (section 3). Section 1(2) of the Law also includes a geographic limitation, whereby it extends to the whole of India, apart from the State of Jammu and Kashmir. There are particular constitutional reasons for this;<sup>179</sup> it is, nevertheless, a significant limitation, although Jammu and Kashmir does have its own right to information law, the Jammu and Kashmir Right to Information Act, 2004.<sup>180</sup>

## Procedural Guarantees

Requests shall, pursuant to section 6, be made in writing or through electronic means in English, Hindi or the local official language to the appropriate information officer (either central or state). Where a request cannot be made in writing for any reason, presumably including illiteracy, the information officer shall render all reasonable assistance to the applicant to reduce it to writing. Pursuant to section 5(3) of the Law, information officers are generally required to render 'reasonable assistance' to applicants. Information officers are also required to provide assistance to the 'sensorily disabled' to enable them to access information, including by inspection (sections 7(4)-(6)). No reasons are required to be given for a request and an innovative supporting rule provides that no personal details may be demanded other than those required for purposes of contacting the applicant.

A response must be provided to a request as soon as possible and in any case within thirty days, although actual provision of the information may be conditional upon payment of a fee. Where the information concerns the life or liberty of a person, a response must be provided within 48 hours. A failure to respond within these timelines is a deemed refusal of the request (sections 7(1) and (2)). The inclusion of a shorter timeline for information concerning life or liberty is a positive measure found in only a few right to information laws.

Where a request concerns information which is either held by another public body or which more closely concerns the work of that body, the information officer shall transfer the request to that body and inform the applicant immediately (section 6(3)). Where an information officer intends to disclose information which relates to or has been provided by a third party and treated as confidential by that third party, he or she shall, within five days of receipt of the request, give written notice of the intent to disclose to the third party, along with an opportunity to provide a representation on the matter within 10 days. The timelines established in section 7 do not apply in such cases and, instead, a response must be provided within 40 days (sections 7(7) and 11).

Where a request is accepted, the applicant shall be informed about any fee to be levied, along with the calculations upon which it is based, his or her right to challenge the assessed fee and the details of how to do this (section 7(3)). Where a request has been rejected, the applicant must be informed about the reasons for the rejection and how to lodge an appeal against that decision (section 7(8)). Interestingly, where access has been granted to only part of a record, far more detailed notice is required to be given regarding that part of the request which has been refused, including not only the reasons for the decision, but also any findings on material questions of fact, and the name and designation of the person who made the disclosure decision (section 10(2)).

Information should normally be provided in the form specified by the applicant, unless this would disproportionately divert the resources of the public body or be detrimental to the preservation or safety of the record (section 7(9)). Section 2(j) specifies a number of forms of access, including directly inspecting work or records, taking notes or certified copies, taking certified samples and obtaining information in other recorded forms, including electronically or through a printout. The inclusion of a right to inspect works and to take certified samples is a particular innovation of the Indian RTI Law, motivated at least in part by a desire to address situations where substandard work or materials have been employed in public works projects.

Access may be made conditional upon the payment of a fee, including for information provided in electronic format, provided that the fee shall be 'reasonable'. No fee may be levied on those below the poverty line. A progressive rule which should help to ensure timely provision of information is that no fee may be charged where a public body fails to respect the established timelines. The government may make regulations concerning the fee to be charged (section 27(2)(b)). Such regulations have been made at the central and all state levels, as well as by some courts. The central rules provide for an application fee for requests of Rs. 10 (approximately USD0.25), Rs. 2 (USD0.05) for each page of A4 or letter size photocopying, the actual cost of samples or models, and Rs. 50 for a diskette. The first hour of inspection shall be free and a fee of Rs. 5 shall be charged for each subsequent hour.<sup>181</sup>

## Duty to Publish

The Indian RTI Law includes very broad obligations of proactive or routine publication. Every public body must, within 120 days of the Law coming into force and thereafter updated annually, publish the a range of information, including the following: particulars of their organisation, functions and duties; the powers and duties of employees; the procedures followed in decision-making processes; any norms which it has adopted to undertake its functions; its rules, regulations, instructions and manuals; the categories of documents it holds and which are in electronic form; public consultation arrangements relating to the formulation or implementation of policy; a description of all boards, councils, committees and other bodies, and whether their meetings or minutes are open; a directory of all employees and their wages; the budget allocated to each of its agencies and particulars of all plans, proposed expenditures and reports on disbursements made; information about the execution of subsidy programmes and the beneficiaries; particulars of the recipients of concessions, permits or other authorisations; facilities for citizens to obtain information (including reading rooms); the contact details of all information officers; and such other information as may be prescribed. Public bodies must also publish all relevant facts when formulating policies or announcing decisions which affect the public, and provide reasons for administrative or quasi-judicial decisions to those affected (section 4(1)).

Significantly, public bodies are also required to make a 'constant endeavour' to provide as much information proactively as possible, so as to minimise the need for the public to have recourse to requests to obtain information. Information shall be disseminated widely and in a manner which makes it easily accessible, to the extent possible electronically, taking into account cost effectiveness, local language and the most effective means of communication in the local area of dissemination. Information covered by these rules shall be provided free, or at the cost of the medium or print cost price (sections 4(2)-(4)).

These proactive publication rules are both extensive and progressive. The question of dissemination is a very important one and the Indian RTI Law addresses it well. The Law also recognises the interplay between the extent of proactive publication and the need to lodge requests. Modern communication technologies are such that public bodies are now able to make a great deal of information available proactively, ideally anything that might be the subject of a request which is not covered by an exception.

58

## Exceptions

The main exceptions are set out in section 8 of the RTI Law, which provides for a comprehensive regime of protection for various public and private secrecy interests. Section 24 provides for the complete exclusion from the ambit of the RTI Law of a number of intelligence and security bodies, namely the 18 bodies listed in the Second Schedule, such as the Intelligence Bureau, the Narcotics Control Bureau and so on. The government may amend the Second Schedule by notification, which must be laid before Parliament. State governments may also specify intelligence and security bodies by notification in the Official Gazette, laid before the relevant state legislature. The exclusion of these bodies from the ambit of the Law is unfortunate and unnecessary. At the same time, there is at least an exception to this, for information pertaining to allegations of corruption and human rights violations. Where information is sought from these bodies in respect of human rights allegations, it shall be provided only after the approval of the relevant Information Commission (Central or State) and, notwithstanding the timelines set out in section 7, within 45 days. No particular procedure is stipulated where the information relates to an allegation of corruption.

The RTI Law, pursuant to section 22, explicitly overrides inconsistent provisions in other laws 'for the time being in force', and it specifically mentions the Official Secrets Act, 1923, as one such law. Most, but not all, of the exceptions do include a form of harm test. The Law also includes a strong public interest override whereby, when the public interest in disclosure outweighs the harm to the protected interest, the information should be disclosed notwithstanding not only the exceptions in the RTI Law but also anything in the Official Secrets Act (section 8(2)). Not satisfied with this, the drafters also included specific public interest overrides for certain exceptions (see below).

Section 10(1) provides for partial disclosure of a record where only part of it is covered by an exception (severability). The Law also provides for historical disclosure, whereby the exceptions do not apply to information relating to any matter which took place 20 years prior to the request, although this does not apply to the exceptions in favour of sovereignty, security, strategic interests, relations with other States, the privileges of parliament and cabinet papers (section 8(3)). It would be far preferable if the historical limits did apply to these exceptions, which are among those which are more likely to be abused, increasing the importance of historical disclosure.

The RTI Law establishes the following specific exceptions:

- information the disclosure of which would prejudicially affect sovereignty or integrity, the security, strategic, scientific or economic interests of the country, or relations with a foreign State, or which would lead to incitement of an offence (section 8(1)(a));
- information the publication of which has expressly been banned by a court or the disclosure of which would constitute contempt of court (section 8(1)(b));
- information the disclosure of which would constitute a breach of the privilege of parliament or a state legislature (section 8(1)(c));
- information, including trade secrets, the disclosure of which would harm the competitive position of a third party, unless the larger public interest warrants disclosure (sections 8(1)(d) and 11(1));
- information available to a person in his fiduciary relationship, unless the larger public interests warrants disclosure (section 8(1)(e));
- information received in confidence from a foreign government (section 8(1)(f));
- information the disclosure of which would endanger the life or safety of any person, or identify a confidential source of information relating to law enforcement or security (section 8(1)(g));
- information the disclosure of which would impede the investigation, apprehension or prosecution of offenders (section 8(1)(h));
- cabinet papers, including records of the deliberations of the Council of Ministers, although these shall be made public after the decision has been taken "and the matter is complete, or over", subject to the other exceptions (section 8(1)(i));
- personal information which has no relationship to any public activity or interest, or the disclosure of which would lead to an unwarranted invasion of privacy, unless the information officer or the appellate authority is satisfied that the larger public interest warrants disclosure or the information could not be denied to parliament (section 8(1)(j)); and
- information the disclosure of which would involve an infringement of a copyright subsisting in a person other than the State (section 9).

These exceptions are largely consistent with those found in other right to information laws, apart from some, such as information the disclosure of which would incite to an offence and information available to a person in his or her fiduciary relationship. At the same time, the list of exceptions does not include a general exception in favour of the internal deliberations of public bodies, an exception which, although it can be important, has been roundly abused in many countries. As noted, most include express or implied harm tests although, significantly, the exception relating to cabinet papers does not and the same is true of the exception for information received in confidence from a foreign government. The standard of harm stated is, however, very high, in most cases requiring that the harm would in fact occur as a result of disclosure of the information.

The exception in favour of personal information is strangely worded. The first part of it does not include a harm test, although it does not extend to information relating to public activities or interests, so that some

personal information which does not constitute an invasion of privacy may be withheld. On the other hand, pursuant to the second part of the exception, information constituting an invasion of privacy which does relate to public activities should not be disclosed, unless this would serve the overall public interest. Some laws exempt only information which is properly private in nature, and exclude private information about public officials relating to their work. This seems a stronger formulation than that adopted in the Indian RTI Law although, in practice, this provision is being interpreted to require harm for both parts.

## Appeals

Pursuant to section 19 of the RTI Law, anyone, including a third party, who either does not receive a decision within the specified timeframe or who is aggrieved by a decision under the Law may, within 30 days, lodge an internal appeal with an officer who is senior in rank to the responsible information officer. A second appeal may be made within 90 days, or such further period as may be deemed appropriate, to the relevant Information Commission (see below). The first appeal must be decided within 30 days, or an extended period of up to 45 days, with reasons for any extension to be given in writing. The onus of justifying any refusal to provide information shall be on the information officer who denied the request (section 19). The onus for complaints relating to other matters – such as excessive fees or undue delay – also lies on the information officer pursuant to section 20(1).

The scope of the right of appeal is outlined in section 18(1), which sets out the duty of the Information Commission to receive and inquire into complaints relating to: inability to submit a request, including because no information officer has been appointed; a refusal to disclose information; failure to respond to a request within the established timelines; the fee charged; allegations of provision of incomplete, misleading or false information; or any other matter relating to requesting or obtaining access to records. These are extremely broad grounds for complaint.

In deciding an appeal an Information Commission may 'initiate an inquiry', in which case they have the same powers as a civil court trying a case under the Code of Civil Procedure, 1908, in respect of: summoning witnesses and compelling them to give evidence; requiring the production of documents, including any public record; receiving evidence on affidavit; and any other matter which may be prescribed (sections 18(2)-(3)).

Information Commission decisions are binding. In deciding a matter, an Information Commission has wide remedial powers, including to: order the public body to take such steps as may be necessary to secure compliance with the Law by providing access, in a particular form, by appointing information officers, by publishing certain information, by making changes to its record management systems, by enhancing the provision of training to its officials or by providing the Commission with an annual report; require the public body to compensate the complainant; or impose any other penalties provided for under the Law, for example to fine an information officer for obstructing access (sections 19(7)-(8)).

The RTI Law includes very detailed provisions regarding the appointment and independence of both Central and State Information Commissions (the commentary below relates only to the Central Information Commission). The Commission shall, pursuant to section 12, consist of a Chief Information Commissioner and up to ten Central Information Commissioners, appointed by the President upon the recommendation of a committee consisting of the Prime Minister, Leader of the Opposition and a Cabinet Minister appointed by the Prime Minister. Although this does prevent the governing party from totally dominating the decision, it is still a highly political approach, although the current Chief Information Commissioner, Wajahat Habibullah, has demonstrated independence in his approach to the position.

Commissioners shall be "persons of eminence in public life, with wide knowledge and experience" in one of the fields listed. They may not be MPs or hold offices of profit or connected with any political party, or carry on any business or pursue any profession (section 12). This latter condition seems rather harsh and would preclude commissioners from pursuing, even part-time, their professions.

Commissioners hold office for five years, non-renewable, and may not hold office after they reach the age of 65. Commissioners must swear the oath set out in the First Schedule, which affirms allegiance to the Constitution, to uphold the sovereignty and integrity of India, and to perform duties to the best of one's ability, without "fear or favour, affection or ill-will". The salaries of Commissioners are linked to those of their counterparts at the Election Commission, less any government pension they may be receiving (section 13). This last seems rather unfair as it would disadvantage those on government pensions compared to those who might be receiving other pensions.

Section 14 addresses the question of removal of Commissioners from office. This may be effected by order of the President upon a decision of the Supreme Court that the Commissioner in question has been shown to have engaged in misbehaviour, including by profiting from his or her office, or to suffer from incapacity. A Commissioner may be suspended by the President while the Supreme Court reference is being decided. The President may also, by order, remove a Commissioner who: has been adjudged an insolvent; has been convicted of an offence which, in the opinion of the President, involves moral turpitude; engages in paid employment; is, in the opinion of the President, unfit to continue in office by reason of infirmity of body or mind; or has acquired financial or other interests which are likely prejudicially to affect his or her functions as a commissioner.

Taken together, these are very strong provisions, although the grounds for removal directly by the President are broad and inconsistent with the need for a Supreme Court reference in other cases (so that only the Supreme Court may decide on incapacity whereas the President alone may remove for mental infirmity).

Section 23 of the RTI Law purports to oust the jurisdiction of the courts in respect of any order made under it. The effect of this in practice, however, is only that one may not approach a lower court for redress, since access to the High and Supreme Courts is constitutionally guaranteed and many right to information cases have already been decided by these courts.

## Sanctions and Protections

The RTI Law includes a developed regime of sanctions. Pursuant to section 20, where an Information Commission is of the view that an information officer has, without reasonable cause, refused to accept a request, failed to provide information within the specified timelines, denied a request in bad faith, knowingly given incorrect, incomplete or misleading information, knowingly destroyed information which was the subject of a request, or obstructed in any manner access to information, it shall impose a penalty of Rs 250/day until the information has been provided, up to a maximum of Rs. 25,000. Presumably, where the problem cannot be remedied, for example because the information has been destroyed, the maximum would apply automatically. Before imposing such a sanction, the Commission shall give the information officer a reasonable opportunity to be heard. The section states that the burden of proving that he or she acted 'reasonably and diligently' shall be on the information officer, although the offence only stipulates a lack of reasonable cause, and not a lack of diligence, as a constituent element. For persistent offenders, the Commission shall recommend disciplinary action. The list of wrongs outlined in this section is extremely comprehensive.

On the other hand, no legal proceeding shall lie against any person for any act done or intended to be done under the Law (section 21). The Law does not provide protection for whistleblowers.<sup>182</sup>

## Promotional Measures

Pursuant to section 5(1), every public body shall appoint as many information officers, formally known as Central or State Public Information Officers, as may be required to provide information to those who request it. These information officers may seek the assistance of any other officer and every such officer shall render all assistance to the information officer (section 5(5)).

Section 4(1)(a) provides for a rudimentary rule on record management, providing that all public bodies must maintain their records “duly catalogued and indexed in a manner and the form which facilitates the right to information”. Although this is useful, it would have been preferable if the Law had put in place a system to establish and implement record management standards. Those records whose nature makes them appropriate for computerisation shall be made available electronically, and shall also be connected through a nation-wide network, subject to resources. Presumably for information other than that required to be made available proactively, this network is internal to the government.

Section 25 of the Law places an obligation on the respective Information Commissions to report annually to government, and these reports shall be laid before each House of Parliament or the state equivalent. Each ministry or department shall, in relation to the public bodies under their jurisdiction, provide such information to the relevant Commission as the latter may require to prepare the report. The report shall at least include the following information: the number of requests made to each public body, the number of requests that were rejected, as well as the provisions of the Law relied upon and the number of times each provision was invoked, the number of appeals to Information Commissions and their outcomes, the particulars of any disciplinary action against officers, the fees collected, facts which indicate an effort to implement the Law in the spirit intended, and any recommendations for reform.

The Law also places an obligation on the different levels of government to produce and update as necessary an accessible guide for the public on how to use the act, in the applicable official language. The guide shall include, among other things, the objects of the Law, the contact details of every information officer and a description of the manner and form in which a request may be made, the assistance available from information officers and the Commissions, remedies for any failure to implement the Law and how to lodge an appeal, the rules on proactive disclosure of information, the rules on fees, and any regulations or circulars which have been adopted to implement the Law (sections 26(2)-(4)).

Finally, the Law stipulates that government may, to the extent of its resources, develop programmes to educate the public on their rights under the Law and provide training to information officers (section 26(1)).

This is a pretty comprehensive package of promotional measures. One element that is missing is that the Law fails to place central responsibility or provide for a locus of responsibility for the more general promotional measures, such as public education and training. As a result, these are currently provided for only in very general and discretionary terms.

# Jamaica

## Introduction

Article 22 of the 1962 Jamaican Constitution guarantees freedom of expression which is defined to include the right to receive and impart ideas and information. This right may be subject to restrictions provided for by law that are reasonably required to protect various public and private interests. The right to access information held by public bodies is not specifically guaranteed.<sup>183</sup>

The Jamaican Access to Information Act, 2002 (the Act)<sup>184</sup> received Royal Assent in July 2002 and came into force in four phases, applying to some public bodies from January 2004 and thereafter to an increasing number until November 2004, when it came fully into force.<sup>185</sup> It had been a long time in the making. Civil

society discussions on the issue date back to at least 1991 and a Green Paper<sup>186</sup> was published in 1995, nearly ten years before the law finally came into force for all public bodies.<sup>187</sup>

The Act contains strong procedural guarantees, a reasonably tight regime of exceptions and a good system of appeals. The proactive disclosure provisions are limited and the practice is also weak in this area. There are also some unnecessary limitations on the scope of the Act. In addition to providing for access to information, the Act also contains a detailed system for updating and correcting personal records.

The Access to Information Unit of the Jamaica Archives and Records Department in the Office of the Prime Minister was created in January 2003 with a mandate to oversee implementation of the Act. The ATI Stakeholders Advisory Group, involving officials, NGOs and businesses, is a voluntary group that also monitors implementation.<sup>188</sup> The latest report available on the website of Access to Information Unit, the *Director's Report on Implementation*, notes that in the first quarter of 2005, some 135 requests were received, 75 were granted in full, 10 were transferred and some 84% were responded to within the statutory time limits.<sup>189</sup>

## The Right of Access

Section 6(1) of the Act sets out a clear right of access, providing: "[E]very person shall have a right to obtain access to an official document, other than an exempt document." The objects of the Act, contained in section 2, are "to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy", specifically "government accountability; transparency; and public participation in national decision-making". These objectives are to be achieved through granting the public a general right to access documents held by public bodies, subject to the exceptions, which balance the right against the overriding public interest in confidentiality of certain governmental, commercial or personal information. This provides a good backdrop for the Act and suggests a positive, purposive approach to interpretation.

As noted, the Act applies to everyone and no restrictions on the basis of nationality, citizenship or residence appear to apply.

The right of access applies to documents, rather than information as such. A document is defined in section 3 broadly to include anything in writing, maps, plans, graphs or drawings, photographs, and devices which record sound, visual or other data which is capable of being reproduced from the device. An 'official document', to which the right of access formerly pertains (see above), is defined as any document held by a public body "in connection with its functions as such", whether or not it was created by that authority, or whether or not it was created before the commencement of the Act. 'Held' for this purpose means that the document is in the possession, custody or control of the public body.

Pursuant to section 5(1)(c), the Act applies only to official documents created or held by a public body for thirty years or less from the day on which the Act comes into force. The minister responsible for the Act, currently the Minister of Information, may, by order subject to negative resolution,<sup>190</sup> extend application back in time to documents created or held by a public body more than thirty years ago.

Finally, pursuant to section 6(4), where a document is accessible to the public pursuant to another law, or otherwise, or available for purchase, these other means of access apply to the exclusion of the rules set out in the Act.

There are two important limitations on the scope of the Act in terms of documents covered. First, the document must pertain to the functions of the public body which holds it. While it may be questioned why a public body would hold information not related to its functions, this might still be abused as a grounds for refusing to provide access to information. Second, the Act does not apply to documents which are more than thirty years old. This is unfortunate and has not been found to be necessary in other access to information laws. The Archives Act does provide for openness of public documents under certain conditions after 30 years, but this is limited and does not conform to accepted right to information standards.<sup>191</sup>

A public body (the term used in the Act is 'public authority') is defined as any ministry, department, executive agency or other government agency, any statutory body, a parish council (local councils), the urban councils of Kingston and St. Andrew Corporations and any government corporation in which the government or an agency thereof has a 50% or greater interest. A government corporation, in turn, is defined as a company registered under the Companies Act in relation to which the government or an agency thereof is in a position to influence policy.

The minister may by order subject to affirmative resolution extend the application of the Act to other government corporations (in other words, those in which the government has a less than 50% interest) or any other body which provides services of a public nature which are "essential to the welfare" of Jamaican society, subject to such limitations as the minister may consider appropriate (sections 5(3)-(4)). He or she may also, again by order subject to affirmative resolution, provide for the non-application of the Act to any statutory body (section 5(6(d))) or limit the application of the Act in relation to government corporations covered by the main definition (i.e. those in which the government has a 50% or greater interest) as he or she deems appropriate (section 5(5)).

The Act also provides for the complete exclusion from its ambit of certain public bodies, namely the Governor-General, in relation to powers and duties conferred or imposed by the constitution or any other law, and the security and intelligence services – namely the various police and defence forces – in relation to their strategic and operational intelligence gathering operations. Finally, the Act does not apply to the judicial functions of courts or holders or judicial offices, although it does apply to documents of an administrative nature held by courts (sections 5(6)-(8)).

The Act thus applies broadly to public bodies and allows the minister to extend application to both private corporations over which the government has an influence and other private bodies providing essential public services. At the same time, the minister is given the power to restrict the application of the Act to government corporations and statutory public bodies. This is unfortunate and could lead to exclusion of bodies from the ambit of the Act on political grounds. The exclusions from the Act are unnecessary, although analogous exclusions are found in some other RTI laws. It is preferable to cover all public bodies and then to provide for appropriate exceptions to protect any legitimate secrecy interests.

## Procedural Guarantees

Anyone may make an application for access to a document in writing, by telephone or by other electronic means (section 7(2)). No reasons are required to be given when requesting information (section 6(3)). The only formal condition on applications is that they should describe the document sought sufficiently clearly to enable the public body to identify it and, where requested, assistance should be provided to this end. Furthermore, where the information provided by the applicant is insufficient to identify the document sought, the public body shall provide the applicant with an opportunity to consult with a view to identifying the document (sections 7(2) and (3), and 10(1)).

The 2003 Regulations provide a simple form for written requests (Form 1 of the Schedule to those Regulations), although use of this form is not required. Pursuant to regulation 8(1), where an application is made by telephone or electronically, the responsible officer shall take the necessary measures to record and store it on Form 1. Regulation 9 requires responsible officers to provide such assistance as may be necessary to help an applicant make a written request where that person is unable to do so either because of limited language skills or disability. Every request shall be acknowledged "in the prescribed manner" (section 7(3)(b)), a task which, pursuant to the Regulations, is undertaken by the 'responsible officer' (see regulation 4(a)).

A request must be responded to as soon as possible and in any case within 30 days, although this may be extended by up to another 30 days where there is 'reasonable cause', upon notice with reasons being provided to the applicant (sections 7(4) and (5)). Where a requested document is held by another public body or relates more closely to the work of another body, the request may be transferred to that body as soon as possible and in any case within 14 days. In this case, the applicant must be notified immediately

of the transfer and the 30 days for responding runs from the time the public body to whom the matter has been transferred receives the request (sections 8 and 7(4)). Where no response is provided within the appropriate period, the applicant may appeal as though this were a refusal (section 30(3)).

Section 10(2) provides for a number of circumstances where the grant of access to a document may be deferred. These include situations where publication of a document within a set timeframe is required by any other law, until that timeframe has passed; where a document is prepared for presentation to Parliament or a particular person or body, until a reasonable time has been allowed to present it to the Parliament or that person; or where premature release would be contrary to the public interest, until such time as release would no longer be contrary to the public interest. Applicants must be informed of a decision to defer within 14 days of its having been made (section 10(3)).

There are a number of problems with these provisions. While it is reasonable to let legal regimes requiring publication overrule an access law, this is so only where those regimes include reasonably short timeframes for publication. Under the rule stated above, even a publication date of years hence would stall disclosure of documents. The rule allowing deferrals where documents are being prepared for others is relatively unique. It may be that this is a sort of *quid pro quo* for the absence of a general 'internal deliberations' exception, such as is found in many access laws (see below, under Exceptions). At the same time, it would be preferable if this ground for deferral at least had a harm component built into it, so that non-disclosure could be justified only where disclosure would cause harm of some sort. The rule on premature disclosure being against the public interest is almost an invitation to abuse. In other laws, the public interest may serve to override exceptions and justify disclosure, not the other way around, as is the case here. Finally, allowing public bodies to wait 14 days to inform applicants after they have made a decision to defer disclosure is quite unnecessary; instead, applicants should be informed of this immediately.

Regulation 18 provides for notice to be provided to third parties where their personal privacy may be affected by granting access to a requested document. Where access is to be granted, the third party is entitled to a copy.

Notice must be provided to applicants of the decision on their request. Where the decision is to refuse or defer access, in whole or in part, the applicant must be notified of this fact, along with reasons and the "options available to an aggrieved applicant", presumably to seek review of the decision (sections 7(5) and 11(2)). Where access is provided, applicants shall be notified of the manner of access, any fees levied and the location for any direct inspection of documents (regulation 14(2)).

The Act provides, at section 9, for access to be given in the form specified by an applicant, and listed options include an opportunity to inspect the document or to listen to or view it; a copy of the document, duly authenticated (for example with the official stamp of the public body); or a transcript of the words contained in sounds, images or codified documents. Access may be given in another form where access in the form requested would be detrimental to the document, inappropriate or constitute an infringement of copyright. Furthermore, in accordance with regulation 16, where the original document is such that it would yield only a poor copy, the applicant shall be informed of this and alternatives suggested.

Section 12 of the Act provides that applicants shall bear the cost of reproducing documents, although the head of the concerned public body may waive or reduce the fee. Section 13, however, provides that access shall be granted where the "cost incurred by the public authority in granting access has been paid", suggesting that other costs may also be charged. However, the Regulations refer repeatedly and only to reproduction costs (see regulations 10(a), 14(2)(b), 20 and 21(1)) and, in practice, these, along with dissemination costs, are the only fees charged. Regulation 20 also provides for applications to the Minister requesting fee reductions or waivers.

## Duty to Publish

Section 4 of the Act provides for proactive publication of the information listed in the First Schedule, initially in accordance with a formula set by the minister. This lists, among other things, a description of the

'subject area' of the public body; a list of its departments and agencies, along with the subjects they deal with, and their locations and opening hours; and the title and business address of the principal officer. This information shall be published in the manner and updated as prescribed. Regulation 6(b) provides for a statement to be published whenever the subjects handled by or functions of a public body change.

The First Schedule also provides a rather complicated description of a statement which must be published which should provide a list of the manuals or other documents containing interpretations, practices, rules, precedents and so on, which are used to make decisions or recommendations regarding rights, privileges, benefits, obligations and the like under a scheme or enactment administered by the public body. The documents listed in this statement shall themselves be made available for inspection and purchase and the statement itself shall be updated at least annually and published in the *Gazette*. Where a document listed in the statement contains exempt information, it does not need to be made available but, to the extent practical, another document excluding the exempt material shall be made available.

The minister may amend the First Schedule by order subject to affirmative resolution. Otherwise, the Act does not provide for any change in the information to be published. This is a modest set of proactive publication rules. In particular, a very limited number of documents actually need to be published on a proactive basis is. At the same time, the requirement to publish a statement of the documents described above could be quite significant, depending on how broadly it is understood, although it still requires the public to engage actively to get access to the information.

There has been little proactive disclosure in practice, over and above basic information. The lists that have been produced are not very helpful in terms of locating documents. The need for a revised publication scheme formed part of at least one of the submissions made to the Joint Select Committee that reviewed the Law last year but there has been no action on the recommendations for the last 18 months (see below).

## 66

### Exceptions

Part III of the Act contains a comprehensive regime of exceptions. Subject to section 35(2), nothing in the Act shall affect secrecy provisions in any other act, apart from the Official Secrets Act, while section 35(3) provides that the Official Secrets Act shall apply to any disclosure made in contravention of the Access to Information Act. It would appear that together these provisions mean that secrecy provisions in laws other than the Official Secrets Act override the right of access under the Access to Information Act while disclosures which are not mandated by the Access to Information Act remain punishable under the Official Secrets Act. It is unclear how a conflict between the Official Secrets Act and the Access to Information Act would be handled.

Most of the exceptions are subject to a harm test, although a notable counterexample is cabinet documents, defined broadly. At the same time, section 23 of the Act provides for a sweeping system of certificates to the effect that a document or part thereof is exempt and such certificates are conclusive proof of that fact. The Prime Minister may issue a certificate to the effect that a document is an exempt cabinet document, and the responsible minister may issue certificates in relation to security, defence or international relations; law enforcement; or management of the economy. The form for such certificates is provided in the Schedule to the Regulations, while regulation 17(3) requires that notice of each certificate be published in the *Gazette*. There is clearly significant potential for abuse of certificates. Ideally, they should not be provided for at all. If they are allowed, they should be restricted to highly sensitive material which is deemed to be too confidential to be reviewed by external bodies.

The Act does not contain a public interest override although, surprisingly, there is one partial override in relation to certain cabinet documents. There is also a public interest override for the exception protecting the environment. Section 11(1) of the Act provides for severability or the provision of the non-exempt part of a document which contains some exempt material. Section 6(2) provides that the exceptions do not apply to documents which are 20 years or older, although the minister may by order subject to affirmative

resolution prescribe a shorter or longer period. This is a positive provision although its impact is limited given that the Act does not apply to documents which are older than 30 years.

The specific exceptions set out in the Act include the following:

- documents whose disclosure would threaten security, defence or international relations, or which contain information communicated in confidence by another government or international organisation (section 4);
- cabinet documents, defined broadly, which have not been published or are not of a purely factual, scientific or technical nature; certain cabinet documents – such as opinions, advice or recommendations prepared for, or a record of deliberations of, cabinet – shall be disclosed if this is in the overall public interest (sections 15 and 19);
- documents relating to law enforcement the disclosure of which could endanger life or safety, prejudice an investigation or a fair trial, disclose a confidential source of information, prejudice the effectiveness of methods for preventing, detecting or investigating breaches of the law, facilitate escape from detention, or jeopardize the security of a correctional facility (section 16);
- documents which are legally privileged, or the disclosure of which would be a breach of confidence, a contempt of court or infringe the privileges of Parliament (section 17);
- official documents – for example relating to taxes, interest rates or monetary policy – whose disclosure could reasonably be expected to have a ‘substantial adverse effect’ on the economy or the government’s ability to manage it (section 18);
- trade secrets or information the disclosure of which could reasonably be expected to harm a commercial interest (section 20);
- documents whose disclosure could reasonably be expected to harm the conservation of a cultural, historical or environmental resource (section 21); and
- where granting access to a document would involve the unreasonable disclosure of private information (section 22).

For the most part, these exceptions are in line with good international practice, although they could in some cases be further narrowed either by more careful language or through the use of exceptions to exceptions. It is, however, significant that there is no general exception to protect internal deliberative processes (apart from protection for Cabinet documents). Such exceptions, although they are found in most RTI laws, are often subject to serious abuse.

## Appeals

The Act provides for both internal reviews and appeals to an independent information Appeal Tribunal. The former applies where a public body has delayed or refused to grant access to all or part of a document, or charged a fee which the applicant deems unreasonable. The request for an internal review must be lodged within 30 days of the original decision and shall be decided within another 30 days. The internal review shall be undertaken by the responsible minister where an exception referred to in sections 14 (defence and international relations), 15 (cabinet documents), 16 (law enforcement) or 18 (the economy) applies, and by the principal officer of the public body in other cases. An internal review may take any decision which might have been taken on an original application (see sections 30-31).

An appeal lies to the Appeal Tribunal against a decision of an internal review (or for a failure to deliver such a decision within the time allocated), or against an original decision where an internal review is not available, within 60 days of the decision. In such an appeal, the onus is on the public body to show it was

justified in its original decision. The Tribunal may make any decision which might have been made on the original application, but it may not nullify a certificate that a document is exempt. The Tribunal may inspect any document claimed to be exempt, provided that, in doing so, it ensures that the public does not thereby gain access to the document (section 32). The Act is silent as to any other powers the Tribunal might have and to the manner in which hearings are to be conducted. These matters are, however, addressed in the Access to Information (Appeal Tribunal) Rules, 2004, which grant a right to parties to be heard and provide for the Tribunal to compel witnesses.

The Second Schedule of the Act provides for the appointment of five members of the Appeals Tribunal, one of whom shall be the chair, by the Governor-General after consultation with the Prime Minister and Leader of the Opposition. Members hold office for five years and are not eligible for reappointment. A member may resign in writing at any time or be removed by the Governor-General, after consultation with the Prime Minister and Leader of the Opposition, for being of unsound mind or unable to perform his or her functions; for becoming a bankrupt; upon being sentenced to death or imprisonment; for conviction for any crime of dishonesty; or for failing to carry out his or her functions under the Act. Remuneration of members is determined by the minister responsible for the public service.

The rules relating to members described above do provide important protection for the independence of the Tribunal. At the same time, these could be further improved, for example by providing for the non-eligibility for appointment of those with strong political connections. According to some reports, the Tribunal lacks the staff required to do its job effectively.<sup>192</sup>

## Sanctions and Protections

68

Section 33(2) provides that no action in defamation, or for breach of confidence or of copyright, shall lie against any officer of a public body or the author of a document where access is granted in the *bona fide* belief that this is required by the Act. At the same time, neither the Act nor a grant of access may be construed as authorising the commission of these wrongs, including by publication of the document by the person granted access (sections 33(1) and (3)). The Act further provides that a grant of access in accordance with the Act shall not, of itself, constitute a criminal offence but that the Official Secrets Act, which does make it a crime to disclose certain information, shall apply to the disclosure of information in breach of the Access to Information Act (section 35). The Act thus provides some protection to those making good faith disclosures but they do not appear to be protected against making mistakes which result in breaches of the Official Secrets Act. This is unfortunate as it may lead to officials being unduly cautious in relation to information disclosure. No protection is provided in the Act for whistleblowers.

Section 34 of the Act makes it a criminal offence to alter, deface, block, erase, destroy or conceal a document to which the Act confers a right of access (that is, a non-exempt official document), with the intention of preventing disclosure.

## Promotional Measures

The Act contains few promotional measures. Regulations 3 and following provide for the appointment of 'responsible officers' with a mandate to process requests, to maintain knowledge of the Act and other relevant rules, to coordinate the proactive publication of information and generally to ensure proper implementation of the Act.

The Act also provides for its review 'from time to time' by a committee of both Houses of Parliament and for the first such review to take place not later than two years after its comes into force (section 38). A Joint Select Committee on Access to Information was accordingly set up in December 2005, and began hearings in January 2006. The Committee completed its hearings in March 2006 but, before its report was finalised, the government fell and the future status of the report remains unclear.

Pursuant to section 36 of the Act, the minister shall prepare an annual report on implementation, to be laid before the House of Representatives and Senate. The report shall contain information on the number of applications for access received, granted, deferred and refused, in whole or in part, the exceptions relied upon to refuse access and how often they were used, and information about internal reviews and appeals, and their outcomes. Each public body must submit relevant information to the minister to assist in the preparation of this report. The last report available online dates from the first quarter of 2005.<sup>193</sup>

# Japan

## Introduction

The Constitution of Japan, adopted in 1946,<sup>194</sup> does not include a specific guarantee of the right to information, although it does provide general protection for freedom of expression, at Article 21, which guarantees freedom of “speech, press and all other forms of expression” and prohibits censorship. As early as 1969, the Supreme Court of Japan established in two high-profile cases the principle that *shiru kenri* (the “right to know”) is protected by the Article 21 guarantee of freedom of expression.<sup>195</sup>

Despite this, it was another 30 years before the national Law Concerning Access to Information Held by Administrative Organs<sup>196</sup> (RTI Law) was finally passed, in May 1999, after a long struggle by civil society. The Law came into effect two years later, in April 2001. Access to public information was seen as crucial to exposing the failures of the government, about which there was growing concern in Japan at the time as the economic miracle started to falter, and in addressing the wall of official secrecy faced by the public. This is reflected in the first article, on the purpose of the Law, which states that the goal of openness is to ensure, “accountability of the Government to the citizens for its various activities, and to contribute to the promotion of a fair and democratic administration that is subject to the citizens’ appropriate understanding and criticism.” The adoption of the national law was preceded, and to some extent prompted, by the adoption at lower levels of government of numerous right to information regulations. Indeed, by the time the national law was adopted in 1999, over 900 municipalities had already adopted such regulations.<sup>197</sup>

The Japanese Law is broad in its application and, with certain exceptions, includes good process guarantees and has a reasonably tight regime of exceptions, although this could be further narrowed. It could be strengthened in a number of other ways, notably by adding in a proactive duty to publish and by moving the oversight body out of the Cabinet Office.

Public bodies in Japan currently handle approximately 50,000 information requests per year. Implementation has, for the most part, been pretty positive. In fiscal year 2006, about 40% of all requests were met with full disclosure of the requested information and about 90% of all requests resulted in either full or partial disclosure. A revision of the RTI Law, which came into force on 1 April 2005, led to the adoption of separate legislation governing the appeal body.<sup>198</sup> Among other things, the scope of responsibility of the appeal body was expanded to include appeals filed under the Personal Information Protection Law, a new statute which came into effect on the same date.

## The Right of Access

The right of access is set out in Article 3 of the RTI Law, which provides that any person may make a request to the head of a public body for the disclosure of administrative documents. Upon receiving a request, the head of the public body is required to disclose the information, subject to the regime of exceptions (set out in Article 5 of the RTI Law).

Article 1, as noted, sets out the purpose of the Law, which is stated to be based on the principle that sovereignty resides in the people. The overall goal is to promote disclosure by public bodies with a view to promoting government accountability to the people and to fostering greater public understanding and criticism of the administration.

The Law defines an “administrative document” as any document, drawing or electromagnetic record, prepared or obtained by an employee in the course of his or her duties, if held by the public body “for organizational use by its employees”. This is limited as there may be other forms in which information may be held and also inasmuch as it only covers records held for official purposes. There are also two exclusions. The first relates to records which have been published for general sale while the second governs archives which, by Cabinet Order, are specially managed as historical or cultural materials or for academic research (Article 2(2)). Lawmakers decided that existing systems for making such information available are adequate, although it would be preferable for all documents to be covered by the same disclosure rules.

Bodies covered by the Law, defined as “administrative organs”, include:

- Cabinet bodies or bodies under Cabinet control that were created by law;
- administrative bodies as defined by various other laws; and
- the Board of Audit (Article 2(1)).

Public corporations, of which there are many in Japan providing, among other things, basic services, are outside the ambit of the Law, as are legislative bodies and the courts, although the Supreme Court has adopted its own rules setting out procedures for requesting information.<sup>199</sup> However, the Law does require a law to be passed governing the disclosure obligations of public corporations within two years of its passage (Additional Provision 2). This obligation was fulfilled with the passage of the Law Concerning Access to Information Held by Independent Administrative Entities, which came into effect on 1 October 2002.<sup>200</sup>

Any person, including non-citizens, has a right to request information under the RTI Law.

## Procedural Guarantees

A request must be in writing, including in electronic form, and must contain the applicant’s name (or the name of a representative, for a corporate applicant), address and a description of the document sought in sufficient detail to enable it to be found. The Law does not require a statement of reasons for requests. Where the request is deficient, the public body shall notify the applicant and give him or her a suitable amount of time to remedy the problem, while also “endeavouring” to provide assistance (Article 4). Heads of public bodies are required to provide information that may be helpful to applicants and also to take other steps to assist (Article 23).

A decision on disclosure must normally be made within 30 days. Where the request is referred back to the applicant for correction or clarification, time spent revising the request is not included in the 30 days. This period may be extended for another 30 days, “when there are justifiable grounds such as difficulties arising from the conduct of affairs”, provided that the applicant must be notified of any such extension in writing, along with the reasons for it (Article 10). Where the request covers a “considerably large amount of Administrative Documents” and there is a risk that the performance of the public body will be “considerably

hindered” by trying to provide all of the information within the 60-day period, the head of the public body may simply disclose a “reasonable portion” within that time period, providing the rest within a “reasonable period of time.” In this case, the applicant must be given written notice, including of the application of this rule and the extended time limit for the remaining documents, although there is no penalty where public bodies do not comply with their own deadlines as provided to applicants (Article 11).

These rules allocate significant discretion to public bodies to delay disclosure. The first extension, for up to 30 additional days, is subject only to a low barrier of ‘justifiable grounds’, and further delay may be occasioned for as long as this is ‘reasonable’, which is not defined in the Law. Many right to information laws do not allow for indefinite extensions of this sort, but instead provide for ‘hard’ overall time limits for responding to requests. The Ministry of Foreign Affairs stands out for taking advantage of this gap in the Law to delay responses indefinitely. In 2003, for example, that Ministry responded within the ordinary time limit of 30 days for 181 requests but imposed an extension in some 705 cases, nearly four times as many. It only complied with its own extension in about one-half of these cases and, in 129 of these cases, the extension was for longer than a year. There have been a few cases in which applicants have filed suit seeking compensation for unreasonable delays in disclosing information.<sup>201</sup>

Requests may be transferred to another body where there is a “justifiable ground” for doing so, such as that the document was prepared by the other body, upon written notice being provided to the applicant (Articles 12 and 12-2). This is a low standard for the transfer of requests, which in many right to information laws is permitted only when the document is more closely associated with the work of the other body.

The Law includes extensive provisions relating to consultation with third parties to whom requested information relates. Such parties may be given an opportunity to make representations. Where a third party opposes disclosure, a two-week period must be imposed between any decision to disclose and actual implementation of that decision (i.e. actual disclosure of the information). The third party must also be informed immediately where the decision is to disclose the information, so that they might appeal against that decision if they wish (Article 13).

Where a decision has been made to disclose information, the applicant shall be notified of that fact in writing, as well as of relevant matters regarding the form of disclosure. Where a decision has been made not to disclose information, including because the information is not held by the public body, the applicant shall again be notified of that fact, although the Law does not specify what such notice shall contain (Article 9). However, Article 8 of the Administrative Procedure Act requires reasons to be provided,<sup>202</sup> and notice of the right to appeal, both administratively and to the courts, must also be provided.<sup>203</sup>

Article 14 of the Law sets out various means by which access may be granted. Applicants may ask to inspect the record, to be provided with copies or for other forms of access to electromagnetic records, as specified by Cabinet Order, and their request should normally be respected. Where, however, inspection of the record is requested and this might pose a risk of harm to the record, the request may instead be satisfied by provision of a copy of the record.

Fees may be charged for both processing requests and for providing the information, pursuant to a Cabinet Order, provided that these may not exceed actual costs. When establishing the fee structure, “consideration shall be given to make the amount as affordable as possible” and, again pursuant to a Cabinet Order, the head of the public body may reduce or waive the fee in cases of economic hardship or for other special reasons (Article 16). Pursuant to Articles 13 and 14 of the Information Disclosure Enforcement Order, the fee for filing a request is 300 yen (approximately USD2.60), or 200 yen for information held electronically, while access via inspection is 100 yen for 100 pages and the copy fee is 10 yen (approximately USD0.09) per page. Waivers are extremely rare.<sup>204</sup>

## Duty to Publish

The Japanese RTI Law does not provide for a proactive obligation to publish certain categories of information, a serious omission given the important role proactive disclosure has assumed in many jurisdictions.

## Exceptions

The Japanese RTI Law includes a list of six different categories of information which may be withheld from applicants, in Article 5. A supplementary law adopted together with the RTI Law provides a list of other statutes which can exclude application of the RTI Law. This list includes many laws that provide alternative means of access to information, such as the code of criminal procedure concerning litigation documents, the real property registration law and others. These rules do not necessarily conform to recognised right to information standards; it would be preferable if the RTI Law overrode these other laws in case of inconsistency, rather than the reverse, which is presently the case.

Most exceptions are subject to a harm test. In some cases these require that actual harm will result from disclosure, although in some cases this may be based on an assessment by the public body that there is 'adequate reason' to believe the harm will result. In others a mere risk of harm is enough.

There are two types of 'public interest override'. Article 7 provides for a general public interest override, where "there is a particular public interest necessity", but this is couched in discretionary terms, providing only that in such cases the head of the public body "may" disclose the information. Furthermore, the standard of application appears to be high so that it is only where there is a clear overriding interest, rather than simply a more important interest, that the rule would be engaged. In addition, more specific overrides for designated types of harm are provided within the exceptions for individual information and commercial information (see below).

Where only part of a document is covered by an exception, the rest of the document must be disclosed where this would still be meaningful (Article 6). The Law does not include provisions on historical disclosure.

72

The first exception in Article 5 relates to information about an individual where it is possible to identify that individual or, where it is not possible to identify anyone, where disclosure of the information "is likely to cause harm to the rights and interests of an individual." This is commonly referred to as the 'individual information' exception. It is a very broad exception, in particular as it covers all information identifying an individual rather than information which would harm a legitimate privacy interest, or which even relates to a privacy interest. Furthermore, the 'identification of individual' part of this exception is not subject to a harm test. This is mitigated to some extent by limits on this exception, for example where disclosure of the information is required, by law or by custom, or where disclosure is necessary in order to protect someone's life, health, livelihood or property, an internal public interest override, as noted above. This exception also does not apply to information concerning the official activities of a public official, an important limitation on its scope. The individual information exception is cited by government officials in a majority of cases where disclosure is denied.

The second exception in Article 5 relates to corporate information where there is a risk that the rights, competitive standing or another legitimate interest of the corporation will be harmed or where it was provided in confidence and on condition of confidentiality, and this is "reasonable" in all of the circumstances. Again, this exception is does not apply where disclosure is necessary in order to protect someone's life, health, livelihood or property.

The third exception covers information where "there are reasonable grounds" for the head of the public body to deem disclosure to pose a risk to State security or to relations with another country or international organisation, or of causing disadvantage in negotiations with another country or international organisation.

The fourth exception concerns information the disclosure of which is, again with adequate reason, deemed to pose a risk of harm to the "prevention, suppression or investigation of crimes, the maintenance of prosecutions, the execution of punishment, and other matters concerning maintenance of public safety and public order."

The fifth exception applies to internal government deliberations or consultations the disclosure of which would risk unjustly harming the frank exchange of views or the neutrality of decision-making, unnecessarily risk causing confusion, or risk causing unfair advantage or disadvantage to anyone. This exception is

largely consistent with international standards, apart from the concern with causing confusion, which is not generally considered to be a legitimate ground for limiting access to information. This is in part because 'confusion' is an excessively subjective concept and in part because an exception of this nature is inherently paternalistic, contrary to a key thrust of right to information laws, which is to put power into the hands of the people.

The sixth exception is aimed at preventing harm to the conduct of business by public bodies. It includes a long list of specific harms, which appears to be non-inclusive. The list includes, among other things, obstruction to research, harm to legitimate business interests, undermining personnel management, harm to the State's interest in contracts or negotiations, and facilitating unfair or illegal acts. Although the list is somewhat off-putting, in fact most items on it are legitimate.

## Appeals

When requests are denied, in whole or in part, requesters can immediately file suit before the courts seeking an order overturning the denial, and they can also file an administrative appeal. Regarding the latter, the RTI Law provides for appeals to be made to the head of a public body, who is then required to refer them to the Information Disclosure and Personal Information Protection Review Board, an oversight body attached to the Cabinet Office, unless the appeal is unlawful or a decision has been made to disclose the documents. No binding time limit is set for such a reference and there are some cases which are simply not referred or which are delayed for periods which can exceed a year, in which case the Board has no power to act. The applicant, the person who preferred the appeal (if different) and any third parties who have made representations must be notified of any appeal (Articles 18-19).

Although the Review Board is within the Cabinet Office, some efforts have been made to ensure that it is independent. It is presently composed of fifteen members and appeals are ordinarily considered in three-member panels.<sup>205</sup> Five Board members serve full-time, with one serving as chairperson of each panel. These members are typically retired government officials. The other ten members serve on a part-time basis and include academics, practicing lawyers and other members of the community. The chairperson of the Board as a whole is typically a retired appellate court judge (the mandatory retirement age for such judges is 65). The Prime Minister appoints members from among people of "superior judgement" who have been approved by both houses of parliament, which should at least ensure openness and political oversight. The term of office is three years and members may be re-appointed. Members may be dismissed by the Prime Minister once the latter has obtained approval from both houses of parliament. The grounds for dismissal are limited to incapacity, misconduct or having acted in contravention of official duties.

While in office, members may not be officers of political parties or associations. The RTI Law provides that members' salaries shall be determined by another law. Full-time members may not engage in other remunerative activities, except with the Prime Minister's permission. This is clearly open to political abuse and it would be preferable if at least outline rules on this had been included directly in the Law or the power to grant permission situated elsewhere than with the Prime Minister. The Chair is appointed by the other members from among themselves. The Law also provides for a secretariat to assist the Board.

The Board shall normally consider matters in groups of three members, although an appellate body of all members may be constituted (Article 6 of the law establishing the Review Board). When considering an appeal, the Board may require the public body to furnish it with the disputed record or request further information from the applicant or from other parties (Article 9 of the Review Board law). The Review Board law provides in detail for the processing of appeals, including representations and investigations. Parties may submit written materials to the Board, which may also allow them to make oral representations (Articles 10-11).<sup>206</sup>

Appeals from decisions by the Board may be taken to the district court.

## Sanctions and Protections

The Japanese RTI Law does not provide for sanctions for wilful obstruction of access to information or for protection for those who disclose information in good faith. It does, however, provide that it is an offence for members of the Board to disclose secret information they accessed as members, punishable by up to one year imprisonment with hard labour or a fine of up to 300,000 yen. This is quite different than imposing sanctions on public officials for disclosing information and seems reasonable, although the penalty is very harsh.

## Promotional Measures

The Law includes a number of general and specific promotional measures. The government is required generally to “endeavor to enhance measures concerned with the provision of information held by Administrative Organs”. Local public entities, in turn, are required to strive to formulate and implement information disclosure measures (Articles 25 and 26).

The Law also requires heads of public bodies to facilitate disclosure by providing information about the records they hold, as well as by taking other “appropriate measures”. Although appointment by public bodies of information officers is not required, the Director-General of the Management and Coordination Agency shall establish “comprehensive information centers concerning Disclosure Requests for ensuring the smooth implementation” of the Law (Article 23).

Heads of public bodies are required to establish rules providing for the “proper” management of documents, in accordance with a Cabinet Order, and to make those rules public. The Cabinet Order shall set general standards relating to the “classification, preparation, preservation and disposal of Administrative Documents” (Article 22). The Cabinet shall also request reports on implementation from public bodies and, annually, compile and publish a summary of these reports (Article 24).

The RTI Law provides that, approximately 4 years after it comes into effect, the government should examine its effectiveness and take necessary measures to improve the disclosure of information, based on the results of this examination (Additional Provision 2). As noted above, the Law was amended in 2004.<sup>207</sup>

74

# Kyrgyzstan

## Introduction

Article 16(6) of the 2003 Kyrgyz Constitution recognises a limited right of access to personal information, unless this is secret. A process of constitutional renewal is currently underway in Kyrgyzstan, with President Bakiev having called, on 21 September 2007, for a referendum on new constitutional proposals. Changes to the Constitution which were adopted in 2006 were struck down by the Constitutional Court, leading to a restoration of the Constitution adopted in a referendum of February 2003.<sup>208</sup>

Kyrgyzstan first adopted a law on Guarantees and Freedom of Access to Information in 1997.<sup>209</sup> Although this law did provide a basic framework for access to information, it did not clearly delineate the exceptions,

it left officials responsible for classifying secrets, and efforts to socialise it among the population were limited.<sup>210</sup> Pressure from various quarters led to the development of a new law, which was prepared by an expert group composed of media, business, NGO and government representatives. The Law on Access to Information held by State Bodies and Local Self-Government Bodies of the Kyrgyz Republic (RTI Law),<sup>211</sup> which came into force in early 2007, represents a very significant improvement over the previous access to information law.

The RTI Law has a number of positive features. It has particularly detailed procedural guarantees, perhaps borne out of a lack of faith in the good will of the government to implement laws according to their spirit, and experience with the letter of the law being taken advantage of by officials. It also has a developed set of provisions on open meetings, something which is found in very few right to information laws. Finally, like some of the newer generation of right to information laws, it includes an extremely detailed set of provisions on proactive disclosure.

At the same time, there are some major shortcomings, the most serious of which is the regime of exceptions, which simply refers to existing secrecy laws. This is problematical given that these do not reflect the principle of openness which underpins the RTI Law. The RTI Law also suffers from weak provisions on appeals, from the lack of any protection for good faith disclosures and from limited promotional measures.

Testing of the Law by the Independent Human Rights Group (IHRG) suggests mixed success in implementation. Of 65 requests for information lodged with different public bodies between June 2005 and September 2007, information was provided in a timely manner for approximately 40% of the requests and provided outside of the time limits in another 14%. The information was refused for about 23% of the requests and no answer at all was received in 25%. Public bodies sometimes provided information only after a legal appeal had been lodged. The courts, however, appear to provide scant redress for those requesting information, frequently rejecting appeals on the basis that the applicant does not have a specific legal interest in the information, contrary to Article 9 of the RTI Law (which provides that no motivation needs to be provided for a request).<sup>212</sup>

## The Right of Access

Article 1 of the RTI Law states its purpose as being to provide for the realisation and defence of the “right of access to information held by State bodies and local self-government, and achieving maximum informational openness, publicity and transparency”. This is bolstered by Article 2(2), which provides that all State and local self-government bodies are obliged to provide information, and Article 4(1), which provides that activities of State and local self-government bodies are “open, transparent and public”.

Article 3 sets out clearly the right of everyone to access information held by State and local self-government bodies, and describes the principles which should underpin this, which are “accessibility, objectivity, timeliness, openness and truthfulness of information”. Restrictions shall be established only by law, and the State shall defend the right of everyone to “seek, receive, research, produce, impart and disseminate information”.

These provisions establish a clear right of access, and also recognize strong principles to guide interpretation, in particular the idea of maximum openness.

Article 6 of the RTI Law recognises a number of general means of providing access to information, such as publication, responding to requests, promulgation of information, providing direct access to documents and materials, providing direct access to meetings, and any other means not prohibited by law. Although perhaps not strictly necessary, since public bodies are presumably free to distribute non-confidential information as they please, this does at least impart some confidence to public bodies to disseminate information through these different channels.

The RTI Law does not actually define information, unlike most right to information laws. This is potentially problematical, since the absence of a definition might be used to deny access to information held certain

formats or of certain types, such as emails. Given the relative recent vintage of the law, whether this will be the case remains to be seen.

State bodies are defined in Article 2(2) as including bodies established by the Constitution or other laws or decrees, legislative, executive and judicial bodies, bodies which execute the decisions of the aforementioned bodies, bodies financed from the State budget, as well as local ('territorial subdivision') bodies realising central State functions. Local self-government bodies – the RTI Law consistently refers to State and local self-government bodies – are defined as "representative, executive-administrative and other bodies" formed by the public at the local level for resolving local issues. Both terms – State and local self-government bodies – also include any institution financed from the federal or local budget which realises functions 'not related' to State power or self-government, including bodies focusing on "health, educational, informational, statistics, advisory or credit issues".

This appears to be a relatively wide definition of public bodies, although private bodies undertaking public functions, even if not funded from the public purse, are additionally included in many right to information laws.

The right of access, as defined in Article 3, applies simply to everyone and would thus appear not to be limited in any way, for example to citizens or residents. Certain other provisions in the Law – such as the right to attend meetings – are limited in scope to citizens, suggesting that the broader formulation here is deliberate.

## Procedural Guarantees

76

As noted above, the procedural provisions in the Kyrgyz RTI Law are very detailed, running to some four pages. Pursuant to Article 7(1), requests may be made orally, by telephone, or in writing via personal delivery, post, courier or electronic channels (see also Article 9). Article 8 sets out clear rules for dealing with oral requests. Article 8(2) provides that 'short information' requested orally shall be provided orally, eliminating the need for a written request. Where an oral response does not fully satisfy the applicant, he or she shall be informed about how to make a written request and other means of receiving information under the Law. Oral requests have to be registered along with information about the applicant and the official who responded to the request.

Pursuant to Article 9, written requests must contain the name of the public body and/or official to whom the request is made, the name, date of birth and residence of the applicant (or similar information for legal applicants), and a sufficient description of the information to enable it to be identified. Where this is not clear, the onus is on the official receiving the request to clarify the request by contacting the applicant or by other means. Otherwise, however, the Law does not make provision for assistance to applicants. Reasons are not required to be given for a request. Request forms must be provided at the premises of public bodies, as well as at post offices, and shall include, on the underside, an explanation of how they are to be filled out, and details about the process and fees.

Article 11(3) provides that the information provided in response to a request shall be complete, so that the applicant is not required to make repeated requests. This is repeated in Article 11(4)(2). Furthermore, the official processing the request may not ask the applicant how he or she intends to use the information. Both of these rules, which are not commonly found in right to information laws, reflect a certain suspicion about the proper application of the rules by the authorities.

Article 11(1) provides for written requests to be registered with the public body which receives them and for the register to include the date the request was received, information about the applicant, a short statement of the subject of the request, the name and position of the official receiving the request, the reasons for any refusal to provide information, any payment levied, any information about forwarding the request, the date the reply was sent to the applicant and information describing the main stages of the preparation of the reply. Presumably this register develops as the request is processed. If implemented well, this should provide an excellent tracking system for requests.

A written request must, in accordance with Article 10, be responded to within two weeks, calculated from the date of receipt of the request and ending on the date the reply is sent (including by putting it in the post). Where a request has to be forwarded to another public body, the period of two weeks starts the date that other public body receives the request. Where a request cannot be responded to within two weeks (no conditions are placed on this), a public body may, upon notice being provided to the requester, extend the response deadline by another two weeks. Failure to respond to a request in time shall be a deemed refusal of the request.

Where a public body does not hold the requested information, it must inform the requester of this fact and, where another public body does hold the information, the request shall be forwarded to that body. Where information has already been promulgated, the official processing the request shall indicate the location of the information to the applicant (Article 12).

The notice provided in response to a request must include the name and position of the official who processed the request, a short description of the subject of the request, a list of any documents provided, the date the notice was prepared and the signature of the official who processed the request. It must also include a "price list of consumables costs and information services", as well as a list of the names and contact information of the main State bodies in that locality which deal with matters of human rights, library services and the provision of information (Article 11(4)). The response must also, in case of a rejection, include the provision of Kyrgyz legislation upon which the refusal is based, as well as information about how to appeal (Article 15(3)). In a progressive provision, the Law provides that the basis for any decision to refuse access must itself be open (Article 4(4)).

Articles 7(2), 7(3), 8(1) and 14 address the question of manner of satisfaction of requests. They provide that the response to a request shall normally be in the form in which it was delivered (i.e. orally, in writing, electronically, etc.), where this is technically possible. Electronic responses may either attach the document as a file or indicate the appropriate URL for it. Requests sent by fax shall be responded to in the same way if the volume of material does 'not prevent' it. Pursuant to Article 7(3), where a document exists in more than one language, it shall be provided in the language preferred by the applicant.

77

Article 13(1) sets out the general rule that responses to requests for information shall normally be free of charge, although Article 13(2) provides that any postal costs shall be covered by the applicant. Pursuant to Article 13(3), copying costs not exceeding actual costs, and in accordance with a central government price list, may be levied for requests requiring more than five pages to be copied. Fee waivers may be extended to the poor.

These rules are, for the most part, in line with good practice in other countries.

## **Duty to Publish**

### **Information**

As noted, the Kyrgyz RTI Law includes very extensive and detailed provisions on the proactive disclosure of information in some 12 articles extending to nearly eight pages. Articles 16-17 describe various specific types of information that must be promulgated including laws, information about current decisions and official events, annual reports of public bodies, the assumption of office or resignation of heads of public bodies, adoption of the national and local budgets, changes in rates or taxes, legal acts relating to management of public property, allocation of land or buildings owned by foreigners, signing international treaties and measures to address disasters. Article 18 requires the annual messages of the President to be promulgated, along with reports of the Constitutional Court and Ombudsman, and reports by State bodies on their activity for the 'reporting period', including key statistical information. Articles 19 and 21 refer to distribution of material in the mass media and via accessible manuals, including a summary of their functions, and establish a general obligation on public bodies to provide information to the mass media on their activities.

Article 20 provides a long list of 36 categories of information which must be published on an annual basis. This includes information about the work and structure of the public body, procedures by which individuals can engage with the body, information about the documents held by the body, and its system of managing information, information about the projects being undertaken by the body, financial information about budgets and funds received from foreign bodies, and detailed information on tenders and open competitions.

Articles 22-25 provide for direct access to official information. Article 23 deals with direct access via official State foundations and the rules governing this, such as an obligation to establish special places where individuals can study documents, timelines for making information available (for example, one week for legal acts and other documents which are signed) and so on. Pursuant to Article 24, public bodies must send official reports, manuals and other official information to libraries, while Article 25 requires public bodies to develop electronic databases of information, with at least a full list of laws currently in force. Access to such electronic databases shall be free. Article 31 supplements this by requiring public bodies to connect to public information networks, to create emails for receiving and responding to requests electronically, and to create user stations in places easily accessible to citizens – such as State buildings, libraries, post offices and so on – to facilitate electronic access in practice. Article 30 provides for the establishment by public bodies of special units to deal with the provision of information.

On the one hand, these are extensive and progressive obligations, linked to practical systems for access such as spaces where individuals can study documents or access electronic databases. At the same time, the real extent of the obligation of proactive disclosure is not very clear. The repeated references to information – such as legal acts, the contact details of State bodies and the list of foreign representatives – which goes online as a matter of course in many countries suggests that the obligations may not be as extensive as they at first appear. While the specific disclosure obligations regarding tenders is impressive, much other financial information is described in very general terms – such as “information about the execution of the budget” – and some disclosure obligations found in other countries, such as a list of civil servants and their salaries, are missing.

## Open Meetings

The Kyrgyz RTI Law is relatively unique in establishing a system of access to public meetings.<sup>213</sup> Article 26 establishes the basic principle, which is that ‘sessions’ of public bodies are open to citizens and representatives of local legal entities, apart from closed sessions. It is not clear what the term ‘sessions’ refers to but the Law refers later to ‘sessions of executive bodies’, which would appear to cover only senior, formal decision-making meetings. The same article provides for meetings to be closed in accordance with the exceptions set out in Article 5 (see below) and for individuals to apply to attend meetings. Article 27 deals with notice, providing for publication in the media on a monthly basis of the plan of meetings, and of the agenda, date, time and place of meetings, as well as notice of meetings being provided at the location of the meeting at least a week before it is held. Article 28 deals with the mechanics of applying to attend, including that there shall be at least five public places in the case of ordinary public bodies and 10 for representative (i.e. elected) bodies, and a system for prioritisation should applications exceed space. Finally, Article 29 provides for removal of those who refuse to obey the rules, as well as the right of those attending to take notes, and make photo and video recordings, as long as this does not disturb the meeting.

The inclusion of these provisions is extremely welcome and clearly signals a real intention to be open. The rules probably need further elaboration, however. The types of meetings that are included within the ambit of the rules should be elaborated. The grounds for closure should also be elaborated as Article 5, which deals with exempt information, is probably not tailored to the specific matter of closure of meetings.

## Exceptions

Unlike most right to information laws, the Kyrgyz RTI Law does not include a comprehensive list of exceptions but, instead, refers simply to secrecy legislation. Article 2(3) provides that the RTI Law does

not apply to information contained in citizens' suggestions, complaints and petitions to public bodies, or to access by public bodies to information held by other public bodies. These would appear to be blanket exclusions from the Law and the rationale for both is unclear.

Article 4 provides that restrictions on access to information are legitimate only if they are in conformity with Article 5, and that any decision to refuse access must be motivated by and founded upon Article 15. Article 5(1) recognises two categories of confidential information: State secrets, in accordance with Kyrgyz legislation, and confidential information, either official secrets or private secrets, the latter also as provided for by Kyrgyz law. Article 5(2) defines official secrets as "technical-organisational rules of protection of the work" of public bodies and the "concrete content of closed hearings and sessions", including the position taken by officials during closed sessions and votes. Article 5(3) notes the obligation, as set out in other laws, of officials to keep certain information secret to protect private interests, such as privacy, commercial interests and professional confidentialities.

For its part, Article 15 provides for the rejection of requests for information on the basis of secrecy laws, where the request is not in conformity with the rules regarding oral requests (as provided for in Article 8), where the same public body is already considering a request by the same person on the same subject, or where the body does not hold and is not obliged to hold the information. Apart from the rule regarding secrecy laws, these are legitimate grounds to refuse requests.

The approach to exceptions as set out in Article 5 (and to some extent Article 15), whereby reference is largely made to secrecy laws for the content of exceptions, is problematical for a number of reasons. Most important is the fact that the existing secrecy laws are most unlikely to respect the openness standards that underpin the right to information legislation. The scope of exceptions is unlikely to be clear and narrow, there are likely to be at least some exceptions which do not include a harm test, so that disclosure may be refused even where no harm is threatened, and secrecy laws are unlikely to include public interest overrides (whereby information must still be disclosed, even if harm may be caused to a legitimate secrecy interest, where this is in the overall public interest).

It may also be noted that the additional exceptions provided for in Article 5 are very problematical, particularly the one purporting to protect the work of public bodies through technical-organisational rules. This is analogous to the 'internal deliberations' exception found in many right to information laws which, if not drafted very carefully, has proven to be susceptible of serious abuse by officials hostile to openness. The formulation in the Kyrgyz RTI Law appears to be very wide and therefore open to such abuse.

On a more positive note, Article 4(4) provides that where a document contains restricted information, any information in that document which is not restricted should still be disclosed (a form of severability clause). Furthermore, Article 6(3) stipulates that access already having been provided through different means cannot be basis for rejecting a request.

## Appeals

The Kyrgyz RTI Law refers only briefly to appeals, in Article 35, providing that any refusal to provide information, or any breach of the provisions of the law, may be appealed to a superior officer, to the Ombudsman or to the court, in accordance with existing legislation.

It thus establishes a right to lodge an internal appeal to a superior officer, which can be a useful way of resolving many problems, particularly at the outset of a new right to information system, when lower-ranking officers may be reluctant or unable to change their established practices and operate more openly. At least some basic procedural rules regarding the processing of such complaints would be a useful way of ensuring at least that they meet consistent minimum standards. A right of appeal to the Ombudsman is also positive, as a form of administrative review that is normally cheap, accessible and rapid. At the same time, in most instances, the power Ombudsmen is limited and they cannot, in particular, order the release of information but simply have the power to make recommendations.

## Sanctions and Protections

Article 36 of the RTI Law provides simply that individuals who fail properly to execute their duties under the law, whether by commission or omission, shall suffer the “criminal, administrative, civil, disciplinary or material liability” in accordance with existing legislation. This is a very general form of sanction for obstruction of the Law. It could be made more precise by stipulating those specific forms of behaviour – such as intentional destruction of documents with the intention of preventing disclosure – that would attract sanction.

The Law does not provide for protection for good faith disclosures either pursuant to the Law itself or to expose wrongdoing (whistleblowers).

## Promotional Measures

The RTI Law includes a very basic system of promotional measures, over and above the extensive measures required in the context of proactive disclosure, detailed above. Public bodies are, pursuant to Article 32, generally required to provide the organisational and other conditions for realisation of the right to information, to abide by their obligations under the Law, to correct inaccurate information within seven working days and to maintain a register of all documents they are obliged to produce.

Article 33 provides for the mandatory appointment of information officers by public bodies, as well as for short telephone messages to be made available on the right to information. Article 34 provides for cooperation with the media to promote implementation of the Law, including by informing the public, and calls on public bodies to publish reports on their implementation efforts in the mass media. Finally, Article 37 obliges the government, within three months of the passage of the Law, to make recommendations to the legislature (Jogorku Kenesh) on how to bring other laws into line with the RTI Law, to make recommendations to the President on organisational measures needed to implement the Law, to bring its own rules into conformity with the RTI Law, and to make recommendations to local self-government bodies on measures required to implement the Law.

The RTI Law does not, however, provide for other promotional measures, such as the publication of a guide to using the Law, the development of a system for the management of public information, the obligation to undertake training of public officials, or an obligation on public bodies to report centrally to the legislature on their performance in implementing the RTI Law, all measures which have been found useful in other countries.

80

# Mexico

## Introduction

In 2002,<sup>214</sup> Article 6 of the Constitution<sup>215</sup> provided a simple guarantee of the right to information as follows: “Freedom of information will be guaranteed by the State.” However, a comprehensive amendment to Article 6, which was passed unanimously not only by both chambers of the Mexican Congress but also by the legislatures of 16 states,<sup>216</sup> significantly extended constitutional protection for the right to information.<sup>217</sup>

The new guarantee provides, among other things, that all information shall be public, subject only to temporary restrictions on access for public interest reasons as established by law, although personal information shall be protected. Rapid systems for accessing information shall be put in place and these shall be overseen by independent bodies. Access to information systems at all levels and branches of government must be brought into line with this regulation within one year of its coming into force.<sup>218</sup> After Sweden,<sup>219</sup> it is probably the most detailed and comprehensive constitutional guarantee of the right to information in the world.

Mexico was one of the earlier countries in Latin America to pass a right to information law, with the signing into law by President Fox of the Federal Transparency and Access to Public Government Information Law (RTI Law)<sup>220</sup> in June 2002. The law, like the constitutional amendments, was adopted unanimously by both chambers of the Congress, part of the commitment by the new administration to tackle corruption and foster democracy in Mexico. The oversight body has the power under the Law to adopt regulations on various matters including, importantly, on classification. A regulation was adopted by IFAI (see below) in June 2003 addressing a range of issues.<sup>221</sup> All 31 Mexican states, as well as the Federal District (Mexico City) have also adopted right to information laws.

*The law is among the more progressive right to information laws found anywhere. It includes a number of positive features, including strong procedural guarantees, along with an innovative approach towards ensuring application to all public bodies, regardless of constitutional status, and a prohibition on classifying information needed for the investigation of grave violations of human rights or crimes against humanity. It establishes a very strong and independent oversight mechanism in the form of the Instituto Federal de Acceso a la Información Pública (IFAI; Federal Institute for Access to Public Information).<sup>222</sup> Human Rights Watch has applauded the law as follows:*

The transparency law may prove to be the most important step Mexico has taken in its transition to democracy since the 2000 election.<sup>223</sup>

Implementation of the Law has generally been positive. A study by the Open Society Justice Initiative suggests that the rate of 'mute refusals' (the failure to provide any answer to a request) was lower in Mexico than any of the other 13 countries surveyed.<sup>224</sup> Mexico was also among the better performers in terms of the percentage of requests met with a positive response. Similarly, a report on IFAI and promoting a culture of transparency in Mexico stated, at its very outset: "In the family of freedom of information laws globally, Mexico is a leader".<sup>225</sup>

81

## The Right of Access

The Law provides generally in Article 2 that all information held by government may be accessed by individuals. Article 1 sets out the purpose, which is to guarantee the right of access to information held by government, autonomous constitutional or other legal bodies, or any other federal entity. Article 4 further elaborates six 'aims' of the law, which are to ensure access to information through simple, expeditious procedures, to promote transparent public administration, to protect personal information, to promote public accountability, to improve the management of records, and to contribute to democratisation and the rule of law in Mexico. Finally, Article 6<sup>226</sup> provides that when interpreting the Law, the principle of transparency of public bodies must be favoured. It also provides that the Law must be interpreted in accordance with the constitution, the *Universal Declaration of Human Rights*<sup>227</sup> and a number of international treaties, including the *International Covenant on Civil and Political Rights*,<sup>228</sup> the principal UN human rights treaty guaranteeing freedom of expression.

Taken together, these provide a good backdrop to the Law and strong guidance to those tasked with implementing it.

The Law defines information as everything contained in documents that public bodies generate, obtain, acquire, transform or preserve. Documents, in turn, are defined as any records, regardless of form, that relate to the exercise of the functions or activities of public bodies and public servants, regardless of their

source, date of creation or form. This is a relatively broad definition, but it is unfortunately limited by the substantive restriction to documents about functions or activities of public bodies (Article 3).

The Law defines separately the obligations of two sets of public bodies. All public bodies, defined as “subjects compelled by the Law” are defined and then a sub-set of these, termed “agencies and entities” is also defined. The Law provides for a more stringent set of obligations for ‘agencies and entities’ (basically the executive branch of government), and less detailed obligations for ‘other’ public bodies.

All “subjects compelled by the Law” (public bodies) includes:

- the federal executive branch and the federal public administration;
- the federal legislative branch, including the House of Deputies, the Senate, the Permanent Commission and other bodies;
- the federal judicial branch and the Council of the Federal Judicature;
- autonomous constitutional bodies;
- federal administrative tribunals; and
- any other federal body.

Autonomous constitutional bodies is further defined to include bodies like the Federal Electoral Institute, the National Commission for Human Rights, the Bank of Mexico, universities and any others provided for in the Constitution.

82

“Agencies and entities”, effectively the first bullet point above, is defined as including bodies indicated in the Constitutional Federal Public Administration Law, including the President and decentralised administrative institutions, such as the Office of the Attorney General.

The definition of public bodies overall is broad inasmuch as it encompasses all branches and levels of government. At the same time, it does not necessarily include private bodies which are funded by government, or private bodies which undertake public functions.

The First Section of the Law applies to all public bodies. However, the Second Section, which contains most procedural provisions, as well as the oversight system, including IFAI, applies only to agencies and entities, effectively the executive branch of government. The Third Section, which applies to other public bodies, mainly the legislative and judicial branches of government, as well as the five autonomous bodies is quite brief, containing only two Articles, but it does seek to incorporate many of the obligations and oversight functions provided for in Section Two. This is an innovative approach to including all three branches of government under the Law while respecting constitutional divisions of power. At the same time, this has led to differential application of the Law, with the executive branch (agencies and entities) being subject to more rigorous oversight, and by more independent bodies.

This chapter will, like the Law, focus on the duties of agencies and entities.

## Procedural Guarantees

Any person may submit a request for access to information to the liaison section which all public bodies are required to establish (see below, under Promotional Measures) either in a letter (including electronically) or the approved form. A request must include the applicant’s name and address, a clear description of the information sought, any other relevant facts and the form in which the applicant would like the information to be disclosed. The Law specifically states that the motive for the request shall not be relevant to the decision whether or not to disclose the information sought. If the information is not described sufficiently

clearly, or if the individual has difficulty making a request, including because of illiteracy, the liaison section must provide assistance (Articles 40-41 and Transitory Eighth).

Notification of a decision on a request must be provided as soon as possible but in any event within 20 working days and the information must then be provided within another 10 working days, once the applicant has paid any fees (Article 44). An unusual provision stipulates that failure to provide a decision within the time limit will be understood as an acceptance of the request, and the agency will then be under an obligation to provide the information within the next 10 days, and for free, unless IFAI determines that it is confidential (Article 53).

Where the information is deemed to be classified or confidential, the Committee – a supervisory unit within all agencies and entities (see below) – must be notified of this fact immediately, along with the reasons for classification, so that it may decide whether to ratify the classification or to revoke it and grant access to the information. Similarly, when documents are not found, the Committee must be notified and, after having taken “appropriate measures” to find the information without success, confirm that the agency or entity does not hold the information (Articles 44-46).

Agencies are only required to provide access to information they hold (Article 42). However, where an agency receives a request for information it does not hold, it must ‘duly orient’ the applicant to the agency which does hold the information (Article 40). The Law does not include many provisions on third party notice, but it does require that the document lodging an appeal indicate any interested third parties (Article 54) and Article 55, on the hearing of appeals, is generally understood to give certain rights to third parties. The Law also provides generally that ‘internal procedures’ for processing requests will be established by regulation (Article 44).<sup>229</sup>

Where a request is satisfied, the applicant must be notified of the cost and form of access (Article 44). Where a request is refused and this has been confirmed by the Committee, the applicant must be notified of this fact within the time limit, along with the reasons for the rejection and the manner in which the decision may be appealed (Article 45). Confirmation must also be provided to the applicant where the agency does not hold the information sought (Article 46).

Disclosure must be in the form requested, if the document will permit that (Article 42). Otherwise, the various forms of access shall be established by regulation (Article 44).

The provisions of the Law relating to fees are progressive. The fees for obtaining access to information, which must be set out in the Federal Duties Law,<sup>230</sup> may not exceed the cost of the materials used to reproduce the information, along with the cost of sending it. The cost of searching for the information and preparing it is thus excluded (Article 27). Access to personal data is free, although charges may be levied to cover the costs of delivery of this information (Article 24). Currently, allowable charges are 1 peso (USD.09) for a simple photocopy and 20 pesos for a certified copy.<sup>231</sup>

The process described above applies only to agencies and entities, not other public bodies. A general attempt is made in Article 61 to require other public bodies to process requests in an analogous fashion by requiring them to “establish in their respective domains the institutions, criteria and institutional procedures for granting private persons access to information according to regulations or agreements of a general nature that comply with the principles and deadlines established in this Law.” They are specifically required, within a year, to set up a number of systems and bodies for this purpose, including a liaison section and procedures for access to information. They are also required to submit an annual report on the activities undertaken to ensure access to information (Articles 62 and Transitory Fourth).

In an interesting innovation, the Law provides that requests for information and the responses to them must themselves be published (Article 47). In practice, the whole request process can be conducted electronically through the System for Information Requests (SISI), which has a separate website dedicated to it.<sup>232</sup> This includes a facility for posting questions, as well as the answers. It also provides access to all electronic documents to which access has been provided since 2003.

## Duty to Publish

Article 7 of the Law provides for a broad duty to publish, subject to the regime of exceptions. It provides that public bodies must, in accordance with the regulations promulgated by IFAI (for agencies and entities) or other relevant oversight bodies (for other public bodies, which must establish or designate their own institutes), publish 17 categories of information in a manner that is accessible and comprehensible.<sup>233</sup> The categories include information about the general operations of the body, the services they offer, procedures and forms, subsidy programmes, contracts entered into, reports made and opportunities for participation. Importantly, Article 12 stipulates that public bodies must publish information regarding the amounts and recipients of any public resources they are responsible for, reflecting the preoccupation with corruption which was an important motivation for the Law.

The Law includes precise stipulations about how this information must be made available, including via electronic means accessible in remote locations and via local systems. An important rule is that every agency must, for purposes of facilitating access to information subject to proactive disclosure, make available a computer to members of the public which includes printing facilities, and support must be provided to users where needed (Article 9).

The Law also includes a number of specific directions regarding the publication of information. Pursuant to Article 8, the judicial branch must make public all rulings, although individuals may object to the disclosure of their personal information. Agencies and entities must publish all rules and formal administrative arrangements 20 days prior to adopting them, unless this could frustrate their success. Reports by political parties and groups to the Federal Electoral Institute, as well as any formal audits of these bodies, must be published as soon as they are finalised (Articles 10-11). Agencies are also required to produce, on a semi-annual basis, an index of the files they have classified, indicating which unit produced the document, and the date and length of classification, and this index may not under any circumstances be considered classified (Article 17).

84

## Exceptions

The Law includes a reasonably clear regime of exceptions, operated largely through a system of classification, although there are a number of potential loopholes in the system. Pursuant to Article 14, information expressly required by another law to be confidential is one of the exceptions – commercial, industrial, tax, bank and fiduciary secrets established by law are specifically mentioned – so that the existing secrecy regime is left in place.

Only some of the exceptions are subject to a harm test and the requisite standard of harm varies. Article 13 provides generally for an exception where disclosure of information ‘could’ lead to a negative result, but the standard of harm varies considerably, ranging from ‘compromise’, ‘harm’ or ‘impair’ to ‘severely prejudice’. The exceptions under Article 14 – which for the most part involve other laws, investigations prior to a decision and internal deliberations (see below) – do not have a harm test. However, pursuant to regulations adopted by IFAI in 2003, when considering whether to classify documents under Articles 13, 14 or 18 of the RTI Law, the heads of public bodies must take into account the harm that disclosure of these documents might cause.

IFAI (or the relevant oversight body for public bodies falling outside of its ambit) is tasked with establishing criteria for classification and declassification of information,<sup>234</sup> as well as for oversight of the system, while the heads of administrative units, defined as the parts of public bodies that hold information, are responsible for actual classification. IFAI may, at any time, have access to classified information to ascertain whether it has been properly classified (Articles 15-17).

There is no public interest override. However, Article 14 does contain an exceptional and extremely positive provision prohibiting the classification of information “when the investigation of grave violations of human

rights or crimes against humanity is at stake.” This should facilitate human rights and humanitarian work.

Article 43 provides for partial disclosure of information (severability), “as long as the documents in which the information is found permit the withholding of the classified parts or sections.”

There is a strict system of time limits to classification under Articles 13 and 14, of 12 years. Information shall be declassified when the grounds for its classification no longer exist or when the period of classification is over, albeit without prejudice to other laws. The time limit may, exceptionally, be extended by IFAI or the relevant oversight body where the grounds for the original classification still pertain (Article 15). In practice, this happens relatively rarely.

Article 48 contains a general exception to the effect that requests which are offensive or which have already been dealt with previously from the same person do not have to be processed. It is unclear what offensive refers to in this context; some other right to information laws refer to vexatious requests. Another general exception is that information already published does not need to be provided to applicants but, in this case, the liaison section must assist the applicant to locate the published information (Article 42).

Article 13 provides for specific exceptions for information the disclosure of which could:

- compromise national or public security, or defence;
- impair ongoing negotiations or international relations, including by divulging information provided on a confidential basis by other States or international organisations;
- harm the country’s financial or economic stability;
- pose a risk to the life, security or health of an individual; or
- severely prejudice law enforcement, including the prevention or prosecution of crime, the administration of justice, the collection of taxes or immigration controls.

These are legitimate grounds for refusing to disclose information, which are found in many right to information laws.

Article 14 adds to these exceptions provided by other laws (as detailed above), prior investigations,<sup>235</sup> files relating to trials prior to a ruling, proceedings against civil servants prior to a ruling, and opinions, recommendations or points of view provided by officials as part of a deliberative process prior to the adoption of a final decision. These exceptions are problematical mainly because they lack harm tests but also because of their breadth.

Articles 18 and 19 also provide protection for private information. When private individuals provide information to public bodies, the latter must indicate what shall remain confidential (which they may do only where they have a legal right to classify it) and then this information may only be released with the consent of the individual who provided it. This is bolstered by Chapter IV of Section I, which is devoted to the protection of personal information, defined in Article 3(II) as information from which a physical person may be identified and concerning his or her “ethnic or racial origin, or referring to his physical, moral or emotional characteristics, his sentimental and family life, domicile, telephone number, patrimony, ideology and political opinions, religious or philosophical beliefs or convictions, his physical or mental state of health, his sexual preferences, or any similar information that might affect his privacy”. Such information may not be disclosed without the consent of the individual concerned, although there are exceptions to this, for example for medical treatment or for purposes of exchanging the information between public bodies pursuant to the proper exercise of their powers. Chapter IV also gives a right to correct personal data (Articles 21 and 25).

## Appeals

For agencies, complaints lie in the first instance to IFAI and from there to the courts. The complaint must be lodged within 15 days of the notice of refusal of access, where information has otherwise not been provided, either in full or in part, where correction of personal information has been refused or to review timeliness, cost or form of access (Article 50). This is an extremely short timeline which may prevent some applicants from lodging appeals. The complaint must contain the names of the agency or entity, the person making the complaint and any third parties, the date the cause of the complaint arose, the subject matter of the complaint, the arguments and a copy of any formal documents relating to the case (such as a notice of refusal of access) (Article 54). Complaints may be lodged with the liaison section of the agency, which must forward it to IFAI the next day (Article 49). Complaints can also be lodged directly with IFAI or made via SISI, which automatically sends a notice to the public body and triggers the process inside IFAI.

A commissioner must investigate the claim and report to all commissioners within 30 working days, and a decision must be made within another 20 days, although these time limits may be doubled for justifiable cause (Article 55). Where an agency has failed to respond within the timelines, IFAI shall process the complaint on an expedited basis (Article 54). A complaint may be rejected where it has been lodged outside of the time limits, where IFAI has already definitively ruled on it, where it does not relate to a decision made by a committee, or where an appeal is being heard by the courts (Article 57).

Once a year has passed since a decision by IFAI confirming an original decision by a public body, the applicant may request IFAI to review its decision, and a second decision must be issued within 60 days of such a request (Article 60).

86

Article 33 provides for the establishment of IFAI as an independent public body charged with promoting the right to information, acting as a complaints body for refusals to disclose information and protecting personal information. The Law includes a number of provisions designed to promote the independence of IFAI. The five commissioners are nominated by the executive branch, but nominations may be vetoed by a majority vote of either the Senate or the Permanent Commission, as long as they act within 30 days. Individuals may not be appointed as commissioners unless they are citizens, have not been convicted of a crime of fraud, are at least 35 years old, do not have strong political connections and have “performed outstandingly in the professional activities” (Articles 34 and 35).

Commissioners hold office for seven years, but may be removed for serious or repeated violations of the Constitution or the RTI Law, where their actions or failure to act undermine the work of IFAI or if they have been convicted of a crime subject to imprisonment (Article 34). Two of the five original Commissioners were appointed for four years, with possibility of renewal for another seven years (Transitory Fifth).

IFAI may accept or reject a complaint, or modify it, and their ruling shall include time limits for compliance (Article 56). The ruling is final for agencies but applicants may appeal them to the federal courts (Article 59).

Other public bodies are also obliged to provide for complaints' procedures in line with those available through IFAI for agencies and entities (Article 61).

## Sanctions and Protections

Civil servants who fail to comply with the law in a number of ways – including by destroying information, by denying access negligently, fraudulently or in bad faith, by intentionally denying access to non-confidential information, or by refusing to disclose information as ordered by a committee or IFAI – are administratively liable. These wrongs, as well as any other failure to respect the provisions of the Law, will be punished in

accordance with the Federal Law of Administrative Responsibilities of Public Servants. Repeated failures will be considered 'serious' for purposes of sanction (Article 63)

The RTI Law also provides for liability on the same basis if officials disclose classified or confidential information, one of the few provisions in the Law that is likely to impede the development of a culture of openness, prompting officials to err in favour of secrecy (Article 63). Many right to information laws instead provide protection to officials who disclose information pursuant to the law in good faith.

## Promotional Measures

The Mexican RTI Law provides for a number of interesting procedural mechanisms to promote effective implementation of the right of access. All public bodies must establish a "liaison section", the analogy of an information officer in some other laws, with a number of duties including to ensure that proactive publication obligations are respected, to receive and process requests for access and to assist applicants, to ensure procedures are respected, to propose internal procedures to ensure efficient handling of requests, to undertake training, and to keep a record of requests for information and their outcome. These sections must be established within six months of the law coming into force and they must become operational within a further six months (Articles 28 and 62, and Transitory Third and Fourth).

The Law also provides for an Information Committee in each agency and entity, with a few exceptions, composed of a civil servant, the head of the liaison section and the head of the internal oversight body. The Committee is responsible for coordinating and supervising information activities, establishing information procedures, overseeing classification, ensuring, along with the liaison section, that documents containing requested information are found, establishing document maintenance criteria and overseeing their implementation, and ensuring the provision to IFAI of the information it needs to produce its annual report (see below) (Articles 29-31).

IFAI has a long list of functions including, in addition to those already noted, interpreting the Law as an administrative regulation, monitoring implementation of the Law and making recommendations in case of non-compliance, providing advice to individuals, developing forms for information requests, promoting training and preparing a simple guide on how to use the Law (Articles 37 and 38).

Article 9 includes a very general rule on record management, providing that agencies and entities must handle their information, including putting it online, in accordance with regulations promulgated by IFAI. Article 32 provides that IFAI must cooperate with the General Archive of the Nation to develop "criteria for cataloguing, categorizing and preserving administrative documents, as well as organizing the archives".

IFAI is responsible for providing an annual report to Congress, which shall include, at a minimum, "the number of requests for access to information presented to each agency and entity and their results; agency response time; the number and outcome of matters attended to by the Institute; the status of denunciations brought before the internal oversight bodies; and any difficulties encountered in carrying out the Law." For this purpose, it shall issue guidelines to the committees of the different agencies on the information which they must, pursuant to Article 29(VII), provide to it (Article 39). Other public bodies must prepare their own reports, along the same lines as is required of IFAI, a copy of which must be provided to IFAI (Article 62).

## Introduction

The 1993 Peruvian Constitution guarantees the right to access information held by public bodies.<sup>236</sup> The guarantee stipulates that no reasons need to be given for requesting information but it is limited to 'required' information. The Constitution also gives broad protection to "banking secrecy and confidentiality concerning taxes", as well as private and family information.<sup>237</sup> The Law of Transparency and Access to Public Information, adopted in August 2002, which gives legislative effect to this constitutional guarantee, is not limited to required information.<sup>238</sup> It was, however, criticised, in particular for its very broad regime of exceptions, and was also subjected to a legal challenge by the Ombudsman Office.<sup>239</sup> As a result, amendments to the Law were promulgated in February 2003, just after it had come into force, to help address these concerns.

The Peruvian RTI Law is a progressive one, which includes all of the key characteristics required to give effect to the right to information in accordance with the principle of maximum disclosure. In some areas, its provisions, while appropriate, are rather brief, leaving out some details which are found other laws. On the other hand, its provisions on the proactive disclosure of information are perhaps the most detailed to be found in any RTI law, particularly in relation to financial information.

## The Right of Access

The Peruvian RTI Law clearly establishes a right of access to information held by public bodies. Article 1 describes the purpose of the law as being to "promote transparency of acts of State" and to regulate the right to information as provided for in the Constitution. Article 7 provides that every individual has the right to request and receive information from public bodies. Article 3 supports this, providing that all information held by the State, other than that covered by the exceptions, is presumed to be public and that the State is obliged to provide information upon request, in accordance with the "Principle of Public Disclosure". The Law does not elaborate in specific detail on its purpose, over and above these general, albeit strong, statements in favour of openness.

Article 10 is the main provision elaborating on the scope of information covered by the RTI Law. It notes that public bodies are obliged to release information whether held in "written documents, photographs, recordings, magnetic or digital devices or any other format", but only if the information was created or obtained by the entity and is under its possession or control. Furthermore, any documentation financed by the public budget, based on decisions of an administrative nature, is public information, including records of official meetings. Article 3 elaborates on this by providing that all activities and regulations of public bodies are subject to the Principle of Public Disclosure.

This is a broad definition, although it is not entirely clear what effect the limitations it contains might have. 'Created or obtained' by the entity would appear to cover most information which might be considered to be public. The requirement that the information must be under the possession or control of a public body is also reasonable, as long as even information archived with a private body is considered to be under the control of the public body which so archived it, as long as it remains accessible to the public body.

Article 2 of the RTI Law defines public bodies as those included in Article 1 of Preliminary Law No. 27.444, the Law of General Administrative Procedures. This Law defines public bodies as all three branches of government – the executive, including ministries and decentralised public bodies, the legislature and the judiciary – as well as regional and local governments, any bodies upon which the constitution or another

law confer autonomy, other “bodies, organs, projects and programmes of the State whose activities are carried out by virtue of administrative power” and private legal bodies which provide public services or serve in an administrative capacity “by virtue of concession, delegation or authorisation of the State”.

Article 8 further provides that State owned enterprises are also “subject to the procedures established in this Law”, while Article 9 provides that private legal entities, “as described in Article 1, clause 8 of the Preliminary Title of Law 27.444,” (see above) “are obliged to inform about the characteristics, costs and administrative functions of the public services they perform.” This is a more limited set of obligations than applies to other public bodies.

As noted, the right of access extends to everyone (see Article 7). In case this was not sufficiently clear, Article 13 specifically provides that a request for information cannot be denied based on the ‘identity’ of the applicant.

## Procedural Guarantees

Requests for information should normally be directed to the official designated by the public body for this purpose, provided that where no individual has been so designated, the request shall be directed to the official who holds the information or to his or her immediate superior (Article 11(a)). No reasons are required to be provided for a request for information (Article 7). The requirement to direct a request to the official who holds the information may prove problematical, since applicants will often not know who this is.

Requests shall normally be responded to within seven working days, although this may be extended for another five working days when it is unusually difficult to gather the information. In this case, the public body must inform the applicant in writing before the expiry of the original seven days (Article 11(b)). These are very short timelines in comparison to most other RTI laws; indeed they might be criticised for being unduly short and therefore difficult to comply with. Where either deadline is breached, the request is deemed to have been refused (Article 11(b), (d) and (e)). This is also the case where the response of the public body is so ambiguous that a request may be considered not to have been fulfilled (Article 13). Where a public body does not hold the information but knows where it may be obtained, it shall inform the applicant of this (Article 11(b)).

Article 13 provides that any denial of access to information must be based on the exceptions contained in Articles 15-17 and that the reasons for any denial, along with the time during which the information will remain confidential, must be communicated to the applicant. These are positive, particularly the requirement of specifying the time the information will remain confidential. At the same time, like some other procedural provisions in the Peruvian RTI Law, they could be more detailed, for example by specifying in more detail what must be included in any notice refusing access to information. Furthermore, in practice they are often honoured as much in the breach as many requests are simply met with mute refusals.

Article 20 of the Law sets out the rules relating to fees. Applicants must bear the cost of reproducing the information requested, but any additional costs shall be considered to be a restriction on the right of access, subject to sanctions (see below). Every public body must elaborate on the amount of fees allowed to be charged in its “Rules of Administrative Procedures (Texto Unico de Procedimientos Administrativos—TUPA)”. These are very progressive rules on fees inasmuch as charges are limited to the cost of reproducing the information. At the same time, a central schedule of fees would prevent different fees being charged by different public bodies and fee waivers could have been considered, for example for the poor.

The Peruvian RTI Law makes explicit what many RTI laws leave unclear, namely that public bodies are not required to create or produce information they do not have or are not obliged to have, although in this case they must inform the applicant of this fact. Public bodies are also not required to provide an evaluation or analysis of information (Article 13). This is not unreasonable, but it might be relied upon as a basis for refusing to perform even quite mechanical operations, such as extracting information in a particular form

automatically from a database, which would otherwise normally be understood as included under the right to information.

The Peruvian RTI Law does not contain provisions on a number of procedural matters commonly addressed in such laws. It does not require public bodies to provide assistance to applicants who need it – for example because they are illiterate or disabled, or have difficulty describing the information they seek in sufficient detail – or to acknowledge requests upon receipt. It does not require third parties to be consulted where a request relates to information which concerns them. The Law also does not contain any provisions allowing applicants to specify the form in which they would like the information to be communicated to them – for example electronically, in photocopy format and so on – although it does provide that applicants should be given “direct and immediate access” to information during business hours, a progressive and practical rule.

## Duty to Publish

The Peruvian RTI Law is remarkable for its extremely extensive pro-active publication provisions. In addition to a few provisions found throughout the text, the Law devotes all of Title IV: Transparency for the Management of Public Finances, running to some 14 articles, to this topic.

Article 5 provides for the progressive provision by government departments, depending on budget, of various types of information through the Internet, including general information about the department, budget information, including the wages of all staff, detailed information about the acquisition of goods and services, and information about official activities involving high-ranking officials. Public bodies must, furthermore, publicly identify the official responsible for the development of their website. Article 6 sets deadlines for the establishment of websites (for example, 1 July 2003 for central government departments) and requires budget authorities to take this into account when assigning resources.

90

As noted, Title IV contains extremely detailed and extensive proactive publication obligations, which are among the most onerous of any RTI law in the world, particularly in the area of public finances, upon which it focuses. It includes its own purpose and definition section (Article 23), as well as a provision on mechanisms for publishing information (Article 24). The latter refers to publishing on websites or through major newspapers, depending on resources, as well as to regulations regarding publication where the number of inhabitants is low. It requires the methodology used to collect the information to be provided and the terms used in documents to be elaborated, so as to allow appropriate analysis of the information. And it requires information published on a quarterly basis to be published within 30 days of the end of each quarter, along with information from the previous two quarters, for comparative purposes.

Specific obligations are set out for certain bodies, such as the Ministry of Economy and Public Finance, the National Fund for the Financing of State Entrepreneurial Activities and the High Council for State Contracts and Acquisitions. It is beyond the scope of this work to elaborate in detail on the specific obligations provided for in Title IV. Suffice it to say that they are extensive and cover budget information, information about employees, projects, contracts and acquisitions, macro-economic information and even economic predictions (such as the probable impact of tax changes to the public budget and on the social-economic situation). The rules even require certain information to be published at least three months before general elections, such as a review of what was accomplished during the tenure of the incumbent administration and fiscal predictions for the next five years.

## Exceptions

The exceptions to the right of access are set out in Articles 15-17 of the RTI Law. Article 15 deals with ‘secret information’, mostly military and intelligence information; Article 16 deals with ‘reserved information’,

mostly relating to the police and justice system; Article 17 deals with 'confidential information', which includes a range of other types of exceptions; and Article 18 places conditions on these exceptions.

According to Article 18, Articles 15-17 provide the only grounds upon which a refusal of access may be based, they may not be overridden by a "norm of a lesser scale" and they should be interpreted in a restrictive manner. These are progressive general rules. Article 17(6), however, provides for an exception for all information which is protected by legislation approved by Congress or the Constitution. Article 17(2) goes even further, rendering confidential information protected by legal rules in various areas such as banking, tax and so on.<sup>240</sup> As a result, the RTI Law fails to override secrecy provisions contained not only in other laws passed by Congress but also lower order legal rules.

The Peruvian RTI Law establishes a complex relationship with classification systems. It states that only heads of departments, or officials nominated by them, may classify information. It then goes on to list the cases in which information might be classified, which constitute the bulk of the exceptions. Presumably information classified in breach of these rules would still be subject to disclosure.

Many of the exceptions in the RTI Law do include a specific harm requirement. However, the intelligence and counter-intelligence activities of the National Intelligence Council (Consejo Nacional de Inteligencia, CNI) appear to be excluded entirely from the ambit of the law, without regard to specific harm (Article 15). Furthermore, most of the exceptions relating to national defence, described as military classification in the Law, do not include a harm test, although some do. This category, for example, includes defence plans for military bases, technical developments relating to national security, and so on, regardless of whether or not the disclosure of this information would cause any harm. In comparison, exceptions relating to intelligence (with the exception of the CNI, as noted above), as well as the categories of reserved and confidential information, mostly refer to some sort of harm, although in some cases the standard is low, as in 'could endanger' or 'could put at risk'.

Significantly, the exception in favour of internal deliberations does not include a harm test, so that all information that contains advice, recommendations or opinions as part of the deliberative process is confidential. This exception is 'terminated' once the decision is made, but only if the public body makes reference to the advice, recommendation or opinion. As a result, background documents may remain confidential even once the matter to which they relate has been completed.

The RTI Law does not include a general public interest override. Article 18 does, however, include two specific overrides of a public interest nature. First, it provides that any information relating to violations of human rights or the Geneva Conventions of 1949 cannot be considered confidential. Furthermore, the exceptions may not be used to undermine provisions in the Peruvian Constitution.

Second, various actors – the Congress, the judiciary, the General Controller (Contralor), and the Human Rights Ombudsman (Defensor del Pueblo) – have a right to access even exempt information under various circumstances, mainly relating to the proper exercise of their functions. Judges, for example, may access confidential information when exercising jurisdiction in a particular case and where it is required to get to the truth and the Ombudsman can access information where pertinent to the defence of human rights.

Article 19 of the RTI Law establishes a rule of severability, whereby that part of a document which is not exempt must be disclosed even if part of the document is confidential.

Article 15 establishes a rule of historical disclosure, but apparently only for exempt information falling within its ambit, namely defence and intelligence information. The system provides that a request for information which has been classified for five years or more may be satisfied if the head of the relevant department declares that disclosure will not harm security, territorial integrity or democracy. If a request for such information is denied, the head must provide reasons for this in writing, which must be forwarded to the Council of Ministers, who may declassify the information.

The specific exceptions established by the Peruvian RTI Law are as follows:

- information classified for military reasons, with several sub-categories elaborated (Article 15(1));

- information classified on grounds of intelligence, also with several sub-categories listed (Article 15(2));
- information relating to preventing and combating crime, once again with several sub-categories (Article 16(1));
- information relating to international negotiations whose disclosure would damage the negotiation process or information whose disclosure would negatively affect foreign relations (Article 16(2));
- internal deliberative material, as described above (Article 17(1));
- information protected by banking, tax, commercial, industrial, technological and stock-exchange rules (Article 17(2));
- information relating to ongoing investigations on the use of power sanctioned by the administration, but only until the matter is resolved or six months have elapsed since the investigation began (Article 17(3));
- information prepared or obtained by public legal advisors whose publication could reveal a legal strategy, or information covered by legal privilege, but only as long as the legal process to which the information relates is ongoing (Article 17(4));
- personal information whose disclosure would constitute an invasion of privacy (Article 17(5)); and
- information rendered secret by any other law (Article 17(6)).

## 92

### Appeals

There are fairly rudimentary appeals provisions in the Peruvian RTI Law. Pursuant to Article 11(e), where a request for information has been denied, or is deemed to have been denied due to the expiry of the deadline for a response, an applicant may, if the public body is “subject to a higher department”, lodge an appeal against the decision, presumably with that higher department. Article 11(f) provides that if the appeal is denied, or if no response is forthcoming within ten working days, all administrative procedures are considered to have been exhausted, paving the way for a legal appeal. It would be preferable if the law required a response to be provided within ten days, but it may amount to more-or-less the same thing.

Apart from the above, which is a form of internal appeal, the RTI Law does not provide for an appeal to an independent administrative body, such as an information commissioner or ombudsman.

Article 11(g) provides for a legal appeal, either pursuant to administrative law procedures or the constitutional process of Habeas Data,<sup>241</sup> protected by Article 200(3) of the Constitution and also provided for by statute.

### Sanctions and Protections

Pursuant to Article 4 of the RTI Law, public bodies are required to respect the provisions of the law. Officials or public servants – that is, employees of public bodies but not private bodies covered by the law – who do not follow the law will be sanctioned for “committing a major offense, possibly being criminally denounced” in accordance with Article 377 of the Penal Code, providing for abuse of authority. This is reinforced by Article 14, which provides that any responsible official who ‘arbitrarily obstructs’ access to information, responds incompletely to a request or hinders implementation of the law will be held liable in accordance with Article 4.

Article 4 also provides that compliance with the Law should not lead to 'reprisals' against officials responsible for releasing requested information. On the other hand, Article 18 provides that officials must keep information covered by the exceptions in Articles 15-17 confidential and that they shall be responsible for any leaks. It is not clear how compatibility between these two provisions is achieved. It seems likely that Article 4 applies subject to Article 18. In other words, officials may not be subject to sanction for releasing information pursuant to a request, unless the information falls within the scope of an exception, in which case they may be sanctioned. In better practice RTI laws, officials are protected against any sanction for releasing information as long as they act in good faith, which helps promote a culture of openness.

The Peruvian RTI Law does not provide for protection for whistleblowers.

## Promotional Measures

The Peruvian RTI Law contains only very basic promotional measures. Pursuant to Article 3, public bodies must designate an official responsible for responding to requests for information. This is backed up by Article 8, which reiterates this obligation, and also provides that, where an official has not been identified, responsibility will lie with the 'secretary general' or whomever is in charge of the body.

Article 3 also establishes two general positive obligations, namely that the responsible official shall plan an 'adequate infrastructure' for the "organisation, systematisation, and publishing of information" and that the body should "adopt basic measures that guarantee and promote transparency". It is unclear how far these obligations extend and how they might be applied in practice.

Article 21 places an obligation on the State to create and maintain its records in a professional manner to ensure proper exercise of the right to information. It forbids public bodies to destroy information 'under any circumstance' and instead provides for the transfer of all information to the National Archive, in accordance with deadlines established by law. The National Archive may destroy information that lacks relevance, in accordance with its internal regulations, but only if the information has not been requested for a reasonable period of time. These are positive obligations but they could be strengthened by establishing more specific systems for ensuring the proper management of records. Furthermore, the idea that public bodies may not destroy any information but must, instead, transfer all information to the archives appears to be based in an unduly narrow conception of 'information' which should include, for example, things like emails and even cookies on computers.

Article 22 of the Law places an obligation on the Council of Ministers to report annually to Congress on information requests, and to indicate which were granted and which denied. The Council of Ministers must furthermore gather information from public bodies so that it may prepare this report. Although positive, it would be helpful if the Law set out in more detail the categories of information required to be included in such a report.

## Introduction

The 1996 Constitution of the Republic of South Africa not only guarantees the right to access information held by the State, but also to access information held by private bodies which is necessary for the exercise or protection of any right.<sup>242</sup> The Constitution also specifically requires the government to pass a law giving effect to this right within three years of its coming into force.<sup>243</sup> This is an extremely practical provision, which forced the government to adopt legislation in a timely fashion, something it did just within the deadline.

The enabling legislation, the Promotion of Access to Information Act (RTI Law), came into effect in March 2001.<sup>244</sup> This is one of the more progressive right to information laws in the world, no doubt a reflection of the profound mistrust of government the apartheid era instilled in people. It has very strong procedural guarantees, as well as a narrowly crafted set of exceptions. A major shortcoming of the South African Law is that it does not provide for an administrative level of appeal. As a result, if requests are refused by public bodies, only courts can review this. It also essentially lacks any proactive obligation to publish, something which has received extensive attention in some of the more recent right to information laws and which is an important complement to request-driven access.

At least as importantly, implementation has been weak. One study suggests that 62% of requests are met with a 'mute refusal' or simply no answer, the highest for any country in the study where a right to information law was in force.<sup>245</sup> The study notes that in terms of compliance (i.e. actual provision of information in response to requests), South Africa had "by far the lowest score of the seven monitored countries with freedom of information laws."<sup>246</sup> This receives some corroboration from the 2005-2006 Annual Report of the South African Human Rights Commission, which notes with concern: "The number of public bodies submitting section 32 reports [on their performance under the Law] continues to remain low with a decrease in the number of reports received compared to the previous reporting period."<sup>247</sup> It is clearly a problem if public bodies do not even fulfil clear, highly visible and officially monitored statutory obligations like reporting.

## The Right of Access

The right of access to public records is set out in section 11(1) of the RTI Law, which provides that an applicant (referred to as a requester) must be given access to a record if he or she complies with the procedural requirements set out in the Law and the record is not covered by an exception. The right to access information held by private bodies is set out in section 50(1) of the Law and is substantially identical to the right defined for public bodies, with the important difference that it is only engaged where the information is required for the exercise or protection of a right. This Chapter focuses mainly on the right of access in relation to public bodies; the Law contains parallel, and very similar, provisions regarding access to information held by private bodies.

Fairly detailed 'objects' for the RTI Law are set out in section 9. These include: giving effect to the constitutional right to access information, subject to justifiable limitations, including those "aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance"; giving effect to the constitutional obligation to promote a human rights culture, including by allowing public bodies to access information held by private bodies; establishing practical mechanisms to give effect to the right of access "as swiftly, inexpensively and effortlessly as reasonably possible"; and generally promoting transparency, accountability and good governance, including through public education.

These objects underpin the Law, giving it direction. They are also given concrete effect in section 2, dealing with interpretation, which requires courts, but apparently not others tasked with interpreting the Law, such as public officials, to prefer any reasonable interpretation which is consistent with the objects of the Law over any other interpretation which is inconsistent with those objects.

A record of a public or private body is defined in section 1 simply as any recorded information, regardless of form or medium, which is in the possession of that body, whether or not it was created by that body. The Law applies to such records regardless of when they came into existence and records are deemed to be records of a body if they are in its possession or control (section 3). This simple definition encompasses all information held in any form by a public or private body, giving effect to the principle of maximum disclosure.

A public body is defined in section 1 of the Law as a department of State or administration in the national, provincial or municipal spheres and any other institution exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation. This would not appear to include private bodies which are substantially publicly funded, unless their duties find legislative expression. Pursuant to section 8, the same body may be considered public in relation to certain information and private in respect of other information. The Law does not apply to cabinet or its committees, the judicial functions of courts and judicial officers of those courts, or individual Members of Parliament (section 12). These are unfortunate exclusions, not found in most right to information laws, although many do include an exception in favour of cabinet documents.

The Law defines a private body as a natural person or partnership which carries on any trade, business or profession, or any former or existing juristic person.

Anyone may make a request for access to information. The Law specifically refers to public bodies as being able to make requests for information from private bodies, while they are at the same time largely prohibited from making requests for information under the Law from public bodies.

## Procedural Guarantees

Requests must be made to an information officer at his or her address, fax number or electronic mail address, in the prescribed form,<sup>248</sup> and must, at a minimum, identify the records requested and the applicant, and specify the form and language in which access is sought. Where an applicant is unable to submit a written request, he or she may make an oral request and the information officer is obliged to reduce it to writing and provide the applicant with a copy (section 18). A request for information shall not be affected by either the applicant's reasons for wishing to access the record or an information officer's views as to what those reasons might be (section 11(3)).

Information officers must provide "such reasonable assistance, free of charge, as is necessary to enable" applicants to make requests. A request may not be rejected without first offering the applicant this assistance (section 19). Section 21 stipulates that information officers are also required to take such steps as are reasonably necessary to preserve any record which is the subject of a request, until that request has been finally determined.

A decision must be made on a request as soon as possible and in any event within 30 days (section 25). This period may be extended for a further 30 days where the request is for a large number of records and to comply within 30 days would unreasonably interfere with the activities of the body, where a search must be conducted in a different city or where inter-agency consultation is required that cannot reasonably be completed within the original 30 days. The applicant must be notified of any extension of the time limits (section 26). Different timelines apply where a third party interest is engaged (see below). Pursuant to section 27, failure to respond to a request within the prescribed time is a deemed refusal of access. Interestingly, for the first year of operation of the Law, the period for deciding on requests is 90 days and for the second year, 60 days (section 87). An applicant whose request is being granted must normally be given access immediately once any fee has been paid.

The Law contains detailed provisions on the transfer of requests, which is required whenever the record in question is in the possession of a public body other than the one with which the original request was filed or the record is more closely connected with another body. Such transfers must be made as soon as possible and in any event within 14 days. This period is not additional to the time limit for responding to requests. The applicant must be informed about the transfer (section 20). Section 23 provides for situations in which a record does not exist or cannot be found, in which case the applicant must be notified of that fact, as well as of the steps taken to attempt to locate the record. This notification is deemed to be a refusal to grant access for purposes of appeal.

The South African Law contains detailed provisions on third party notice and intervention, which is the subject of Chapter 5 of Part II. Where certain exceptions are engaged – specifically those that involve the rights of third parties such as protection of privacy or commercial confidentiality – any third parties to whom the information sought relates must be informed as soon as possible and in any case within 21 days of the request, the applicant and any possible application of the public interest override (section 47). Third parties must then be given 21 days either to make representations as to why the request should be refused or to give consent to disclosure of the record (section 48). A decision on disclosure must be made within 30 days of notifying relevant third parties of the request, and they must be notified of the decision. Where the decision is to grant access, the applicant must be given access within a further 30 days (i.e. within 81 days of lodging the request), unless the third party lodges an appeal against the decision (section 49).

Where a request is granted, notice shall be provided to the applicant stipulating the fees to be charged, the form in which access will be given and the right to appeal, for example against the form of access or the fee. Where a request is refused, in whole or in part, the notice must include adequate reasons for the denial, along with the provision of the Law relied upon and the right to appeal (section 25).

The Law provides for some detail in terms of the forms of access that applicants may request, including a copy, inspection or viewing of the record, a transcript, an electronic copy or extraction of the information from the record by a machine. The applicant must be given access in the form requested unless this would unreasonably interfere with the operations of the public body, be detrimental to the preservation of the record or infringe copyright. The Law also provides for special forms of access for persons with disabilities, at no extra charge. Finally, applicants may request the record in a certain language and access must be provided in that language if the record is available in it (sections 29 and 31).

Applicants may be charged fees for requests, both for reproduction of the record and for search and preparation. Where these fees are likely to be above a predetermined limit, the applicant may be asked to make an advance deposit. The Law specifically provides for the minister to exempt any person from paying the fees, to set limits on fees, to determine the manner in which fees are to be calculated, to exempt certain categories of records from the fee and to determine that where the cost of collecting the fee exceeds the value of the fee, it shall be waived (section 22).

Regulations adopted by the Minister of Justice and Constitutional Development in February 2002 set out a schedule of fees for access which, for requests to public bodies, comprises a R35 (approximately USD5.30) fee for processing a request and access fees of R0.60 per page (approximately USD0.10) for photocopying, R5 (approximately USD0.70) for a floppy disk and R40 (approximately USD5.7) for a compact disk. Six hours of staff time is set as the limit before a deposit may be demanded.<sup>249</sup> In an October 2005 Government Notice, the Minister of Justice exempted requestors earning less than R14,712 per annum (approximately USD2,101)<sup>250</sup> from having to pay any of the access/reproduction fees specified above. The same Notice provides that fees may not be charged where the cost of collection would exceed the fee or for requests for personal information.<sup>251</sup>

The Law also provides for the correction of personal data, where this is not already catered to by another law (section 88).

## Duty to Publish

The South African RTI Law does not include a duty to publish as such, and this is a serious shortcoming. It does, at least, require each public body to provide an annual report to the responsible minister, who is the minister responsible for the administration of justice, detailing which categories of records are automatically available in the absence of a request, including for inspection, for purchase or free of charge. The minister, in turn, must publish this information in the *Gazette* (section 15). Private bodies may also submit such a list to the minister, in which case he or she is required to publish the list in the *Gazette* (section 52).

The South Africa Law also includes a unique provision which requires the government to ensure that the name and contact details of every information officer of every public body is published in every general use telephone book (section 16).

## Exceptions

The South African RTI Law contains a very detailed, comprehensive and narrow regime of exceptions. Significantly, pursuant to section 5, the Law applies to the exclusion of any other legislation that prohibits or restricts disclosure of information and which is materially inconsistent with the objects or a specific provision of the Law. However, records requested for use in civil or criminal cases after they have been commenced and for which access is provided in other legislation are excluded from the ambit of the Law (section 7). This is presumably to preserve the system for accessing this information under the relevant civil or criminal procedure rules.

Most exceptions in the Law contain a form of harm test, although a few do not. For the most part, the standard is 'could be reasonably expected' to cause the harm in question, a relatively low standard, depending on interpretation. For some exceptions, the standard is the relatively higher one of 'would be likely'. The Law does not provide for the issuing of certificates of confidentiality.

All exceptions are subject to a form of public interest override. The override applies whenever the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law or an imminent and serious risk to public safety or the environment, and where the public interest in disclosure "clearly outweighs" the harm (section 46). This is in some ways a limited override, because of the limited categories of public interest specified, but it has the virtue of avoiding potentially messy debates about what constitutes a public interest.

The Law includes a severability provision at section 28 which requires any part of a record which does not contain exempt information, and which can reasonably be severed from the rest, to be disclosed. In this case, different notice requirements apply to the different parts of the record, namely disclosure notice rules for the part that is disclosed and refusal notice rules for the part that has been withheld.

The Law does not include a general provision on historical disclosure of records. Historical limits have, however, been imposed in relation to some specific exceptions. For example, a 20-year time limit applies to the exception in favour of international relations and the same applies to internal decision-making.

The Law provides for two general exceptions and a number of more specific ones. Where a record is to be published within the next 90 days, access to that record may be deferred "for a reasonable period", provided that an applicant may make representations as to why he or she needs the record before that time and access shall be provided where the applicant is otherwise likely to suffer substantial prejudice (section 25). Second, requests which are "manifestly frivolous or vexatious" or the processing of which would "substantially and unreasonably divert the resources of the public body" may be refused (section 45).

The main exceptions are set out in Chapter 4. The South African Law is somewhat unique in that it is both an access law and a secrecy law. This is achieved by providing that for some exceptions, the public body *must* refuse access, whereas for others the more usual language of *may* refuse access is used. The Law sets out very detailed and narrow exceptions, in many cases carving out exceptions to exceptions to further limit the scope of non-disclosure.

Section 34 sets out an exception where granting access to a record would involve the “unreasonable disclosure of personal information about a third party”. However, this exception does not apply in a number of circumstances, including where the individual has consented, the individual was informed upon providing the information that it belonged to a class of information that might be disclosed or the information is already publicly available. Importantly, the exception also does not apply to information about a public official in his or her official capacity.

An unusual exception relates to information obtained by the South African Revenue Service for the purposes of enforcing tax collection legislation (section 35). This exception is not subject to any harm test.

Section 36 protects commercial information including trade secrets, information the disclosure of which would be likely to harm the commercial interests of the third party who provided it and information provided in confidence, the disclosure of which could “reasonably be expected” to put the third party at a disadvantage. Section 37 further exempts information where disclosure would constitute an actionable breach of confidence, as well as information supplied in confidence where disclosure could reasonably be expected to prejudice the future supply of such information, and it is in the public interest that such information continue to be supplied.

The section 36 and 37 exceptions do not apply where the third party consents to disclosure or the information is already publicly available. Importantly, the section 36 exception also does not apply where the information contains the results of product or environmental testing which discloses a serious public safety or environmental risk.

Information the disclosure of which could reasonably be expected to endanger life or physical safety, the security of a building, system, other property or means of transport, or systems for protecting individuals, property or systems is also the subject of an exception (section 38).

Section 39 provides in some detail for an exception related to law enforcement and legal proceedings, including where disclosure could reasonably be expected to undermine law enforcement techniques, or the prosecution, investigation or prevention of crime. This does not, however, apply to information about general conditions of detention of persons in custody. This is welcome but it is not clear why it was deemed to be necessary, since this information should not affect law enforcement in the first place. Information covered by legal privilege is also exempt, unless the beneficiary of the privilege has waived it (section 40).

Section 41 deals with security and international relations, exempting information the disclosure of which “could reasonably be expected to cause prejudice to” defence, security or international relations. It also exempts information which is required to be held in confidence under international law or an international agreement, or which would reveal information supplied in confidence by or to another State or intergovernmental organisation, although this does not apply to information which has been in existence for more than 20 years. The latter part of this exception does not include a harm test, which is unfortunate. The same section includes a detailed but non-exclusive list of what this exception covers, in particular as regards military information, no doubt in an attempt to limit the scope of what is otherwise always a highly problematical exception. At the same time, this list includes impossibly broad categories, such as information on the vulnerability of weapons, which may well be the subject of not only legitimate but indeed important public debate.

Section 42 exempts information the disclosure of which “would be likely to materially jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy”. Once again, an indicative list is provided, which is somewhat narrower than the list for military information. The same section exempts State trade secrets or information the disclosure of which would be likely to cause harm to the commercial interests of a public body, or which could reasonably be expected to put the body at a disadvantage in negotiations or competition. This latter part of the exception does not

apply to information that contains the results of product or environmental testing, and which discloses a serious public safety or environmental risk

Another unusual exception in the South African Law applies to research, either by a third party or the public body, the disclosure of which would be likely to expose the third party or public body, or the research or the subject matter, to "serious disadvantage" (section 43). This exception would normally be considered to fall largely within the scope of the confidentiality exception and the need for it to be elaborated separately is not clear.

The South African Law, like most right to information laws, includes an exception designed to preserve the effectiveness of internal decision-making processes. Section 44 exempts records which contain an opinion, advice, recommendation, or account of a consultation or discussion for the purpose of assisting to formulate a policy. This is another exception which is not subject to a harm test and, as a result, it is potentially very broad, although it is still subject to the public interest override set out in section 46 (see above). Section 44 also exempts information the disclosure of which could reasonably be expected to frustrate the deliberative process by inhibiting the candid exchange of views and opinions within government, or the success of a policy by premature disclosure. This part of the exception does not apply to records which are more than 20 years old. Finally, section 44 exempts information the disclosure of which could reasonably be expected to jeopardise testing, evaluative material supplied with a presumption of confidence and preliminary drafts.

The South African regime of exceptions is generally a good one, in the sense that it is fairly limited. The harm and public interest tests are not as strong as they might be, and there are a couple of apparently unnecessary exceptions. On the other hand, the exceptions are drafted narrowly in a clear attempt to ensure that only legitimately confidential information is in fact kept secret.

## Appeals

The South African RTI Law provides for two levels of appeal, internally within the public body and, after that avenue has been exhausted, to the courts. There is no provision for an appeal to an independent administrative body, a serious shortcoming since court appeals are expensive and time consuming.

Either the applicant or a third party may lodge an internal appeal regarding a range of matters, including access to information, fees, extension of time limits or form of access. The appeal must be lodged in the prescribed form, within 60 days (or within 30 days if third party notice is required) and be accompanied by any applicable fees. Once again, detailed provision is made for third party intervention (sections 74-76). An internal appeal must effectively be decided within thirty days and relevant written notice must be provided to both the appellant and any third parties of the decision, as well as their right to appeal to the courts (section 77).

An appeal to the courts must, like internal appeals, be lodged within 60 days (or within 30 days if third party notice is required) of receiving the decision in an internal appeal and may only be brought after the internal appeals process has been exhausted. The grounds include those available for an internal appeal, as well as any complaint relating to a refusal of a public body to entertain a late internal appeal. The Law requires public bodies to provide the court with any record the latter might request, but enjoins the court from disclosing documents which are exempt (sections 78-80).

## Sanctions and Protections

The South African Law contains both sanctions and protections. It is a criminal offence to destroy, damage, alter, conceal or falsify a record with intent to deny a right of access, punishable by a fine or up to 2 years' imprisonment (section 90). Regulations issued by the Minister of Justice in October 2006 made it an offence for an information officer to fail to make the manual required by section 14 of the Law available, to charge

an applicant a fee for inspection or copying of the manual or to charge fees other than those prescribed, punishable by a fine or imprisonment.<sup>252</sup>

On the other hand, no one shall be liable for anything done in good faith “in the exercise or performance or purported exercise or performance of any power or duty” under the Law (section 89). The RTI Law does not provide for protection for whistleblowers but these are the subject of protection pursuant to a law specially designed for that purpose.<sup>253</sup>

## Promotional Measures

The South African RTI Law includes a number of promotional measures. Pursuant to section 1, the information officer is effectively the head of a public body and, in accordance with section 17, each public body must “designate such number of persons as deputy information officers as are necessary to render the public body as accessible as reasonably possible for requesters of its records.”

Every public body must, within six months of the Law coming into force, compile, in at least three official languages, a manual with information about its information disclosure processes. The precise contents of the manual are set out in section 14, including information about the structure of the body, how to make information requests, services available to the public, any consultative or participatory processes and a description of all remedies. The manual must be updated annually and disseminated in accordance with regulations to that effect. The 2002 Regulation contains detailed stipulations as to the dissemination of these guides, including to every place of ‘legal deposit’, the Human Rights Commission and every office of the public body.<sup>254</sup> A similar obligation is placed on private bodies pursuant to section 51, which has proven problematical, as these bodies claim that this is unduly onerous for them and few have actually published guides.

IOO

The Human Rights Commission is also tasked with publishing a guide, in all eleven official languages, on how to use the Law. Section 10 sets out in some detail what must be included in the guide, including the names and contact details of every information officer of every public body, the procedures for requesting information and assistance available through the Commission. The guide must be updated every two years as necessary. Once again, the 2002 Regulation provides for extensive dissemination of the guide, including to every place of legal deposit and every public body, and through publication in the *Gazette* and website of the Commission.<sup>255</sup>

Public bodies are required to submit an annual report to the Human Rights Commission with detailed information about the number of information requests, whether or not they were granted, the provisions of the Law relied upon to deny access, appeals and so on (section 32). The Human Rights Commission is then tasked with including in its annual report to the National Assembly information on the functioning of the Law, including any recommendations and detailed information, in relation to each public body, about requests received, granted, refused, appealed and so on (section 84).

The Human Rights Commission is also given a number of other tasks, to the extent that its financial and other resources allow, including:

- undertaking educational and training programmes;
- promoting the timely dissemination of accurate information;
- making recommendations to improve the functioning of the Law, including to public bodies;
- monitoring implementation; and
- assisting individuals to exercise their rights under the Law (section 83).

## Introduction

Sweden has extensive constitutional protection for the right to information. Article 1 of Chapter 2 of The Instrument of Government, one of the four founding documents of the Swedish Constitution, states:

Every citizen shall be guaranteed the following rights and freedoms in his relations with the public institutions:

...

- (2) freedom of information: that is, the freedom to procure and receive information and otherwise acquaint oneself with the utterances of others.<sup>256</sup>

Sweden is somewhat unique inasmuch as the entirety of its right to information law is part of the Swedish Constitution. Chapter 2 of the Freedom of the Press Act, another of the four founding constitutional documents, entitled "On the Public Nature of Official Documents" is effectively the Swedish right to information law (RTI Law).<sup>257</sup>

Sweden is also unique inasmuch as it was the first country in the world to adopt a law granting individuals the right to access information held by public bodies, having incorporated right to information provisions in the original Freedom of the Press Act in 1766. The right to access, and to correct, personal data is provided for by the Personal Data Act.<sup>258</sup> The Secrecy Act is also effectively incorporated into the RTI Law as the regime of exceptions,<sup>259</sup> and it contains various provisions implementing the right to information, such as an obligation to register documents and to organise databases with due consideration for the right of access to official documents

IOI

The Swedish RTI Law has a number of strengths and weaknesses. It lacks some of the provisions found in many more recent right to information laws, such as proactive obligations of disclosure, provision for independent administrative appeals and proactive measures to promote openness. It also excludes a number of documents from the scope of the Law, rather than including all information held by public bodies, subject to the regime of exceptions. At the same time, it has a number of very progressive rules. It requires all secrecy provisions to be set out in one central law. It also includes strong procedural guarantees, including an obligation on public bodies to create a public register of all of the documents they hold.

It is generally agreed that the culture of openness in Sweden is very strong and entrenched, after over 200 years of experience with the right to information. According to Swanström, this was originally based on an understanding by political parties that openness would help promote a more level playing field for them when they were not in power, a mature view to which few modern democracies seem to subscribe. At the same time, there are ongoing challenges, including frequent amendments which seek to expand the scope of the Secrecy Act, as well as conflict with the European Union, which has sometimes sought to limit Swedish openness on the basis of a lowest common denominator approach.<sup>260</sup>

## The Right of Access

Article 1 of Chapter 2 of the Law states simply: "In order to encourage the free interchange of opinion and the enlightenment of the public, every Swedish subject shall have free access to official documents." This provides a general but important interpretive background for the Law.

Chapter 2 of the Swedish Law devotes quite a lot of attention to describing precisely what does, and what does not, qualify as an official document. The form of documents is defined broadly to include any “record which can be read, listened to, or otherwise comprehended only by means of technical aids”.

Article 3 limits the scope of official documents to documents which are, “in the keeping of a public body, and if it can be deemed under the terms of Article 6 or 7 to have been received, prepared, or drawn up by an authority”. A record is considered to be “kept” by a public body if it is available to the body for transcription, which would include practically all recorded information held. Detailed rules govern the question of when an electronic document is ‘available’.<sup>261</sup> The Law specifically notes that letters and other communications addressed to civil servants which refer to official matters are official documents (Articles 3 and 4).

Article 6 describes documents which are considered to have been ‘received’ by a public body, including when they have arrived at the body or are in the hands of a competent official. This includes documents containing official information which are received by public officials at their private addresses. Entries for competitions and tenders in sealed envelopes are not deemed to have been received before the time fixed for their opening. Furthermore, measures taken solely as part of the technical processing of documents by a public body do not qualify the document as having been received by that body. This applies primarily to electronic records. However, the definition is still quite broad.

Article 7 provides that a document has been ‘drawn up’ by a public body if it has been despatched or finalised. The former applies whenever the document has been sent outside of the body. The latter applies only if the matter to which the document relates has been “finally settled by the authority”, “finally checked and approved” or “finalized in some other manner”. The effect of this rule, which would otherwise exclude all non-final documents, is modified somewhat by exceptions relating to ledgers or lists kept on an ongoing basis and court rulings which have been pronounced. A third exception to the ‘finalisation’ rule relates to records and memoranda which have been checked and approved, but this does not include, “protocols from meetings kept by committees of the Parliament, by the Auditors of the Parliament or by auditors of local authorities, by Government commissions, or by local authorities in a matter dealt with by the body solely in order to prepare the matter for decision”.

IO2

These provisions have the effect of excluding a range of working documents from the application of the Law, although most are subject to disclosure after the matter to which they relate has been determined. Still, preparatory documents not used in the final version may never be disclosed under this rule.

Documents which have been handed over to another public body are also considered not to have been received or drawn up.

Memoranda which have not been sent are not official documents, unless accepted for filing or where they contain factual information. For this purpose, a memorandum is an *aide memoiré* or other notation made for the purpose of preparing a case or matter. Likewise, preliminary outlines or drafts are not official documents unless they have been accepted for filing. This is analogous to the internal working document exception found in many right to information laws, but it is not subject to a harm test. Documents kept in technical storage for another body are also not official documents of the body which stores them (Articles 9-10).

Article 11 sets out a number of categories of documents which are not official documents, including the following:

- letters, telegrams and the like provided to or drawn up by a public body and intended solely for communication purposes;
- documents solely for the purpose of being published in a periodical of a public body; and
- documents which are part of a library or which have been deposited with a public body for storage or research, along with records relating to these documents.

The first of these essentially covers letters, telegrams and other messages that are distributed on behalf of the public by a public authority, such as the postal and telegraph services. However, these functions have now been privatised so the provision is effectively obsolete.

In contrast to the detailed definition of official documents, Chapter 2 devotes little attention to the issue of public bodies. Article 5 does note that “the Parliament and any local government assembly vested with powers of decision-making shall be equated with a public authority”. However, the Swedish Ministry of Justice has defined public bodies as,

...those entities included in the state and municipal administration. The Government, the central public authorities, the commercial public agencies, the courts and the municipal boards are examples of such public authorities. However, companies, associations and foundations are not public authorities even if the state or a municipality wholly owns or controls them.<sup>262</sup>

As this makes clear, companies are not public bodies, even if they are owned or controlled by the State. This is a significant limitation, particularly in modern times when many public functions are carried out by companies. However, some companies and other legal persons vested with the power to exercise public authority or to distribute publicly funds are listed in the Appendix to the Secrecy Act and are hence subject to information disclosure obligations like other public bodies.

Despite the title of the Law, which refers to the press, and Article 1 of Chapter 2, which refers to Swedish subjects, everyone can claim the right to access information. Article 5(2) of Chapter 14, General Provisions, states that except as otherwise provided for in the Law, foreign nationals are to be equated with Swedish citizens. Sweden has developed a reputation for being a good country to access European Union documents.

## Procedural Guarantees

An application for access to a document should be made to the body which holds it, which shall normally decide upon the request. However, “where special reasons so warrant”, a provision in, or specifically authorised by, the Secrecy Act may provide for processing of requests by another body. Specific reference is made in this context to documents of “key importance for the security of the Realm”. A public body may not inquire as to an individual’s motivation for requesting a document, except where this is necessary to ascertain whether or not the document is subject to disclosure (Article 14). This might be the case, for example, where information is secret, but the applicant only wants to use it for certain purposes, which do not create a risk of harm (see below under Exceptions).

The Swedish Law does not place any obligation on public bodies to provide assistance to applicants. However, public bodies are obliged to assist and give service, as in all dealings with the public, in accordance with the obligations spelt out in the Administrative Procedures Act.

Access via inspection shall be dealt with “forthwith, or as quickly as possible” (Article 12), while requests for a transcript or copy shall be dealt with ‘promptly’. In neither case are specific timelines set out, although it would appear that most requests are dealt with quickly.<sup>263</sup>

Apart from the rule set out above, whereby bodies which receive requests must normally process them, the Law does not provide for the transfer of requests or for consultation with third parties.

Where access to all or part of a document or information in a document is refused, the applicant is entitled to written notice of this fact, along with the specific grounds upon which the refusal is based.<sup>264</sup>

Any official document subject to disclosure must be made available for inspection at the place where it is kept, in a manner that enables it to be read, viewed and so on, free of charge, by anyone. Where necessary, this includes making equipment available for such purposes. These obligations do not, however, apply

where this “presents serious difficulty” or where the applicant can be provided access, without serious inconvenience, at a public body “located in the vicinity” (Articles 12-13). The document may also be copied or otherwise reproduced for a fixed fee, although public bodies are not obliged to make electronic documents available other than via a print out.

Inspection of a document shall be provided free of charge. Central statutory rates apply to the provisions of copies of documents exceeding nine pages.<sup>265</sup>

A particular feature of the Swedish right to information system, set out in Chapter 15 of the Secrecy Act, 1981, is the requirement for all public bodies to register all documents they have received or drawn up. There are four exceptions to this rule:

- documents which are obviously of little importance, such as press cuttings;
- documents which are not secret and which are kept in a manner which makes it easy to ascertain whether they have been received or drawn up by a public body;
- documents found in large numbers which have been exempted; and
- electronic records kept in a central registry.<sup>266</sup>

The register must record the date the document was received or drawn up, a registration number or other identifying designation, who the document was received from or dispatched to, where relevant, and a brief description of the document. In general, information in the register is itself open for public inspection, although in exceptional cases certain information in the register itself, as an official document, might be covered by a secrecy provision.

## IO4

### Duty to Publish

A very significant lacunae in the Swedish RTI Law is that it does not include any particular obligation of proactive publication. In practice, most Swedish public bodies do provide a wealth of information on a proactive basis, particularly via their websites.

Furthermore, provisions in various other laws and rules place certain proactive publication obligations on public bodies. The government must publish all laws and the various State authorities entrusted with the power to adopt regulations are also obliged to publish these. Material that forms the basis of legislation, such as government committee proposals, is published in a particular series produced by the government at the start of public consultation on the legislation, before the government makes its proposals to parliament.

Agreements between Sweden and other States or international organisations are published in a special series, produced by the Ministry for Foreign Affairs. “Post- och Inrikes Tidningar” (PoIT) is an official publication for disseminating announcements from public bodies and others that are obliged by law to publish information. It contains, among other things, information about shareholding companies and other associations, notices to attend shareholders’ meetings, divisions of joint property between spouses, notices to creditors and adjudications of bankruptcy. PoIT, nowadays published exclusively on the Internet, is claimed to be the world’s oldest surviving newspaper, founded in 1645.

### Exceptions

The exceptions are provided for in Article 2 of Chapter 2 of the Law although, as noted above, the definition of whether a document is official also serves to limit access. The Swedish Law has a rather unique

means of addressing exceptions and relations with other laws. Article 2(2) requires any restriction to be “scrupulously specified in the provisions of a special Act of law”, under which the government may issue detailed regulations. This special act is the Secrecy Act, which sets out comprehensive grounds for secrecy, including references to other legislation and government regulations.<sup>267</sup>

Article 2(1) of the RTI Law provides for restrictions which “are necessary having regard to” seven specific interests. Under the Secrecy Act most provisions provide for some form of harm test, although a few exceptions are absolute, in the sense that the information may be disclosed only pursuant to an overriding statutory rule (for example allowing courts to access the information). The remaining exceptions are divided into two categories. The first provides for release of information unless the public body can show that harm will result, a proper presumption of openness approach. In the second category, the presumption in favour of disclosure is reversed and the document is presumed to be secret unless it is clear that no harm will result.<sup>268</sup>

Neither the Freedom of the Press Act nor the Secrecy Act provide for a general public interest override. However, some secrecy provisions in the area of consumer protection and health and safety do include internal public interest tests. Furthermore, some provisions in the Secrecy Act authorise the government, in special cases, to disclose particular official documents, which is analogous to a public interest override.

The RTI Law also provides for severability of documents where only part of the document is covered by an exception (Article 12). The RTI Law, in conjunction with the Secrecy Act, also envisages that in some cases documents subject to secrecy may be made available subject to certain reservations, such as a prohibition on publication or on any use other than for research, where these would eliminate the risk of harm.<sup>269</sup> Similar reservations may be imposed by an individual when waiving their right to personal privacy for purposes of release of a document.

Finally, the Secrecy Act imposes time limits, ranging from 2 to 70 years, on the withholding of documents. Protection of privacy and private interests, for example, usually attracts secrecy for between 50 and 70 years, while protection of public or private commercial interests is often limited to 20 years.<sup>270</sup>

There are seven specific interests protected by the RTI Law, which correspond to separate chapters of the Secrecy Act, as follows:

- security or relations with foreign States or international organisations;
- central finance policy, monetary policy or foreign exchange policy;
- inspection, control or other supervisory functions;
- the interest in preventing or prosecuting crime;
- the public economic interests;
- protection of personal integrity and economic privacy; and
- preservation of animal or plant species.

These are, by-and-large, restrictions commonly found in other right to information laws, apart from the last one, which is somewhat unique. These are the only grounds for restricting access to official documents and, where a document is confidential, a notation must be provided on the document, indicating the provision under which the restriction is authorised (Article 16).

## Appeals

An individual may appeal any refusal to provide, or limits on access. Appeals are in most cases lodged with the administrative courts. The Secrecy Act shall “stipulate in detail” how such an appeal may be lodged and they shall “always be dealt with promptly.” An appeal against a decision by agencies of the parliament will be governed by special provisions (Article 15). There is no provision for a binding appeal to an independent administrative body, which is another serious shortcoming in the Swedish RTI Law.

## Sanctions and Protections

The Law does not provide for sanctions for breach of its provisions. However, courts have the power under the Penal Code to sanction individuals who flout the provisions of the Law, either by releasing secret documents on purpose or through negligence, or by mishandling requests for access.<sup>271</sup> The Law also does not provide protection for those who, in good faith, release information pursuant to a request. Instead, Chapter 7 of the Freedom of the Press Act, entitled “On Offences Against the Freedom of the Press” provides for sanctions for individuals who, without authority but lacking the intent to aid a foreign power, traffic in or release through ‘gross carelessness’ sensitive security information (Articles 4(4) and (5)). Article 5 of the same chapter makes it an offence deliberately to publish a secret official document acquired in the course of public service or to disregard a duty of secrecy.

## Promotional Measures

106

The Swedish RTI Law fails to incorporate any provisions placing an obligation on public bodies to undertake promotional measures. At the same time, a long-standing culture of openness, along with the implementation in practice of a number of promotional measures, means that it may be less important for these to be required by law, as is the case with many more recent right to information laws.

# **T**hailand

## Introduction

The worst economic crisis in decades, coming to a peak in the late 1990s, had a profound impact on politics in Thailand, leading to the adoption of a new Constitution in October 1997, which provided very strong rights guarantees. Among other things, the 1997 Constitution guaranteed the right to access information held by public bodies, subject only to limited exceptions in favour of State security, public safety or the interests of others, as provided for by law.<sup>272</sup> The same Constitution also guaranteed the right to receive information from public bodies before permission is given for any activity which might affect the environment, health, quality or life or any other material interest.<sup>273</sup> The same guarantees are contained in the 2007 Constitution, approved by referendum on 19 August 2007.<sup>274</sup>

Public anger over corruption and the lack of transparency in government, which was widely believed to have contributed to the economic crisis, had led to the adoption, three months prior to the 1997 Constitution, of the Official Information Act (RTI Law),<sup>275</sup> which came into effect on 9 December 1997.

The RTI Law has a number of positive features, including a wide scope of application, good general process guarantees, for the most part, and a reasonably limited regime of exceptions. At the same time, it has a number of fairly serious shortcomings, including the absence of hard timelines for responding to requests for information, a lack of independence on the part of the oversight body and very few promotional measures.

Although the RTI Law was initially greeted with enthusiasm and some important successes,<sup>276</sup> this soon diminished due to weak enforcement and, in particular, long delays in processing requests. The Official Information Commission's<sup>277</sup> English language website records 214 complaints and 135 appeals in 2007 (the total number of requests to public bodies is not recorded), although it does not indicate what the outcome of these were.<sup>278</sup>

## The Right of Access

The right of access is cast in the Thai RTI Law as a procedural right, at section 11, to make a request for information and, if that request meets certain minimum threshold standards (such as describing the information sought in sufficient detail), the public body to which the request is directed must provide the information.

The Law does not include any statement of purpose or objectives.

Information is defined very broadly to include any material that communicates anything, regardless of the form that material takes. Official information, to which the right of access applies, is defined simply as information in the possession of a State agency (the term used to describe a public body), whether relating to State business or to a private individual (section 4).

A public body is defined broadly in section 4 as, "central administration, provincial administration, local administration, State enterprise, Government agency attached to the National Assembly, Court only in respect of the affairs unassociated with the trial and adjudication of cases, professional supervisory organisation, independent agency of the State and such other agency as prescribed in the Ministerial Regulation" (section 4). This effectively captures the administrative functions of the legislative and judicial branches of government, as well as a fairly wide range of public bodies. It does not, however, cover private bodies which are substantially publicly funded.

The right of access, as provided for in section 11, applies to any person. However, the extent to which it applies to aliens – defined to include those lacking Thai nationality and not residing in Thailand, as well as certain companies and associations – shall be provided by Ministerial regulation (sections 9 and 11).

## Procedural Guarantees

Anyone may make a request for information not otherwise required to be published or made available for inspection, and the information shall be provided as long as the request is sufficiently detailed to identify the information being sought. Requests may be rejected where they are for an excessive amount of information or made too frequently without reasonable cause (section 1).

Information shall be provided within a reasonable length of time, which is not actually specified in the Law. This has caused considerable problems of delay in some cases and is one of the major shortcomings of the Law. Where the record might be damaged by giving access, the public body may extend the period

for providing the information (section 11). This is an unusual provision and it is unclear why it might be necessary to extend the time limit, already a problem with the Law, simply to protect the integrity of a record.

A public body may, notwithstanding that it holds information, advise an applicant to transfer a request to another public body. Where the information was prepared by another public body and marked by that body as confidential, the request shall be remitted to that other body for a decision (section 12). This is not unreasonable but again there are no time limits.

The Law contains reasonably detailed provisions for third party notice. Third parties must be given notice of any request concerning information that may affect their interests, and at least 15 days to provide objections in writing. Where an objection is lodged, it must be considered and the author provided with notice of the decision regarding disclosure of the information concerned. Where the decision is to disclose, this must be delayed for 15 days to give the third party the opportunity to lodge an appeal (section 17).

Applicants must be notified of any refusal to satisfy their request, and such notice shall indicate the type of information requested and the reasons for non-disclosure (section 15). This is useful but the notice could further be required to specify the exact provision relied upon for non-disclosure, as well as the right to appeal this.

Information will only be provided where it is held in a form which is ready for distribution in the sense that no further preparation, analysis or compilation is required. However, this does not apply where the information may be generated electronically, for example from a visual or sound recording system. Furthermore, where the information sought is not for commercial purposes but is necessary for the protection of the rights and liberties of the applicant, or is generally for the public benefit, the public body may still provide information which requires further processing. Where a record might otherwise be damaged, a copy may be provided in such a manner as to protect the document (section 11). Otherwise, an applicant has the right to inspect, or to obtain a copy or certified copy of the document (section 9).

The Law provides for fees to be charged by public bodies, but only with the approval of the Official Information Commission. Furthermore, due regard must be given when charging fees to the need for concessions for persons with low incomes (section 9).

Chapter III of the Law, entitled Personal Information, is a sort of mini-data protection regime, which sets out rules regarding the collection, disclosure and correction of personal data. Although for the most part this is not inconsistent with right to information principles, this is a complex subject and it would be preferable for it to be dealt with in a fully-fledge data protection act.

## Duty to Publish

The Thai RTI Law provides for both a duty to publish information in the Government Gazette and for a duty to make certain information available for inspection. Neither of these obligations apply to information which is required by another law to be disseminated or disclosed (section 10) or to information which came into existence before the Law came into force (section 42). The former obligation, found at section 7, covers information about the structure and organisation of the body, a summary of its main powers, duties and operational methods, contact details for the purpose of making requests, by-laws, regulations and policies, and such other information as may be determined by the Official Information Commission.

Section 9 requires public bodies to make the following information, subject to the regime of exceptions, available for inspection:

- a decision which has a direct effect on a private individual;
- any policy or interpretation not covered by section 7;

- a work-plan and annual expenditure estimate;
- a manual or order relating to work which affects the rights or duties of private individuals;
- published materials relating to the powers and duties of the public body;
- monopolistic contracts and joint ventures;
- resolutions of governing bodies established by law; and
- other information as determined by the Official Information Commission.

The Official Information Commission may set rules and procedures regarding access via inspection pursuant to section 9. As with requests for information, access to these documents may be subject to payment of a fee which has been approved by the Commission.

## Exceptions

The Thai RTI Law includes a full regime of exceptions. Section 3 of the Law provides that all laws which are inconsistent with it shall, to the extent of that inconsistency, be replaced by it. However, section 15(1)(6) provides that information which other laws render confidential is exempt. It must, therefore, be assumed that section 3 does not apply to exceptions and that, as a result, secrecy laws are effectively preserved by the RTI Law. Furthermore, public bodies are required to put in place systems and rules to prevent unauthorised disclosure of information, in accordance with the Rule on Official Secrets Protection (section 16).

109

Most of the exceptions do include a form of harm test, although these range from a possibility of harm (will jeopardise) to a certainty of harm (will result in). Two key exceptions which are not harm-based are internal opinions or advice, although this does at least exclude technical and factual reports, and information provided in confidence. Together, these are very significant exceptions. The Law does not provide for certificates, although it does allow information to be rendered secret by Royal Decree (see below).

Section 15, the main exception provision, provides that when issuing an order prohibiting the disclosure of official information, a public body shall take into account its duties, the public interest and any private interests involved. The reference here to the public interest, although useful, is not the same as a general public interest override, which should be couched in mandatory terms and should not be just one factor to be considered. A stronger form of public interest override is contained in section 20, which provides that officials shall not be liable for good faith disclosures where they release information for the purpose of securing an overriding public interest, and the disclosure is reasonable. This differs from public interest overrides in most right to information laws, which provide for a form of balancing between the harm to the protected interest and the overall public interest. The Thai Law, in contrast, is almost a combination of a public interest override and protection for good faith disclosures.

The Law does not include a clear statement on severability but this is probably the intention of section 9(2), which also applies to requests, and which provides that where part of the information subject to public inspection (or disclosure pursuant to a request) is covered by an exception, that part shall be deleted or otherwise dealt with so as to prevent disclosure of that part. This suggests that the remainder of the information, the non-exempt part, should still be disclosed.

The Law also provides for time limits on the non-disclosure of information. Information relating to the Royal Institution shall be disclosed after 75 years while all other information is presumed to be subject to disclosure after 20 years, although the public body may, where it is of the opinion that the information should still not be disclosed after 20 years, extend this by up to five years. The information shall then be transferred to the National Archives Division or an appropriate other archiving body or, where provided for in the rules, destroyed (section 26).

In terms of specific exceptions, section 14 provides: "Official information which may jeopardise the Royal Institution shall not be disclosed." This involves a form of harm test, but it is not clear what precisely would be covered. In practice, secrecy regarding the Royal Family is very stringent indeed.

Section 15 provides for the following categories of exception:

- information the disclosure of which would threaten national security, international relations or national economic security;
- information the disclosure of which would undermine law enforcement;
- internal opinions or advice, but not background technical or factual reports upon which they are based;
- information the disclosure of which would endanger the life or security of any person;
- personal information which would unreasonably encroach on privacy;
- information already protected by law or provided in confidence; and
- any other information protected by Royal Decree.

These are, for the most part, categories of exceptions which are recognised in the right to information laws of other countries. The two counter-examples are the exceptions in favour of the Royal Institution and the power of the King to protect information by Royal Decree.

## IIO

### Appeals

Anyone who considers that a public body has failed to publish information, to make information available or to provide information in response to a request may lodge a complaint with the Official Information Commission. This right is not applicable in certain cases, including where the public body has issued an order declaring the information exempt or overriding the objections of a third party, or an order refusing to correct personal data. These limitations seriously undermine the effectiveness of this type of complaint as they mean that the Commissioner cannot probe into the application of an exception. However, a right of appeal to the Information Disclosure Tribunal is available in such cases. The Commission must issue a decision within 30 days, which can be extended for another 30 days upon notice to the applicant (section 13).

The Law provides for the establishment of an Official Information Commission consisting of a number of Permanent Secretaries, for example for defence, agriculture and commerce, and a Minister appointed by the Prime Minister as chair, as well as 9 other members appointed by the Council of Ministers from the public and private sectors (section 27). Members hold office for 3 years, which may be renewed, and may be removed for, among other things, being incompetent, acting improperly or having been imprisoned (sections 29 and 30). This system fails to ensure the independence of the Commission, which largely consists of public officials and is chaired by a minister.

The RTI Law sets out various procedural rules for the Commission regarding meetings (section 31). The Commission has the power to require a public body to produce any information before it, as well as to inspect the premises of any public body (sections 32 and 33). Failure to comply with an order of the Commission in relation to summons or the production of information may lead to imprisonment for up to three months and/or a fine (section 40). The powers of the Commission to resolve complaints, however, are not clear from the Law.

Applicants and others may, within 15 days, appeal an order for non-disclosure or dismissing the objections of a third party to the Information Disclosure Tribunal through the Commission (section 18). Various

specialized Information Disclosure Tribunals, based on the type of information in question, such as security, economy or law enforcement, are appointed by the Council of Ministers upon recommendation of the Commission. Each Tribunal consists of at least three people, with government officials acting as secretary and assistant secretary. The lack of independence of the Commission means that the Tribunals also suffer from a lack of structural protection for their independence. At the same time, some limited protection against bias is provided by the rule prohibiting members of the Tribunal who represent a particular public body from participating in any decision concerning that public body. The Tribunal shall decide appeals within seven days and their decisions are considered final (sections 36 and 37). The powers and duties of the Tribunals, as well as procedural matters, shall be provided for in Rules adopted by the Commission and published in the Government Gazette.

Where the Commission, Tribunal or courts access information marked as confidential as part of the resolution of a dispute, they are prohibited from divulging that information as part of the consideration of the dispute (section 19).

## Sanctions and Protections

The RTI Law does not contain any sanctions for wilful obstruction of access. It also does not really include any protection for good faith disclosures. Section 20, noted above in connection with the public interest override, does protect officials who disclose information which has not been classified in accordance with section 16, even where such disclosure in fact breaches an exception set out in section 15. Furthermore, officials of a certain level, as prescribed by ministerial regulation, are exempted from liability if they disclose information in the public interest. Even in this case, however, the public body may still be subject to liability. As a result, it may be assumed that this power will rarely be used.

III

## Promotional Measures

The Thai RTI Law includes few promotional measures. As noted, the Law includes a chapter on protection of personal data, limiting the collection, storage and use of such data. This system also allows everyone to access their own personal data, subject to the regime of exceptions (sections 21-25). In addition to its mandate to receive complaints, the Commission has a mandate to provide advice to State officials and public bodies, to make recommendations regarding the enactment of regulations or rules under the Law, to provide an annual report on implementation of the Law to the Council of Ministers and to carry out other duties as entrusted to it by the Council of Ministers or Prime Minister (section 28).

# Uganda

## Introduction

Article 41(1) of the 1995 Constitution of Uganda guarantees every citizen the right to access information held by the State, except where release of the information is likely to prejudice the security or sovereignty of the State or interfere with an individual's right to privacy. Significantly, Article 41(2) specifically requires

parliament to make laws prescribing the classes of information covered by this right, as well as the procedure for realising it.

Despite these strong guarantees, it was nearly ten years before the Ugandan Access to Information Act, 2005,<sup>279</sup> (RTI Law) was signed into law on 7 July 2005, and another nine months before it came into force on 20 April 2006. Civil society had been active in advocating for a right to information law since at least 2003 and the government made a commitment to adopt one, motivated at least in part by a desire to combat corruption, the same year.

Some of the more positive aspects of the Law are a narrowly drafted, for the most part, regime of exceptions, including a developed set of exceptions to exceptions. The procedural guarantees are also well-developed and, again for the most part, progressive, particularly as regards notice, which is required to be provided in some detail at every step. Importantly, the Law provides protection for whistleblowers, or those who disclose evidence of wrongdoing. On the other hand, the Law contains only a very limited regime for proactive or routine publication of information, contrary to the trend in some of the more recent right to information laws. The Law also fails to establish an independent oversight mechanism, so that the only recourse for a refusal to provide access is the judicial system. The Law also contains an extremely rudimentary set of promotional measures, which can be a barrier to successful implementation.

Indeed, implementation of the Law remains illusive. Implementing regulations have still not been adopted as this goes to print, over two years after the Law was adopted, and this has prevented proper implementation. Efforts are currently underway to see regulations adopted but it remains to be seen whether these will be effective, and if so when.

## The Right of Access

### II2

Section 5(1) of the RTI Law clearly sets out the right of access, echoing Article 41 of the Constitution, stipulating that every citizen has a right to access information and records held by public bodies, unless release of the information is likely to prejudice security or sovereignty, or an individual's right to privacy. Section 5(2) supplements this by providing that the information citizens have a right to access should be accurate and up-to-date. A further, and important, gloss on this is provided in section 24(1), which provides for access to information or records held by public bodies if the requirements of the Law have been complied with and access is not prohibited by Part III of the Law, setting out the exceptions. This is important since the limited exceptions specifically referred to in the Constitution, as well as in section 5(1) of the Law, are insufficient to protect the various public and private interests that might legitimately override the right to access information.

Section 3 sets out the purposes of the Law which are, among other things, to promote "efficient, effective, transparent and accountable" government, to give effect to Article 41 of the Constitution, to protect individuals who disclose evidence of wrongdoing in government, to promote transparency and accountability of the organs of the State by providing the public with access to timely and accurate information, and to empower the public to scrutinise and participate in government decisions that affect them. Section 2(3) further provides that nothing in the Law shall detract from the provisions of any other law granting a right to access information.

These are all very positive purposes which, taken together, should provide a good interpretive background to the Law.

The right of access as set out in section 5 applies to both information and records. Information is defined in section 4 as including written, visual, aural and electronic information. A record is defined as "any recorded information, in any format, including an electronic format" in the possession of a public body, whether or not that body created it. These definitions would appear to cover all information held by public bodies.

The right of access applies to all information and records held by the State or any public body. Section 4 defines a public body as including "a government, ministry, department, statutory corporation, authority or

commission” while section 2(1) states that the Law applies to information held by “Government ministries, departments, local governments, statutory corporations and bodies, commissions and other Government organs and agencies”, which appears to be a bit broader. Regardless, these definitions are not as wide as those of some right to information laws, which also include bodies funded or controlled by the State, and even private bodies undertaking public functions.

As noted, the right of access applies only to citizens, contrary to best practice laws, which apply to everyone, including corporate bodies.

## Procedural Guarantees

Requests must be provided in writing, in the prescribed form. The RTI Law does not stipulate whether or not requests may be lodged electronically. The request must include a description of the information or record sought in sufficient detail to allow an experienced officer to identify it, the identity and address of the applicant and the means by which the applicant would like the information to be communicated (section 11). Where an applicant is unable, due to illiteracy or disability, to make a written request, the request may be made orally, in which case the information officer shall reduce the request to writing and provide a copy to the applicant.

Section 12 places a general obligation on information officers to assist applicants, free of charge, even when the request is for information held by another public body. It also requires information officers to give notice to applicants whose requests fail to meet the requirements described above and to offer to provide them with assistance so as to resolve the problem.

Pursuant to section 6, the right of access is not affected by any reason an applicant may give for requesting information or by an information officer’s belief as to an applicant’s reason for making a request. It might have been better had the Law simply provided, as many right to information laws do, that no reasons are required to be given, although the prohibition on information officers being influenced by their beliefs as to reasons for a request could prove important.

II3

Section 14 deals with cases where a public body does not hold or cannot, after making reasonable effort, find requested records and does not know which public body has them, in which case the applicant shall be informed of this fact in writing, along with a full account of steps taken to find the record. A notice of this sort shall, for appeal purposes, be regarded as a refusal to fulfil a request. The section also provides that, should the information be found, it must be provided to the applicant.

An applicant should normally be notified within 21 days as to whether or not his or her request will be granted (section 16(1)). This may be extended by up to another 21 days where the request is for a large number of records or requires a search through a large number of records and to comply within the original 21 days would unreasonably interfere with the work of the public body, where the request requires access to records not located in the same location and this cannot reasonably be completed within the original timeline or where the applicant consents to the extension in writing. In this case, the information officer shall notify the applicant of the period of the extension, the reasons therefore and his or her right to lodge an appeal (section 17). Pursuant to section 18, failure to comply with the relevant timelines shall be a deemed refusal of a request. These provisions provide a good balance between the need for reasonably short timelines and the need for timelines not to be so short that it is impossible in practice for officials to comply with them.

Pursuant to section 15, access to a record may be delayed where the record is to be published within 90 days “or such further period as is reasonably necessary for printing the record for the purpose of publishing it”, where the record is required by law to be published or where the record has been prepared as a submission (to a public body, public officer or particular person), but has not yet been submitted. In this case, the applicant shall be notified of the likely period of delay and given an opportunity to make representations to the information officer as to why he or she requires the record before that time. Information officers are

required to grant earlier access to the record only if there are “reasonable grounds for believing that the person will suffer substantial prejudice” from the proposed delay.

Many right to information laws provide for delays in these or analogous cases. The problem with these provisions is the absence of hard timelines. A law may, for example, require publication of certain material but give no particular deadline for this, or a deadline of two years hence. A document may be prepared for submission to a public body in the distant future, or it may never actually be submitted, in which case section 15 would allow indefinite delay. The possibility of overcoming the delay is helpful, but the standard – substantial prejudice – is high and, given that access is a right, does not suffice to negate the underlying problem of an absence of deadlines.

Section 13 provides for the transfer of requests where the information is not held by the public body originally approached or where the subject matter of the information is more closely connected to the work of another public body. Such transfer should be effected as soon as possible but in any case within 21 days and, in this case, the applicant should be informed of the fact of the transfer, the reasons for it and the period within which the request will be dealt with. These provisions are analogous to those found in other right to information laws, although the period given to effect a transfer, 21 days, is the same as to process a request, which seems unduly long for this relatively simple matter.

Pursuant to section 35, where an information officer intends to disclose a record he or she must, within 21 days, inform a third party in writing where the record might contain a trade secret of that third party, confidential financial, commercial, scientific or technical information supplied by that third party, or information the disclosure of which could result in a commercial loss to that third party. In this case, the third party shall have 20 days to make a representation as to why the information should not be disclosed and the information officer shall, within another 21 days, decide whether or not to release the record (section 36(1)). This sort of provision is common in a right to information law, save for the timelines, which are unduly long and do not conform to the time requirements set out in sections 16 and 17 (since the various periods listed in this section run to over 60 days).

## 114

Where a decision has been made to grant a request, notice shall be provided indicating any fee to be paid, the form in which access is proposed to be given and the right of the applicant to appeal against the proposed fee or form of access, as well as the procedure for making such an appeal (section 16(2)). Where a request is refused, the notice shall state adequate reasons for the refusal, including the provisions in the RTI Law upon which it is based, the right of the applicant to appeal against the refusal, and the procedure for doing so (section 16(3)). Where access to part of a record is granted and part refused, notice should be provided in accordance with the above for the respective parts of that record (section 19(2)).

The RTI Law includes very detailed provisions on the form of access. Section 20(2) provides a long list of possible forms of access, which include a copy of a record (including in electronic form where relevant), inspection of the record (including via sound equipment), the extraction of information from the record using equipment available to the public body and even for the applicant to make copies of a record him- or herself, subject to certain conditions. Access should normally be provided in the form requested, unless this would unreasonably interfere with the work of the public body, be detrimental to the preservation of the record or breach a copyright not held by the State. Where access is, for one of these reasons, provided in a form other than that requested, the fee shall not exceed that which might have been levied had the information been provided in the form requested. The Law also includes detailed provisions on access by persons with disabilities, to whom access should be provided in an appropriate form, unless this would be ‘outrageously expensive’. Fees are, in analogous fashion, capped at the level they would have been had the person not had the disability.

The RTI Law includes only very framework rules on fees. Section 20(1) provides that access should be granted as soon as any fee is paid. No other mention is made of fees in the Law itself, other than to grant the minister responsible for the Law the power to make regulations regarding “any matter relating to the fees including the procedures and guidelines for determining when such fees should be waived or reduced”. Such fees must, however, represent only the actual cost of retrieval and reproduction of the information (section 47(1)(b) and (2)). This system has its strengths and weaknesses. It does at least ensure that there is a central set of fee rules, ensuring consistency across public bodies on this important matter, along with, presumably, fee waivers or reductions. On the other hand, inclusion of retrieval costs has the

potential to escalate the cost of access considerably. It also means that applicants are somehow made responsible for the consequences of poor record management by public bodies.

## Duty to Publish

The main provision on proactive publication is section 7, which requires a manual to be prepared within six months of that section coming into force, to be updated at least every two years. The manual shall be made available 'as prescribed' and shall at least contain: a description of the public body and its functions; the postal address and other contact details of the information officer and every deputy information officer; the address of the public body where the public may submit requests for information; a description of the process for making a request; a description of the subjects on which the body holds information; a notice (as provided for in section 8, see below) listing the information which is routinely available; a description of the services the body provides to the public and how to access them; a description of any opportunities the public has to participate in decision-making; a description of all remedies available to the public; and such other information as may be prescribed.

This is a respectable list but is otherwise nowhere near as detailed as those found in many of the right to information laws which have been adopted in recent years. In particular, the idea of just publishing a manual, as opposed to making a wide range of information available over the Internet, seems unduly limiting. How this information should be disseminated is, as noted, left up to subsequent regulation.

Section 8 requires public bodies to publish, at least every two years, a description of the categories of information that are made available on a proactive basis. Section 9 requires public bodies to ensure that the postal address and other contact details of information officers are published in every directory that is issued for general use. This is useful from the perspective of access to information, although it may be doubted whether the private address of information officers, if that is what is intended, should be made available.

115

## Exceptions

The RTI Law contains a comprehensive regime of exceptions in Part III. This Part even has its own interpretive guidelines, in section 23, which essentially preclude provisions from being read in such a way as to limit other provisions. Section 2(2) sets out two complete exclusions from the ambit of the Law, namely cabinet records (and records of its committees) and records of court proceedings before the conclusion of the case to which the records related. Cabinet documents are again protected under section 25, although this latter provision does at least envisage the minister making rules for disclosure of certain categories of records – presumably meaning cabinet records – which shall or may be available after seven, fourteen and twenty one years. It is unclear how these rules will operate in practice.

The Law is unclear as to its relationship with other laws and, in particular, secrecy laws. Presumably normal rules of interpretation thus apply so that which law will prevail will depend on a number of different considerations. Like a few other right to information laws, the Ugandan RTI Law is also a secrecy law, as signalled by the fact that some of the exceptions are mandatory (i.e. officials are prohibited from disclosing the information covered, instead of just being permitted not to disclose it). This is the case for cabinet records, commercially sensitive and other confidential third party information, and protection of individuals against danger, a fair trial and legally privileged information (see below for more detailed elaboration of these categories). Although there is nothing wrong in principle with this, it can undermine the message being sent by adoption of the right to information law and it also means that any protection to officers for good faith application of the law (see below under Sanctions and Protections) applies not only to disclosures but also to the withholding of information (i.e. good faith refusals to disclose information as protected just as good faith disclosures are).

Most of the exceptions do include some form of harm test, apart from the ones relating to cabinet minutes and one or two others, including one in favour of internal deliberations of public bodies. Personal information requires an 'unreasonable disclosure' and many other exceptions are based on the standard that disclosure could "reasonably be expected" to cause the harm listed. This is potentially a lower standard than applies in some right to information laws and how strictly it is interpreted will be important for the successful implementation of the Law. Many of the exceptions contain exceptions to exceptions, or circumstances that override the exception. The RTI Law does not provide for certificates to be issued by ministers warranting that certain records fall within the scope of an exception.

Section 34 contains a public interest override whereby information must be disclosed even where it otherwise falls within the scope of an exception where the disclosure would reveal evidence of a substantial breach of the law or an imminent and serious public safety, public health or environmental risk, and the public interest in disclosure is greater than the likely harm to the protected interest. Although this is limited in scope to the harms listed – breach of the law and so on – it does at least have the advantage of being clearer than a more generic reference to the public interest.

Section 19(1) includes a severability clause, whereby any part of a record which is not covered by an exception shall be disclosed. The Law does not include general historical time limits on confidentiality but such limits do apply to defence, international relations and the exception in favour of internal deliberations of public bodies (see below).

The specific exceptions are as follows:

- cabinet minutes and other records (sections 2(2) and 25(1));
- the unreasonable disclosure of personal information or personal health records, unless the person has consented, the person was informed when providing the information that it belonged to a class of information that might be disclosed, the information is already available, or the information relates to the functions of a public official (sections 21 and 26);
- information containing trade secrets, copyright, patents and the like, information the disclosure of which is likely to cause harm to the interests or proper functioning of a public body, and information supplied in confidence the disclosure of which could reasonably be expected to put the third party supplier at a commercial disadvantage, unless the information is already publicly available, the third party has consented to disclosure, or the information contains the results of a product or environmental test which reveals a serious public safety or health risk (section 27);
- information the disclosure of which would constitute a breach of a legally owed confidence or information provided in confidence the disclosure of which could reasonably be expected to prejudice the future supply of similar information, contrary to the public interest, unless the information is already publicly available or the third party has consented to disclosure (section 28);
- information the disclosure of which could reasonably be expected to endanger the life or physical safety of an individual or which is likely to prejudice the security of a building or other property, a means of transport, or a method, plan, etc. for the protection of a witness, public safety or property (section 29);
- information the disclosure of which would deprive a person of a fair trial, could reasonably be expected to prejudice the effectiveness of methods for or the actual prevention, detection or investigation of a breach of the law or the prosecution of an offender, or result in a miscarriage of justice, or is likely to reveal a confidential source of information, result in the intimidation of a witness or facilitate the commission of an offence, but information about general conditions of detention may not be withheld on these grounds (section 30);
- information which is privileged from production in legal proceedings unless the person entitled to the privilege has waived it (section 31);

- information the disclosure of which is likely to prejudice defence, security, sovereignty or international relations, or reveal information supplied in confidence by another State or international organisation, unless the record is more than twenty years old (section 32); and
- information containing advice or recommendations, or an account of a consultation or discussion, information the disclosure of which could reasonably be expected to frustrate the deliberative process by inhibiting the communication of an opinion, report or recommendation or the conduct of a consultation or discussion, unless the record is more than ten years old (section 33).

Generally, these exceptions are in line with accepted standards, although a couple of points are relevant. First, as noted, an important part of the internal deliberations exception does not require any harm – all advice and recommendations are covered – leading to a potentially huge gap in the right of access, as with the blanket exception for cabinet documents. Second, the Law provides a non-exclusive list of examples of defence information. Although perhaps apparently reasonable at first blush, many of these cover much information which, in democracies, are in fact a necessary part of public scrutiny of official action. To give one example, the list includes information relating to the quality, characteristics or vulnerabilities of weapons, whereas much public debate about this is perfectly legitimate. Thus, although the list is no doubt an attempt to narrow the scope of the defence exception, it fails to achieve this objective.

## Appeals

The Ugandan RTI Law does not provide for an appeal to an independent administrative body. This is a distinct shortcoming and experience in other countries has proven the importance of the possibility of an independent appeal. The Law does, however, contain relatively detailed rules on appeals to the courts. Section 37 provides for individuals to lodge complaints with the Chief Magistrate against any refusal to grant access, undue delay in responding to a request or a refusal to grant access in the form requested. Pursuant to section 38, anyone aggrieved by a decision of the Chief Magistrate may, within 21 days, appeal to the High Court. The Rules Committee<sup>280</sup> is required to adopt a set of rules for the processing of these complaints (section 39).<sup>281</sup>

II7

Section 40 states that, in hearing a complaint, the court may, notwithstanding anything in the RTI Law or any other law, examine any record held by a public body and no such record may be withheld on any grounds, except where access is expressly prohibited by the RTI Law or any other law. This is somewhat confusing and the intention of the drafters is far from clear. It may mean that courts shall have access unless a law specifically denies them – as opposed to the general public – this possibility. Many best practice right to information laws simply provide for the administrative appeals body, and the courts, to have full access to records although of course this may be overcome by other legislation. When accessing records, the court may not disclose any record to which access has been refused and, to achieve this, it may, among other things, receive representations *ex parte* or hold hearings *in camera*. Pursuant to section 22, public bodies must preserve a record until all appeal procedures relating to it have been exhausted.

In any hearing under the RTI Law, the proceedings are civil in nature, although the burden of proving that a refusal to grant access, or any other decision under the Law, is legitimate lies with the party claiming that it complies with the Law (section 41). Given that the Law places obligations almost exclusively on public bodies, this burden would normally fall on them. In making a decision on a complaint under the RTI Law, the court may, among other things, confirm or set aside the original decision, require access to the information requested to be granted, grant interim or specific relief, including compensation, order payment of costs, or require a public body to take such other action as it deems necessary (section 42). This is a broad set of remedial actions which empower courts to ensure proper implementation of the Law.

## Sanctions and Protections

The Ugandan RTI Law contains strong provisions on both sanctions and protections. Pursuant to section 46, anyone who, with intent to deny access, destroys, damages, alters, conceals or falsifies a record commits an offence punishable by up to 240 'currency points' (the Schedule sets a currency point at 20,000 Ugandan Shillings or approximately USD11.50) and/or imprisonment for up to three years.

On the other hand, no public officer shall be subject to any civil or criminal liability for any act done in good faith in the exercise or performance of any power or duty under the RTI Law (section 45). Officers are thus protected for disclosing information as long as they act in good faith. As noted, this would protect both the disclosure of information as well as the withholding of it, on the basis that this was required by the RTI Law, given that it is both a secrecy and access law.

Section 44 of the RTI Law provides protection against legal, administrative or employment-related sanction for whistleblowers – those who release information on wrongdoing or a serious threat to health, safety or the environment – as long as they acted in good faith and in the reasonable belief that the information was true and disclosed evidence of wrongdoing. For the purposes of that section, wrongdoing includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or maladministration. This is significant because very few right to information laws include protection for whistleblowers, although a growing number of countries have separate legislation on this.<sup>282</sup>

## Promotional Measures

118

The Ugandan RTI Law has very little in the way of promotional measures. Section 10 provides that the chief executive of each public body is responsible for ensuring that its records are accessible. This is consistent with the definition of information officer who, pursuant to section 4, is the chief executive. Throughout the Law, as noted in this chapter, the information officer bears primary responsibility for the implementation of most of the obligations placed on public bodies. Identifying this position with the leading management figure should at least have the effect of ensuring that these responsibilities are taken seriously within public bodies.

Pursuant to section 43, each minister shall submit an annual report to Parliament regarding those public bodies for which he or she is responsible, describing the requests for information made to those public bodies, whether or not access was given and, if not, the reasons. Reporting of this sort is common in right to information laws, but many such laws provide for more detailed and extensive reporting obligations than the Ugandan RTI Law.

The Ugandan RTI Law does not include a number of other promotional measures found in many right to information laws, such as an obligation to produce a guide for the public on how to request information, a system to promote efficient record management or an obligation to train officers on information disclosure. The Law also fails to identify a specific locus of responsibility within government for promoting the proper implementation of the Law, which may lead to this important matter effectively falling between the cracks, as it were.

## Introduction

The United Kingdom does not have a constitutional bill of rights and the right to information does not find constitutional expression. The Human Rights Act 1998, which, although formally simply an ordinary piece of legislation, has some form of special status, incorporates the guarantee of freedom of expression found in the European Convention on Human Rights. However, the European Court of Human Rights has refused to find a right to access information held by public bodies as part of the generally guarantee of freedom of expression,<sup>283</sup> and it is most unlikely that British courts would interpret this right any more expansively.

The United Kingdom presents an interesting conundrum on the right to information, contrasting a vibrant media operating in an atmosphere of relatively robust respect for freedom of expression with a government which has traditionally been extremely secretive. This explains the odd situation whereby the Freedom of Information Act 2000 (RTI Law) was not passed in the United Kingdom until November 2000,<sup>284</sup> long after most established democracies had adopted such a law, and even then did not come fully into force until January 2005.

This late adoption of a right to information law was despite a long campaign by local civil society groups, which had been pushing for a law for decades. An attempt to have a law adopted through the introduction of a private members bill in 1978 failed and, despite 'peer group' countries like Australia, Canada and New Zealand all passing right to information laws in the early 1980s, the British government refused to do so. When the Labour party came to power in 1997, after a long period of Conservative rule, one of its election promises was to adopt right to information legislation, and this was done in due course in 2000. In October 2001, shortly after the attacks of 11 September in the United States, the government delayed implementation of key elements of the Law until January 2005.

The RTI Law of the United Kingdom includes good process guarantees and a broad scope of application, along with a number of innovative promotional measures. For example, it introduces the idea of a publication scheme for proactive publication, providing a flexible tool for increasing the scope of information subject to disclosure over time. At the same time, it is seriously undermined by a very extensive regime of exceptions. These are not only broad on their face but many lack any harm test and are not subject to a public interest override.

## The Right of Access

The first provision in the United Kingdom's RTI Law, section 1(1), provides that any person "making a request for information to a public authority is entitled" to be informed whether or not the body holds the information and, if it does, to have the information "communicated" to him or her. The right is made subject to a number of other provisions in the Law, including:

- any reasonable request by the body for further information in order to identify and locate the information;
- the regime of exceptions;
- the payment of any fees; and
- an exception for vexatious or repeated requests (sections 1(2) and (3)).

The Law does not include a section on purpose, although the long title refers generally to its purpose as being to “make provision for the disclosure of information held by public authorities”.

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

The main means under the Law for designating public bodies is through a list in Schedule 1, running to some 18 pages. The list includes all government departments, the various legislative bodies (the Law does not cover Scotland, which has its own law),<sup>285</sup> the armed forces and numerous other bodies listed individually by name. It does not, however, include the special forces, which are completely excluded from the ambit of the Law.

The Law also provides that the Secretary of State may add to or remove from the list of bodies in Schedule 1 subject to certain conditions (section 4), or more generally designate as public, bodies which “exercise functions of a public nature” or which provide contract services for a public body (section 5). A number of section 4 orders have been made.<sup>286</sup>

Finally, publicly-owned corporations, defined as bodies wholly owned by the Crown or a public body other than a government department, are also public bodies (section 6). The Law also provides that where a body is designated as a public body only in relation to certain information, the obligation of disclosure is similarly restricted to that information (section 7).

## I2O

There have been attempts recently, in the form of the MacLean Bill,<sup>287</sup> to remove parliament from the ambit of the Law, but these were fiercely criticised and now appear to be dead.<sup>288</sup> More encouragingly, a consultation was announced on 25 October 2007 to consider extending the scope of the Law to a wider range of private bodies performing public functions.<sup>289</sup>

The right to access information under the United Kingdom RTI Law is not limited by nationality or residence.

### Procedural Guarantees

A request to access information must be in writing and specify the name and address of the applicant, as well as a description of the information desired. A request is deemed to be in writing if it is received electronically, as long as it is legible and capable of being used for subsequent reference (section 8). Although the Law does not specifically state that reasons are not required when making a request, this is implicit given that reasons are not included in the list of what must be provided.<sup>290</sup> Public bodies are required to provide such assistance to applicants, “as it would be reasonable to expect the authority to do” (section 16). The extent of this obligation is elaborated on in the Code of Practice adopted by the Secretary of State pursuant to section 45 of the Law.<sup>291</sup> While the Code is not formally binding of itself, it is widely considered to be an authoritative elaboration of provisions in the Law which are binding. Public bodies must assist those unable to frame their requests in writing, either by directing them to bodies which can help them or, exceptionally, by reducing the request to writing themselves (paragraph 7). Where a request does not describe the information sought in sufficient detail, assistance should also be provided (paragraphs 8-9).

A public body must normally either provide the information or inform the applicant of its refusal to do so promptly and, in any case, within twenty working days. For the purpose of calculating the twenty days, the time between informing the applicant of the fees to be paid and the date on which those fees are actually

paid is not counted. The Secretary of State may, by regulation, extend this period in respect of different classes of information to up to 60 days (section 10).<sup>292</sup>

A slightly different regime applies when a disclosure decision depends on a consideration of the overall public interest.<sup>293</sup> In such cases, the public body does not need to provide the information, “until such time as is reasonable in the circumstances” (section 10). However, the applicant must be notified within the twenty days that the matter is still under consideration, and this notice should give an estimate of the time within which a decision will be made (section 17(2)). Where, after such a delay, the final decision is not to disclose, a further notice must be sent setting out the reasons for this (section 17(3)).

The RTI Law does not address the questions of transfer of requests or consultation with third parties directly but, rather, provides for elaboration of these matters in the Code of Practice pursuant to section 45. In general, where the information sought is held by another public body, the applicant should be informed of this and of the contact details of that other public body. Where this would be ‘more appropriate’, a request may be transferred directly to another public body but only where that public body has been consulted to verify that it does hold the information and where objections from the applicant are not likely (or his or her consent to the transfer has been obtained). In this case, the applicant shall be informed of the transfer as soon as possible and the time limits start to run from the date on which the other public body receives the request (Part III of the Code of Practice).

Part IV of the Code of Practice addresses the issue of consultations with third parties, which are highly recommended where the information relates to someone other than the applicant or where disclosure of the information is likely to affect the interests of a third party. Where the information has been supplied by another public body, that body must be notified and where appropriate consulted, before the information is disclosed.

Notice must be provided to an applicant of an refusal to disclose information, stating the exception which is being applied, the reasons therefore, and details of any internal complaints procedure, as well as the right to lodge a complaint with the Information Commissioner (section 17).

**121**

Under the RTI Law, the applicant may specify the form in which he or she wishes to receive the information. Three different forms are listed as options for the applicant: in permanent or another form; an opportunity to inspect a record containing the information; or a digest or summary of the information in permanent or another form. The public body must provide the information in the form requested, as far as to do so is “reasonably practicable”, taking into account, among other things, the cost (section 11).

The Law contains two separate systems for fees, one for ‘ordinary’ request and one which comes into play for more complicated requests. Pursuant to the first, public bodies may make disclosure of information conditional upon payment of a fee and any such fee must be paid within three months (section 9(2)). Such fees must be in accordance with regulations made by the Secretary of State and these may prescribe that no fee is to be paid in certain cases, set a maximum fee and/or provide for the manner in which fees are to be calculated. Regulations adopted in 2004 provide that only the costs of informing the applicant of the fact that it holds the information and communicating the information to him or her (including reproduction and postage or other transmission costs), but no costs for staff time, may be charged.<sup>294</sup>

This regime does not, however, apply to the second fee system which, pursuant to section 12, comes into play when the cost of providing information would exceed such “appropriate limit ... as may be prescribed”. The 2004 Regulations set this limit at £600 (approximately USD1234) for central government and parliament and £450 for the wider public sector. In calculating the costs, the time spent determining whether the information is held, and the time spent locating, retrieving and extracting the information may be charged at £25/hour (approximately USD54) (paragraph 4). The cost of multiple requests may be aggregated where two or more requests relating to similar information are received within a period of 60 working days, and are made by the same person or persons who appear to be acting in concert or in pursuance of a campaign. Where the costs would exceed the limit, the public body is not under any obligation to provide the information although, pursuant to section 13, it may still provide it and charge all of the costs noted above to calculate the limit, as well as the costs of reproducing and communicating the information to the applicant (paragraph 7 of the Regulations). The permissive language used means that section 12 is formally an exception which allows public bodies to refuse all larger requests.

There have been efforts recently to introduce retrogressive changes to the fee rules, in particular to add the cost of the time spent consulting with others and considering whether an exception applies to the calculation of the appropriate limit, and to allow aggregation of unrelated requests whenever it is “reasonable in all the circumstances” to do so.<sup>295</sup> These have just been dropped by the government as this publication goes to print.

## Duty to Publish

The United Kingdom RTI Law, unlike many other right to information laws, does not provide a list of information that each public body must, even in the absence of a request, publish. Rather, section 19 provides that every public body must develop, publish and implement a publication scheme, setting out the classes of information which it will publish, the manner in which it will publish them and whether or not it intends to charge for any particular publication. In adopting the scheme, the public body must take account of the public interest in access to the information it holds and in the “publication of reasons for decisions made by the authority”.

Importantly, the scheme must be approved by the Information Commissioner. The Commissioner may put a time limit on his or her approval or, with six months notice, withdraw the approval (section 19). Furthermore, the Law provides for the development of model publication schemes by the Commissioner for different classes of public body.<sup>296</sup> As long as the scheme remains approved, any public body within the relevant class may simply apply that scheme, rather than developing its own (section 20).

This system builds a degree of flexibility into the obligation of proactive publication, so that public bodies may adapt implementation in this area to their specific needs. It also provides for oversight by the Commissioner without placing too great a burden on him or her, taking into account the very numerous public bodies. Importantly, it allows for the levering up of proactive publication obligations over time, as public bodies gain capacity in this area.

In practice, however, there is little uniformity in the schemes produced by different bodies, apart from those who have adopted the model publication schemes. There is also substantial variation in the amount of information which similar public bodies provide under their publication schemes. This is due in part to the fact that the Information Commissioner has adopted a relaxed approach to the approval process and has not, for example, attempted to ensure that similar bodies undertake to publish similar information.

The Code of Practice published by the Secretary of State pursuant to section 45 of the RTI Law sets out some specific proactive publication duties, including to publish procedures for dealing with requests for information (paragraph 4).

## Exceptions

The United Kingdom RTI Law has a very broad regime of exceptions, referred to in the Law as exemptions, reflecting an ongoing preoccupation with secrecy in government. Indeed, this is the real Achilles heel of the Law, which is otherwise progressive. Most of the exceptions are reasonably clear, but many are anything but narrow and, in some cases, they go well beyond what has been considered necessary in other countries.

The Law preserves secrecy provisions in other laws, as well as disclosures prohibited by European Community obligations or the rules relating to contempt of court (section 44). However, it does at least give the Secretary of State summary powers to repeal or amend by order laws restricting disclosure (section 75), which could in theory serve to mitigate at least the most egregious problems of leaving in place secrecy laws. So far, only one Regulation has been adopted pursuant to this power<sup>297</sup> and, while this is positive, it failed to address the most important secrecy legislation, the Official Secrets Act 1989.<sup>298</sup> At the same time,

the RTI Law provides that nothing contained within it shall be deemed to limit the powers of a public body to disclose information (section 78). Thus, like most right to information laws, it is not in any way a secrecy law, this interest already being more than adequately catered for by the Official Secrets Act and other secrecy legislation.

Some of the exceptions are subject to a harm test but the majority are not, making them class exceptions. A common formulation of the harm test, for those exceptions which include one, is “would, or would be likely to, prejudice” the protected interest, a fairly strong formulation. In a few cases – such as legally privileged information – the exceptions effectively incorporate an internal harm test.

Certificates are envisaged in relation to the exceptions in favour of security bodies (section 23), national security (section 24) and parliamentary privilege (section 34), as well as in relation to the public interest override (see below). Where a minister issues a certificate to the effect that information falls within the scope of one of these exceptions, it shall “be conclusive evidence of that fact”, subject to different levels of review by the Information Tribunal (see below) (section 60).

The Law does provide for a public interest override, albeit in negative terms, providing that the obligation to disclose does not apply where, “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information” (section 2(2)(b)). This is a good test, requiring the grounds for exemption to outweigh those in favour of disclosure. It is, however, undermined in two key ways. First, section 2(3) provides a long list of exceptions which are “absolute”, in the sense that the public interest override does not apply to them. These include information accessible by other means (section 21), information relating to security bodies (section 23), court records (section 32), parliamentary privilege (section 34), the conduct of public affairs in relation to both houses of parliament (section 36), most personal information (section 40), information provided in confidence (section 41), and information the disclosure of which is prohibited by any other law or European Community obligation (section 44). Most of these are themselves class exceptions in the sense that they do not require a risk of harm.

The exceptions to the public interest override are wide but even more significant is the power to defeat the public interest override provided for in section 53. This allows the “accountable person” at any of the public bodies covered by this section, normally a minister, within twenty days of a decision by the Commissioner that information should be disclosed in the public interest, to sign a certificate that, “he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure” to comply with the law. The effect of such a certificate is effectively to void the Commissioner’s decision regarding the public interest override. This power is granted to all government departments, the National Assembly of Wales and any other public body so designated by the Secretary of State. In practice, this substantially undermines the enforcement powers of the Commissioner in relation to the public interest override.

The RTI Law does not include a specific provision on severability. However, the provisions of the Law apply to information, not documents, so that severability is implicit. In other words, the exceptions only extend to the information they describe, not documents containing that information, so that any information not covered by an exception must be disclosed.

The Law contains detailed provisions relating to historical records, defined for the most part as records which are more than 30 years old, although some records are protected for longer and others are not subject to any historical disclosure. A number of the exceptions no longer apply after the historical release date, including those protecting relations within the United Kingdom (section 28), court information (section 32), those protecting internal government processes (sections 35 and 36) and commercially confidential information (section 43). A consultation on reducing the 30-year limit was announced on 25 October 2007.<sup>299</sup>

There are three general exceptions, as well as some twenty specific ones. The three general exceptions are for vexatious or repeated requests (section 14), information which is already reasonably accessible to the applicant, even though this involves payment (section 21), and information intended to be published, as long as it is reasonable not to disclose it pursuant to the request, even though no date of publication has been set (section 22). This latter is problematical inasmuch as it could be abused to delay disclosure beyond the normal timelines for responding to requests.

The specific exceptions are as follows:

- information directly or indirectly supplied by or relating to a long list of security bodies and their oversight tribunals (section 23);<sup>300</sup>
- information the withholding of which is “required for safeguarding national security” (section 24) or the disclosure of which would prejudice defence (section 26);
- information the disclosure of which would, or would be likely, to prejudice relations with other States or international bodies or the interests of the United Kingdom abroad, or which was supplied in confidence by another State or inter-governmental body (section 27);
- information the disclosure of which would, or would be likely, to prejudice relations between different administrations within the United Kingdom (section 28);
- information the disclosure of which would, or would be likely, to prejudice the economic interests of the United Kingdom or the financial interests of the government (section 29);
- information the disclosure of which would, or would be likely, to prejudice criminal investigations (section 30);
- information the disclosure of which would, or would be likely, to prejudice the detection, prevention or prosecution of crime or the administration of justice generally (section 31);
- court records (section 32);
- information the disclosure of which would, or would be likely, to prejudice audit functions or the examination of the effectiveness of public bodies (section 33);
- information covered by parliamentary privilege (section 34);
- information relating to the formulation of government policy or ministerial communications; this ceases to apply to statistical information, but not other information, once the policy has been adopted (section 35);
- information the disclosure of which would, or would be likely, to prejudice the collective responsibility of ministers or the free and frank provision of advice (section 36);
- information relating to communications with Her Majesty (section 37)
- information the disclosure of which would, or would be likely, to prejudice health or safety (section 38);
- information separately required to be provided under environmental regulations (section 39);
- personal information (section 40);
- information the disclosure of which would constitute a breach of confidence (section 41);
- legally privileged information (section 42);
- trade secrets and information the disclosure of which would, or would be likely, to prejudice the commercial interests of any person (section 43); and
- information the disclosure of which is prohibited by any other law or European Community obligation (section 44).

Taken together this is a formidable list of broad, repetitive and in many cases simply unnecessary exceptions.

## Appeals

The RTI Law provides for three levels of appeal, first within the public body which holds the information, second to the Information Commissioner and then to a special Information Tribunal. Both of these latter bodies were originally established under the Data Protection Act 1998 as, respectively, the Data Protection Commissioner and the Data Protection Tribunal. The Commissioner is appointed by Her Majesty<sup>301</sup> and the Tribunal consists of a chair and a number of deputy chairs appointed by the Lord Chancellor (effectively the Minister of Justice) as well as a number of other members appointed by the Secretary of State.<sup>302</sup> Although the appointments process does not provide strong structural guarantees for this, both are effectively independent bodies in practice.

Section 45 provides for the publication by the Secretary of State of a code of practice dealing with various matters including internal procedures for dealing with complaints relating to requests for information. The 2004 Code of Practice does include detailed provisions on this in Part VI. Any written reply from an applicant expressing dissatisfaction shall be treated as a formal complaint, whether or not it is technically styled as such. It is up to each public body to set its own complaints procedure, but this shall be fair and provide for a thorough and fresh review of the matter, where possible by someone senior to the original decision-maker. Complaints shall be acknowledged and an indication of the time expected to be taken to resolve them provided. Timelines shall be 'reasonable', although no specific limit is set. The complainant shall always be informed of the outcome and, where a complaint is rejected, he or she shall be informed of his or her right to appeal that decision. Where the complaint reveals a procedural failure, steps shall be taken to ensure that it does not happen again.

Pursuant to section 50, the Information Commissioner must consider all complaints relating to the manner in which requests have been dealt with under the Law unless the complainant has not exhausted any internal complaints procedures, there has been excessive delay in lodging the complaint, or the complaint appears frivolous. Upon receipt of a complaint, the Commissioner must issue a decision notice and, where there has been a breach of any provision in Part I – including the obligation to disclose information, a failure to disclose in the form requested or a failure properly to notify the applicant of reasons for any refusal to disclose – this notice should direct the public body to take steps to rectify the problem.

The Commissioner has the power to require any public body to provide him or her with any information he or she may require either pursuant to a complaint or for purposes of ensuring that the body has complied with its obligations under the Law (section 51). The Commissioner may also require a public body to take such steps as are necessary to comply with its obligations under the Law, even in the absence of a complaint (section 52).

Where a public body fails to take the steps required of it by the Commissioner, he or she may notify the courts of this fact and the courts may inquire into the matter and, if it is substantiated, deal with the body as if it had committed a contempt of court (i.e. as if it were in breach of a court order) (section 54).

Either the applicant or the public body may appeal to the Tribunal against any decision or order of the Information Commissioner. The Tribunal has the power to review decisions of the Commissioner on both points of law and fact (sections 57-58). As noted above, the Tribunal has different powers in respect of appeals against different ministerial certificates. Where the certificate states that information relates to security bodies, the Tribunal has full powers of review on the merits and may quash the certificate if it finds that the information is not in fact exempt. Regarding national security certificates, the Tribunal only has the power to undertake judicial review, i.e. it may quash the certificate only if it holds that the Minister did not have reasonable grounds for issuing it (section 60).

A further appeal lies to the courts from a decision of the Tribunal on points of law (section 59).

## Sanctions and Protections

The RTI Law includes a number of sanctions and protections. It is an offence where, in the context of a request for information, any person “alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information”, punishable by a fine (section 77).

The Law also provides that no defamation suit shall lie in respect of the disclosure of information provided by third parties, unless that disclosure was actuated by malice (section 79). The RTI Law does not provide protection to whistleblowers, but another law does provide a detailed scheme of protection for so-called public interest disclosures.<sup>303</sup>

## Promotional Measures

The RTI Law contains a number of promotional measures. At a very general level, it provides for monies to be allocated to ensure its proper implementation (section 85). While it does not specifically provide for the appointment of information officers, the 2004 Code of Practice does require the provision of an address and telephone number to which requests may be directed, “where possible that of a named individual” (paragraph 5).

In addition to the Code of Practice mandated by section 45 of the Law, the Lord Chancellor (the Minister of Justice) is required, pursuant to section 46, to issue a Code of Practice providing guidance to public bodies regarding the keeping, management and destruction of their records. This Code shall also deal with the issue of transfer of records to the Public Record Office (the archives), including the destruction of those records which are not to be transferred.

Neither of the Codes are technically binding, although to some extent they may be considered to elaborate on binding obligations in the primary legislation. However, the Information Commission has a mandate to promote compliance with them, specifically through the issuing of practice recommendations on the extent to which public bodies are complying with their provisions (section 48).

As a matter of practice, the Department for Constitutional Affairs (DCA) has provided a number of guidance notes for public officials on how to implement the Law.<sup>304</sup> The DCA no longer exists and responsibility for this has now passed to the Ministry of Justice. The latter now issues an annual report on implementation of the Law.<sup>305</sup>

The Information Commissioner has a general mandate under section 47 to promote compliance with the Law, the two codes of practice and generally good practice in relation to the maintenance and disclosure of information. For this purpose, the Commissioner is specifically empowered to provide information on matters within the scope of his or her functions, to assess the performance of any public body (section 47), and to report annually, as well as on an *ad hoc* basis, to parliament (section 49).<sup>306</sup>

## Introduction

The Constitution of the United States includes strong protection for the right to freedom of expression, albeit cast in negative terms by prohibiting Congress from passing any law restricting freedom of speech or of the press.<sup>307</sup> The United States Supreme Court has held that this does not “[mandate] a right to access government information or sources of information within government’s control.”<sup>308</sup>

Despite the lack of constitutional protection, the United States was one of the first countries to embrace the right to information after Sweden<sup>309</sup> and Finland,<sup>310</sup> adopting legislation giving effect to this right in 1966 in the form of the Freedom of Information Act (RTI Law).<sup>311</sup> The Law has been amended a number of times since it was adopted,<sup>312</sup> most recently on 18 December 2007, just as this is going to print, when amendments to the Law were adopted in the form of the OPEN Government Act of 2007 (referred to herein as the most recent amendments).<sup>313</sup> Since that time, despite ups and downs, it is fair to say that a significant culture of openness has developed in government, fuelled not only by the RTI Law but also by the activities of whistleblowers,<sup>314</sup> as well as the Privacy Act,<sup>315</sup> which gives access to personal information held by public authorities, the Government in the Sunshine Act,<sup>316</sup> which requires disclosure of the deliberations of certain bodies, primarily those with governing boards, and the Federal Advisory Committee Act,<sup>317</sup> which requires committees that advise federal bodies to be open. In addition, all 50 individual states now have right to information laws of their own.

The United States RTI Law has a number of both strengths and weaknesses. It includes good provisions on fees, strong rules on the electronic provision of information and a number of good promotional measures, introduced recently. Weaknesses include rules on timely processing of information which may be circumvented, permission to classify documents, which has expanded significantly in recent years, and the lack of an independent administrative oversight mechanism, including with the power to hear complaints about failures by public bodies to apply the rules properly.

Implementation of the Law has also been undermined in recent years. An October 2001 Memorandum by the Attorney General reversed a previous approach whereby public bodies had been asked to exercise their discretion to disclose documents, and a Department of Justice Memorandum of March 2002 imposed further restrictions in relation to documents on weapons of mass destruction or that could otherwise threaten national security or public order. A recent report states baldly:

**In the past six years, the basic principle of openness as the underpinning of democracy has been seriously undermined.**<sup>318</sup>

## The Right of Access

Subparagraph (a)(3)(A) of the Law sets out the basic right of any person to request and receive information promptly from the bodies covered, as long as the request meets certain basic conditions and subject to the provisions of the Law. The Law does not include an internal statement of purposes or general principles of interpretation. However, section 2 of the Electronic Freedom of Information Act Amendments of 1996 sets out a number of ‘findings and purposes’ including “to establish and enable enforcement of the right of any person to obtain access to the records of such agencies, subject to statutory exemptions, for any public or private purpose”, to “foster democracy by ensuring public access to agency records and information” and to “maximize the usefulness of agency records and information collected, maintained, used, retained, and disseminated by the Federal Government”.

The new OPEN Government Act adds a number of important ‘findings’, including that constitutional democracy depends on the informed consent of the governed, that “disclosure, not secrecy, is the dominant objective of the Act” and, significantly, that Congress should regularly review the Law to determine whether further changes are necessary to give effect not to the “need to know” but the “fundamental ‘right to know’” (section 2). This effectively gives recognition to the idea of the right to information as recognised under international law.

The Law defines “record” – the term used throughout to refer to the subject of a request – as “any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format” (paragraph (f)(2)). This has been interpreted by the United States Supreme Court to include any record created or obtained by the public body in question, which is under the control of that public body when a request is lodged.<sup>319</sup> The most recent amendments to the Law also include within the definition of record, information maintained for a public body under contract (section 9 of the OPEN Government Act).

The term “agency”, which refers to the public bodies under an obligation to disclose, includes, “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency” (paragraph (f)(1)). The Law is thus focused on the executive branch of government, in all its manifestations, including where it controls private corporations. It does not, however, cover either the legislative branch – Congress – or the courts.<sup>320</sup> Nor does it cover the Executive Office of President, including, for example, the National Security Council and White House Counsel. Finally, it does not cover private bodies which are substantially publicly funded or which undertake public functions. This is relatively limited in scope compared to some of the more recent right to information laws.

There are no limits to lodging requests for information based on citizenship or residence, and foreigners do frequently use the RTI Law. This is somewhat limited by subparagraph (a)(3)(E), which states that no public body which is “an element of the intelligence community”, as defined by the National Security Act of 1947<sup>321</sup> (section 3(4)), shall make information available to a foreign government entity or representative.

## Procedural Guarantees

Anyone may make a request for information. If a request reasonably describes the information sought and is in accordance with published rules relating to time, place, any fees and the procedures to be followed, the public body must, subject to the exceptions, provide the information sought (subparagraph (a)(3)(A)). In limited cases, public bodies may aggregate different requests which actually constitute a single request (clause (a)(6)(B)(iv)). Applicants do not need to explain the reason for their request but this may assist them if they want to overcome a discretionary exception, or apply for a fee waiver or for expedited processing of their request. The most recent amendments to the Law noted above require public bodies to establish tracking systems for requests and to provide applicants with the tracking number for their request within ten days of it being lodged.<sup>322</sup>

Jurisprudence under the Law requires a public body to undertake a search that is reasonably calculated to uncover all documents. This now finds statutory form in relation to records in electronic format, for which a reasonable search effort is required, except where this would significantly interfere with the operations of the public body (subparagraphs (a)(3)(C) and (D)).

The Law does not impose any obligation on public bodies to provide assistance to applicants. Executive Order 13392, adopted in December 2005,<sup>323</sup> does seek to impose some obligation on public bodies to respond appropriately to requests, providing, at section 1(b): “agencies shall provide FOIA requesters, and the public in general, with citizen-centered ways to learn about the FOIA process, about agency records that are publicly available (e.g., on the agency’s website), and about the status of a person’s FOIA request and appropriate information about the agency’s response.”

The Law includes detailed rules on time limits. Requests shall be answered “promptly”, normally within 20 working days (subparagraph (a)(3)(A)). In “unusual circumstances”, the time limit may by notice be extended

for an additional 10 days. In such cases, the public body shall notify the applicant that the information cannot be provided within the original 20 days and provide him or her with an opportunity either to limit the scope of the request or to arrange an alternative timeframe. For these purposes, “unusual circumstances” shall mean, to the extent reasonably necessary for the proper processing of requests, the need to search for records from field facilities, the need to search through a large volume of records or the need to consult with another public body or two or more branches of the same public body (clause (a)(6)(B)).

The Law also provides for “multitrack” processing of requests based on the amount of work involved (subparagraph (a)(6)(D)), as well as for expedited processing of requests in cases where the applicant demonstrates a “compelling need”. A claim of compelling need must be determined within 10 days and notice provided to the applicant of such determination. A compelling need exists either where a failure to obtain the record could reasonably be expected to pose an imminent threat to life or safety, or where there is an urgent need to inform the public about federal government activity and the applicant’s primary focus is the dissemination of information (subparagraph (a)(6)(E)).

Pursuant to subparagraph (a)(6)(C), an applicant shall be deemed to have exhausted his or her administrative remedies if a public body fails to comply with the applicable time limits (deemed refusal). However, where the body can show that exceptional circumstances exist and that it is exercising due diligence in pursuing the request, a court reviewing the matter may allow the public body additional time to comply with the request. Exceptional circumstances do not include a delay resulting from a predictable workload of requests but any refusal by the applicant to modify the scope of a request or to arrange for an alternative timeframe for meeting the request may be taken into account. In practice, as a result of these rules, there have been a number of serious delays in the provision of information. Some bodies, such as the FBI, have delays running to several years and sometimes even decades,<sup>324</sup> many of which have been upheld by the courts.

The most recent amendments to the Law introduce a number of measures to try to address this problem. Limits on the ability of public bodies to extend the 20-day period will be introduced, certain fees may not be charged where time limits are not met and FOIA Public Liaisons must be made available to assist applicants resolve disputes. Furthermore, detailed reporting requirements on the time for responding to requests have been imposed on public bodies, to be included in the annual reports to the Attorney General (see below under Promotional Measures) (sections 6 and 8 of the OPEN Government Act).

The Law provides for neither the transfer of requests to other public bodies nor consultations with third parties. However, Executive Order 12,600 of 23 June 1987<sup>325</sup> does require public bodies to establish procedures for consulting with third parties where they may be required to disclose confidential commercial information. Furthermore, clause (a)(6)(B)(iii)(III) does refer to consultation with other public bodies in the context of delayed responses to requests for information. In practice, transfer of requests is common.

The response to a request should set out the reasons for the decision, along with any right of internal appeal (clause (a)(6)(A)(i)).<sup>326</sup> Where all or part of a request is denied, the notice shall also provide the names and titles or positions of the officers responsible for the denial decision (a)(6)(C)(i)), as well as a reasonable estimate of the quantity of information denied, unless this would itself divulge information excepted from disclosure (subparagraph (a)(6)(F)).

Pursuant to subparagraph (a)(3)(B), information must be provided to an applicant in the specified format, as long as it is readily reproducible in that format. Bodies are also required to make an effort to ensure that their records are reproducible for purposes of compliance with this duty.

The Law sets out detailed rules on the fees which may be charged for responding to requests for information. Each public body must, after public consultation, promulgate regulations specifying the schedule of fees which may be charged for access to information, as well as the procedures and guidelines for waiving or reducing these fees. The schedules must conform to guidelines promulgated, again after public consultation, by the Director of the Office of Management and Budget, which shall provide a uniform schedule of fees for all public bodies (clause (a)(4)(A)(i)).<sup>327</sup>

The Law provides for three different fee systems for different types of request. Requests for commercial use may be billed “reasonable standard charges for document search, duplication, and review”. Requests by

educational or scientific institutions which are not for commercial purposes may be billed only “reasonable standard charges for document duplication” and all other requests may be charged for search and duplication (clause (a)(4)(A)(ii)). For the latter two categories of document, no fees may be charged for the first two hours of search or for duplication of the first 100 pages of documents. And no fee may be charged where the cost of collecting the fee would exceed the value of the fee (clause (a)(4)(A)(iv)).

Only direct costs may be levied. As regards any charges for ‘review’, these shall apply only to the initial examination of the document to determine whether it should be disclosed. Furthermore, where disclosure is in the public interest because it is, “likely to contribute significantly to public understanding of the operations or activities of the government”, records must be provided without charge or at a lower charge than would otherwise be the case (clause (a)(4)(A)(iii)). This is, in effect, a waiver for the media, as well as for NGOs who can show a public interest use. Finally, no advance fee may be charged unless the applicant has already failed to pay a fee or the public body determines that the fee will exceed US\$250 (clause (a)(4)(A)(v)).

This fee regime does not displace any statutory charging system for information (clause (a)(4)(A)(vi)).

## Duty to Publish

The Law provides for two different obligations to make information available to the public on a proactive basis. Each public body is required to publish certain information in the Federal Register, as provided for in paragraph (a)(1), including the following:

- a description of its central and field organisation;
- the manner in which and from whom information may be requested;
- an overview of its general functions and of all formal and informal procedures;
- rules of procedure and a description of all forms and papers produced;
- statements of policy and legal rules of general applicability; and
- any amendments to the above.

The Law also requires public bodies, in accordance with published rules, to make available for public inspection and copying a range of information, unless this information is to be published shortly and offered for sale. Records covered which were created after 1 November 1996 must be made available by electronic means. Information covered by this rule includes final opinions and orders, statements of policy and interpretations and administrative staff manuals. Significantly, this rule also covers records released pursuant to a request which, “the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records”, as well as an index of such records, which must be made available electronically. Information may be deleted from these records, to “the extent required to prevent a clearly unwarranted invasion of personal privacy” but in such cases a written justification must be provided and the extent of the deletion must be indicated, unless this itself would result in the disclosure of exempt information. Public bodies must maintain an index of all records covered by this rule, which must be published at least quarterly (paragraph (a)(2)).

Every public body which has more than one member is also required to make available for public inspection a record of the final votes of each member in every proceeding of the body (paragraph (a)(5)).

## Exceptions

The regime of exceptions (commonly referred to as exemptions) has been rendered reasonably clear through juridical interpretation but it could be significantly improved upon. Subsection (d) provides that the Law does not justify non-disclosure of information except as provided for in the Law and that it is not authority to withhold information from Congress. In other words, the exceptions in the Law are comprehensive in the sense that no other exceptions are recognised. Significantly, however, paragraph (b)(3), the third exception, excludes from the ambit of the Law all records which are exempt from disclosure by other statutes, as long as these laws leave no discretion as to non-disclosure or establish particular criteria for withholding information. These conditions would rule out some secrecy provisions but leave in place most secrecy laws.

The first exception in subsection (b) covers all information which is specifically classified as secret, under criteria established by an Executive Order, for purposes of national defence or foreign policy, as long as the material is in fact properly classified pursuant to that Executive Order. Classification is currently governed by Executive Order 13292 – Further Amendment to Executive Order 12958, as Amended, Classified National Security Information, adopted by President Bush on 25 March 2003.<sup>328</sup> The Order does ensure some procedural guarantees against excessive classification, including who may classify information (section 1.3), on what grounds (section 1.4) and for how long (section 1.5). In general, information may be classified under the Order only if its disclosure would cause damage to national security, but the disclosure of information provided by foreign governments is presumed to cause harm (section 1.1). The Order also prohibits classification of information in certain cases, for example to conceal violations of the law, to prevent embarrassment or to restrain competition (section 1.7).

Many of the primary exceptions under subsection (b) are not subject to a harm test. As a result, many information requests fall into the “discretionary” category. A Memorandum issued by the Attorney General on 4 October 1993 called on public bodies to use this discretion to disclose information.<sup>329</sup> This was reversed by a later Memorandum issued by the Attorney General on 12 October 2001, which required public bodies to carefully consider any discretionary disclosures, stating:

Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.

The later Memorandum also promised legal defence to public bodies whenever there was a ‘sound legal basis’ for their decision to withhold information, replacing the ‘foreseeable harm’ test applied previously.<sup>330</sup>

There is no provision in the RTI Law for a public interest override.

Subsection (b) requires that any information which may be segregated from exempt material be disclosed. It also requires applicants to be informed about the amount of information deleted and, where technically feasible, the place where the deletion was made.

The Law contains nine primary exceptions in subsection (b), in addition to a general exception for information that has already been published in the Federal Register or which is required to be made available for public inspection. The first exception, relating to classified information, is detailed above.

The second exception covers records, “related solely to the internal personnel rules and practices of an agency”. There is no harm test, although the exception itself is relatively narrow. The third exception, which relates to secrecy provisions in other laws, has already been described. The fourth exception applies to trade secrets, and confidential or privileged commercial or financial information obtained from a third party. Once again, although the exception does contain conditions, it is not subject to a harm test. The fifth exception applies to inter-agency memoranda which would not be available to parties in litigation. This is effectively the internal deliberations or ‘room to think’ exception.

The sixth exception covers files the disclosure of which, “would constitute a clearly unwarranted invasion of personal privacy”, a relatively strong form of harm test. In practice, courts have applied a modified public interest test to determine whether or not an invasion of privacy is warranted. The seventh exception relates to a range of records compiled for law enforcement purposes, all of which, apart from one to protect confidential sources of information, have built-in harm tests.

The eighth exception relates to certain reports prepared by a public body responsible for regulating financial institutions. Once again, although harm may often be presumed, the exception would benefit from being explicitly subject to a harm test. The final exception, which is not found in most right to information laws, relates to geological and geographical information concerning wells – added due to lobbying by the oil industry – and it is not subject to a harm test. These last two exceptions are seldom used in practice.

Certain records are, pursuant to subsection (c), excluded entirely from the ambit of the Law (these are commonly referred to as exceptions). These include records relating to enforcement of the criminal law where the subject is not aware of the investigation and disclosure of the record could reasonably be expected to interfere with enforcement proceedings, records maintained by a criminal law body under an informant’s name, unless the status of the informant is public, and records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or international terrorism.

## Appeals

Applicants must first appeal any refusal to disclose information to the head of the relevant public body. This internal appeal must be decided within 20 working days and, if the appeal is refused, in whole or in part, the applicant must be notified of the possibility of judicial review (clause (a)(6)(A)(ii)). In unusual circumstances, as outlined above in relation to the original request, this period may be extended by written notice, for a maximum of another 10 days (clause (a)(6)(B)(i)). If there is no response within the stipulated time limits, the applicant can appeal directly to the courts.

There is no provision for an independent administrative level of appeal. This is a serious shortcoming in the Law. There are, however, currently some efforts in place to address this. The most recent amendments to the Law will establish a new Office of Government Information Services within the National Archives and Records Administration, with a mandate, among other things, or making recommendations for reform of the system and of mediating disputes between applicants and public bodies, with a view to alleviating the need for litigation.<sup>331</sup>

If the internal appeals system has been exhausted, an appeal will lie to various courts, at the choice of the applicant (subparagraph (a)(4)(B)). An appeal will also lie to the courts if the time limits for a response have been exceeded, subject to exceptional circumstances (see above, under Process) (clause (a)(6)(C)(i)).

The defendant public body must file a response within 30 days of service of the pleading in the complaint (subparagraph (a)(4)(C)). The court may require the public body to produce the record for its examination, *in camera* if warranted, and require the public body to disclose the record.

The court shall examine the matter *de novo*, and the burden of proof shall be on the public body to justify non-disclosure. However, the court is required to accord “substantial weight” to an affidavit of a public body concerning whether the information falls within the scope of an exception (subparagraph (a)(4)(B)). When considering appeals relating to fee waivers, the court shall consider the matter *de novo*, but based only on the record before the public body (clause (a)(4)(A)(vii)).

The court may, in any case where the complainant “substantially prevails”, order the government to pay reasonable lawyers fees and other litigation expenses (subparagraph (a)(4)(E)). In case of non-compliance with an order of the court, the responsible officer may be punished for contempt of court (subparagraph (a)(4)(G)).

## Sanctions and Protections

The Law includes a mechanism for addressing cases of obstruction of access. Where the circumstances of a case in which costs have been assessed against the government raises questions as to whether the personnel of the public body “acted arbitrarily or capriciously” with respect to the withholding of information, the Special Counsel shall initiate a proceeding to determine whether disciplinary action is warranted. The findings of this proceeding shall be submitted to the administrative authority of the public body concerned, as well as to the officer concerned (subparagraph (a)(4)(F)).<sup>332</sup> These provisions have never been applied. However, the most recent amendments to the Law require the Attorney General to notify the Special Counsel of each case described above, and require both the Attorney General and the Special Counsel to submit an annual report to Congress on this (section 6 of the OPEN Government Act).

The Law does not provide general protection for officials who disclose information improperly. However, Section 1.8 of Executive Order 13292 does promote challenges to improper classification of information, and provides protection against retribution for officials who launch such challenges. A variety of laws, including the Sarbanes-Oxley Act of 2002,<sup>333</sup> provide some protection to whistleblowers but there is still no comprehensive legislation protecting whistleblowers.<sup>334</sup>

## Promotional Measures

Various promotional measures are required under the RTI Law and derivative rules. Executive Order 13392, adopted in December 2005,<sup>335</sup> requires public bodies to appoint a Chief FOIA Officer with broad responsibilities for ensuring appropriate implementation of the Law, including by monitoring implementation, by making recommendations as to necessary changes and by fostering public awareness of the purposes of the exceptions (paragraphs 2(a) and (b)). The most recent amendments to the Law enshrine this at the statutory level.<sup>336</sup> Public bodies are also required to establish one or more FOIA Requester Service Centers and to appoint one or more FOIA Public Liaisons. The former is a first port of call for applicants seeking information on the status of their request, while the latter are supervisory officers with whom applicants may raise concerns (paragraph 2(c)).

The head of each public body is required to prepare and make publicly available a guide for requesting records including an index of all major information systems, a description of the main information locator systems and a handbook for obtaining various types of public information from the public body (subsection (g) of the Law).

Public bodies are required to submit annual reports to the Attorney General on their activities under the Law and these annual reports must be made publicly available, including via electronic means. The reports must, in particular, cover:

- the number of refusals to disclose information, along with the reasons;
- the number of appeals, their outcome and the grounds for each appeal that does not result in disclosure of information;
- a list of all statutes relied upon to withhold information, whether or not the court has upheld the refusal to disclose, and the scope of information withheld;
- the number of requests pending and the average number of days they have been pending;
- the number of requests both received and processed, along with the average number of days to process requests of different types;
- the total amount of fees charged; and

- the number of full-time staff working on access to information (paragraphs (e)(1) and (2)).

The Attorney General must also make all annual reports available at a central website and notify various Congressional committee representatives of their availability (paragraph (e)(3)). The Attorney General, in consultation with the Director of the Office of Management and Budget, must develop reporting and performance guidelines for the annual reports and he or she must also submit an annual report listing the number of cases arising under the Law, the exception relied upon in each case, the disposition of each case, and the cost, fees and penalties assessed (paragraphs (e)(4) and (5)).<sup>337</sup>

Section 3 of Executive Order 13392 requires public bodies to review and evaluate their right to information operations, including by reference to numerical benchmarks, and to identify ways to eliminate or reduce backlogs. A plan must be developed to ensure that applicable standards are being met, including through the increased dissemination of information proactively, to avoid the need for individuals to have resort to the request procedure. The Plan should include concrete milestones with specific timelines, and must be followed up by including a report on the development and implementation of the Plan in the annual reports filed by public bodies in 2005 and 2006. The Attorney General was required to provide a report on implementation to the President within ten months of the adoption of the Order. The Report, published in October 2006, reported that all public bodies had reviewed their performance under the Law and developed implementation plans.<sup>338</sup> At the same time, the Report noted problems with a number of the plans, as well as steps to address these.<sup>339</sup> It remains to be seen how effective implementation of the plans will be in practice.

## Notes

160. The Law is available at: [http://www.antikorrupsiya.gov.az/eng/img/Law\\_on\\_right\\_to\\_obtain\\_information\\_done.pdf](http://www.antikorrupsiya.gov.az/eng/img/Law_on_right_to_obtain_information_done.pdf).
161. Available at: <http://www.ijnet.org/Director.aspx?P=MediaLaws&ID=25178&LID=1>.
162. Banisar, D., *Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws* (Privacy International, 2006), p. 47. Available at: <http://www.privacyinternational.org/foi/foisurvey2006.pdf>.
163. *How does the Law «On obtaining of Information» WORK in Azerbaijan?* (Media Rights Institute, 2007). The Media Rights Institute is a body founded by Internews Azerbaijan. See <http://www.internews.az/eng/media/>.
164. The Code was enacted on 11 July 2000. The amendments were introduced on 20 October 2006.
165. Available at: <http://www.parliament.bg/?page=const&lng=en>.
166. Available at: <http://www.aip-bg.org/library/laws/apia.htm>.
167. Available at: [http://www.mvr.bg/NR/rdonlyres/C4EA720F-B6D3-4316-A3F9-CB4BEB9251B1/0/06\\_Law\\_Protection\\_Classified\\_Information\\_EN.pdf](http://www.mvr.bg/NR/rdonlyres/C4EA720F-B6D3-4316-A3F9-CB4BEB9251B1/0/06_Law_Protection_Classified_Information_EN.pdf).
168. See [http://www.aip-bg.org/documents/press\\_070607\\_eng.htm](http://www.aip-bg.org/documents/press_070607_eng.htm).
169. See *Access to Information in Bulgaria: 2006* (AIP, 2007), Forward. Available at: <http://www.aip-bg.org/pdf/report2006-en-end.pdf>.
170. AIP alone has been involved in over 120 court appeals.
171. The scope of this is discussed below, under Exceptions.
172. See Articles 2(1) and 7(1). See also Article 9(2).
173. Transitional and final provisions of the amendments.
174. *S.P. Gupta v. President of India* [1982] AIR (SC) 149, p. 234. See also *State of Uttar Pradesh v. Raj Narain and Others*, (1975) 4 SCC 428 and *Indian Express Newspapers (Bombay) Pvt. Ltd. v. India*, (1985) 1 SCC 641.

175. Bill No. 98-C of 2000. Available at: [http://orissagov.nic.in/e-magazine/orissaannualreference/ORA-2004/pdf/the\\_freedom\\_of\\_inf\\_act2002.pdf](http://orissagov.nic.in/e-magazine/orissaannualreference/ORA-2004/pdf/the_freedom_of_inf_act2002.pdf).
176. For a detailed review of earlier regional and national right to information developments in India see ARTICLE 19, Centre for Policy Alternatives, Commonwealth Human Rights Initiative and Human Rights Commission of Pakistan, *Global Trends on the Right to Information: A Survey of South Asia* (London: July, 2001). Available at: <http://www.article19.org/pdfs/publications/south-asia-foi-survey.pdf>.
177. Right to Information Act, No. 22 of 2005. Available at: <http://persmin.nic.in/RTI/WelcomesRTI.htm>.
178. Information provided to the author by Shekhar Singh, 13 November 2007.
179. Article 370 of the Constitution of India confers a “special status” on Jammu and Kashmir State and Parliament may make laws for it only with the concurrence of that State.
180. Available at: <http://jkgad.nic.in/roi/JK-RTI-Act-2004.PDF>.
181. See the Right to Information (Regulation of Fee and Cost) Rules, 2005, adopted 16 September 2005 and the Right to Information (Regulation of Fee and Cost) (Amendment) Rules, 2005, adopted 27 October 2007. Both available at: <http://persmin.nic.in/RTI/WelcomesRTI.htm>.
182. India does not have full whistleblower legislation but Resolution 89, adopted on 21 April 2004 by the Ministry of Personnel, Public Grievances and Pensions, does provide some protection to them.
183. Available at: <http://pdba.georgetown.edu/Constitutions/Jamaica/jam62.html>.
184. Available at: [http://www.jis.gov.jm/special\\_sections/ATI/ATIACT.pdf](http://www.jis.gov.jm/special_sections/ATI/ATIACT.pdf).
185. Pursuant to the Access to Information (Amendment) Act, 2003, adopted in December 2003. Available at: [http://www.jis.gov.jm/special\\_sections/ATI/Amendment.pdf](http://www.jis.gov.jm/special_sections/ATI/Amendment.pdf). See, in particular, new section 5(1). Regulations were adopted in 2003, providing for implementation of various aspects of the Act. Available at: [http://www.jis.gov.jm/special\\_sections/ATI/regulations.pdf](http://www.jis.gov.jm/special_sections/ATI/regulations.pdf). References are to sections of the Act as amended.
186. A Green Paper is an official discussion document which allows for public input and discussion prior to formalising policy proposals either in a White Paper or in draft legislation.
187. According to Kati Suominen, the Law had been stalled for 11 years and passed after extensive consultation with civil society. See *Access to Information in Latin America and the Caribbean*, available at: <http://www.juridicas.unam.mx/publica/librev/rev/comlawj/cont/2/arc/arc2.pdf>.
188. The Group has official approval of its terms of reference from the Minister but otherwise has no official powers.
189. The report is available at: [http://jard.gov.jm/ati/index.php?option=com\\_docman&task=cat\\_view&Itemid=1&gid=70&orderby=dmdate\\_published&ascdesc=DESC](http://jard.gov.jm/ati/index.php?option=com_docman&task=cat_view&Itemid=1&gid=70&orderby=dmdate_published&ascdesc=DESC).
190. Pursuant to section 30(4) of the Jamaican Interpretation Act, this means that a regulation must be laid before both houses of parliament at the earliest possible opportunity and either house may, within 21 days, annul the regulation. The phrase ‘subject to affirmative resolution’ means that the regulation shall not come into effect unless and until it is affirmed by a resolution of each house of parliament.
191. Act No. 20 of 1982. See section 10 of the Act. Available at: <http://www.moj.gov.jm/laws/statutes/The%20Archives%20Act.pdf>.
192. See the review of the Jamaican Act in the Commonwealth Human Rights Initiative’s Spring 2006 Newsletter, available at: [http://www.humanrightsinitiative.org/publications/nl/newsletter\\_spring\\_2006/article6.htm](http://www.humanrightsinitiative.org/publications/nl/newsletter_spring_2006/article6.htm).
193. See note 189.
194. Available at: [http://www.kantei.go.jp/foreign/constitution\\_and\\_government/frame\\_01.html](http://www.kantei.go.jp/foreign/constitution_and_government/frame_01.html).
195. See Repeta, *Local Government Disclosure Systems in Japan*, National Bureau of Asian Research, Paper Number 16, October 1999, p. 3. One such case is: Supreme Court Criminal Case Reporter, Vol. 22, No. 23 (1969), p. 1490 (the “Hakata Station Film Case”).

196. It was amended by Law No. 84 of 2004, which came into effect on 1 April 2005. The amended version is available at: <http://www.cas.go.jp/jp/seisaku/hourei/data/AIHAO.pdf>.
197. See Repeta and Schultz, *Japanese Government Information: New Rules for Access*, <http://www.gwu.edu/~nsarchiv/nsa/foia/japanfoia.html>.
198. Law Establishing the Information Disclosure and Personal Information Protection Law Review Board, Law No. 60 of 2003, adopted 30 May 2003.
199. Unpublished memorandum by Lawrence Repeta, 2 October 2007.
200. See Repeta and Schultz, note 197. This law is effectively the same as the RTI Law, although it applies to independent public bodies as opposed to government bodies.
201. Unpublished memorandum by Lawrence Repeta, 2 October 2007.
202. This provides generally that where public bodies refuse permission in applications they must give reasons. The Administrative Procedure Act is available at: <http://www.cas.go.jp/jp/seisaku/hourei/data/APA.pdf>.
203. See Article 57 of Administrative Appeal Examination law and Article 46 of Administrative Case Litigation law. Unpublished memorandum by Lawrence Repeta, 2 October 2007.
204. Ordinarily less than 10 per year from all public bodies. *Ibid.*
205. Effective 1 April 2005, when the new Review Board law came into effect, the number of board members was increased from 12 to 15. See note 198.
206. Information concerning the Review Board was provided by Lawrence Repeta on 12 November 2007.
207. Note 196.
208. See <http://www.legislationline.org/legislations.php?jid=29&ltid=14>.
209. Available at: <http://www.legislationline.org/upload/legislations/0b/b3/71bdeda3cd18a208b73f34711206.pdf>.
210. See Almaz Kalet, *Access to Information in Kyrgyzstan in Central Asia – In Defence of the Future: Media in Multi-Cultural and Multi-Lingual Societies* (OSCE 2003).
211. Available at: <http://www.article19.org/pdfs/analysis/kyrgyzstan-foi-06.pdf>. The Law is attached as an annex to the analysis; although this is formally of a draft, the law finally adopted was identical to the one analysed.
212. Information provided by Maria Lisitsyna on 4 November 2007. Based on the IHRG study authored by Nurbek Toktakunov.
213. Some countries have dedicated laws governing open meetings. An example is the United States Government in the Sunshine Act, 5 U.S.C. 552b, available at: <http://www.usdoj.gov/oip/gisastat.pdf>.
214. When the national right to information law was first adopted in Mexico.
215. A version of the Constitution as it was in 2002 is available at: <http://historicaltextarchive.com/sections.php?op=viewarticle&artid=93#T1C1>.
216. A constitutional amendment requires the support of 16 States to pass.
217. Published in the *Diario Oficial de la Federación* on 20 July 2007.
218. That is, by July 2008.
219. Where the entirety of the right to information law is considered to be of constitutional status.
220. Available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/laweng.pdf>. Available in Spanish, as amended, at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/244.pdf>.
221. Reglamento de la Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental, adopted 11 June 2003. Available (in Spanish) at: [http://www.sre.gob.mx/transparencia/docs/reglamento\\_lftaipg.htm](http://www.sre.gob.mx/transparencia/docs/reglamento_lftaipg.htm).
222. In relation to IFAI, Former World Bank President, Paul Wolfowitz, stated: “I was particularly impressed by IFAI, the autonomous agency which gives ordinary citizens access to public information.” Press conference in Monterrey, Mexico, 26 April 2006. Available at: <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/MEXICOEXTN/0,,contentMDK:20903722~pagePK:1497618~piPK:217854~theSitePK:338397,00.html>.
223. *Lost in Transition: Bold Ambitions, Limited Results for Human Rights Under Fox* (Human Rights Watch, 2006), p. 4. Available at: <http://hrw.org/reports/2006/mexico0506/mexico0506web.pdf>.

224. See *Transparency and Silence: A Survey of Access to Information Laws and Practices in Fourteen Countries* (Open Society Justice Initiative, 2006), p. 43. Available at: [http://www.soros.org/resources/articles\\_publications/publications/transparency\\_20060928](http://www.soros.org/resources/articles_publications/publications/transparency_20060928).
225. Sobel, D. and Bogado, B., *The Federal Institute for Access to Public Information in Mexico and a Culture of Transparency*, February 2005, Executive Summary. Available at: <http://www.global.asc.upenn.edu/index.php?page=32>.
226. Article 6 was amended on 6 June 2006.
227. UN General Assembly Resolution 217A(III), 10 December 1948.
228. UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.
229. A regulation was adopted in June 2003 which does, among other things, address the issue of processing of requests. See note 221.
230. Which came into force on 31 December 1981. Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/107.pdf>.
231. It would appear that different public bodies interpret this differently, some charging by page and others for entire documents.
232. See [www.sisi.org.mx](http://www.sisi.org.mx).
233. This is further elaborated in Articles 8-25 of the 2003 Regulation, note 221.
234. The 2003 Regulation includes extensive rules on classification.
235. It is unclear what this means.
236. See Article 2(5). Available at: <http://www.idlo.int/texts/leg6577.pdf>.
237. See Articles 2(5) and (6).
238. Law No. 27806. Available in amended form at: [http://www.justiceinitiative.org/db/resource2/fs/?file\\_id=15210](http://www.justiceinitiative.org/db/resource2/fs/?file_id=15210).
239. See Committee to Protect Journalists, *Attacks on the Press 2002*, <http://www.cpj.org/attacks02/americas02/peru.html>.
240. This is consistent with Article 2(5) of the Constitution which, as noted above, provides broad protection to these types of information.
241. This is the right to access one's own personal data.
242. Act No. 108 of 1996, Section 32. Available at: [http://www.acts.co.za/constitution\\_of\\_the\\_republic\\_of\\_south\\_africa\\_1996.htm](http://www.acts.co.za/constitution_of_the_republic_of_south_africa_1996.htm).
243. Article 32(2) and Schedule 6, item 23 of the 1996 Constitution.
244. Act No. 2, 2000. Available at: <http://www.gov.za/gazette/acts/2000/a2-00.pdf>.
245. See *Transparency and Silence: A Survey of Access to Information Laws and Practices in Fourteen Countries* (Open Society Justice Initiative, 2006), p. 43. Available at: [http://www.soros.org/resources/articles\\_publications/publications/transparency\\_20060928](http://www.soros.org/resources/articles_publications/publications/transparency_20060928).
246. *Ibid.*, p. 69.
247. Annexure, p. 85. Available at: <http://www.sahrc.org.za/sahrc/cms/downloads/Annexures.pdf>.
248. Which is set out in Form A of Annexure B of the Regulations Regarding the Promotion of Access to Information, No. R. 187, 15 February 2002. Available at: [http://www.dme.gov.za/pdfs/about\\_dme/paia\\_regulations.pdf](http://www.dme.gov.za/pdfs/about_dme/paia_regulations.pdf).
249. *Ibid.*, Part II, Annexure A.
250. For single requesters. The limit was set at R27,192 for married couples.
251. Promotion of Access to Information Act, 2000 Exemptions and Determinations for Purposes of Section 22(8), No. R. 991, 14 October 2005. Available at: <http://www.info.gov.za/gazette/regulation/2005/28107.pdf>.
252. Promotion of Access to Information Act, 2000 Regulations Regarding the Promotion of Access to Information, No. R. 990, 13 October 2006. Available at: <http://www.info.gov.za/gazette/regulation/2006/29278.pdf>.
253. The Protected Disclosures Act, No. 26 of 2000.
254. Note 248, Regulations 4 and 5.
255. *Ibid.*, Regulations 2 and 3.
256. The Instrument of Government is available at: [http://www.riksdagen.se/templates/R\\_Page\\_\\_\\_\\_6307.aspx](http://www.riksdagen.se/templates/R_Page____6307.aspx).
257. Available at: [http://www.riksdagen.se/templates/R\\_Page\\_\\_\\_\\_6313.aspx](http://www.riksdagen.se/templates/R_Page____6313.aspx).
258. Which came into force on 24 October 1998. Available at: <http://www.sweden.gov.se/content/1/c6/01/55/42/b451922d.pdf>.

259. Act No. 100 of 1980. Available in Swedish at: <http://www.notisum.se/index2.asp?iParentMenuID=236&iMenuID=314&iMiddleID=285&top=1&sTemplate=/template/index.asp>. The author was unable to find the Swedish Secrecy Act in English but it is described in some detail in Chapter 3 of the official document produced by the Ministry of Justice, *Public Access to Information and Secrecy with Swedish Authorities* (December 2004). Available at: <http://www.sweden.gov.se/content/1/c6/03/68/28/b8e73d81.pdf>.
260. Swanström, K., *Access to information – an efficient means for controlling public power*. On file with the author.
261. *Ibid.*, p. 3.
262. *Public Access to Information and Secrecy with Swedish Authorities*, note 259, Chapter 2.1
263. According to Swanström, in normal cases the information is provided within two or three days. Note 260, p. 5.
264. *Ibid.*
265. *Ibid.*
266. *Public Access to Information and Secrecy with Swedish Authorities*, note 259, Chapter 3.6.1.
267. The regulations are contained in the Secrecy Ordinance, Swedish Code of Statutes 1980:657. Available in Swedish at: <http://www.notisum.se/index2.asp?iParentMenuID=236&iMenuID=314&iMiddleID=285&top=1&sTemplate=/template/index.asp>.
268. *Public Access to Information and Secrecy with Swedish Authorities*, note 259, Chapter 3.3.2.
269. *Ibid.*, Chapter 3.5.4.
270. *Ibid.*, Chapter 3.3.3.
271. See Banisar, D., *Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws* (Privacy International, 2006), p. 142 for an example of this. Available at: <http://www.privacyinternational.org/foi/foisurvey2006.pdf>.
272. Section 58. The 1997 Constitution is available at: [http://www.servat.unibe.ch/law/icl/th00000\\_.html](http://www.servat.unibe.ch/law/icl/th00000_.html).
273. Section 59.
274. Sections 56 and 57. The 2007 Constitution is available at: <http://www.asianlii.org/th/legis/const/2007/>.
275. B.E. 2540 (1997). Available at: [http://www.oic.go.th/content\\_eng/act.htm](http://www.oic.go.th/content_eng/act.htm).
276. See, for example, a case study on exposure of corruption in Thai schools using the right to information law in ARTICLE 19, Centre for Policy Alternatives, Commonwealth Human Rights Initiative and Human Rights Commission of Pakistan, *Global Trends on the Right to Information: A Survey of South Asia* (London: July, 2001), pp. 23-24. Available at: <http://www.article19.org/pdfs/publications/south-asia-foi-survey.pdf>. See also the website of the Official Information Commission: [http://www.oic.go.th/content\\_eng/default\\_eng.asp](http://www.oic.go.th/content_eng/default_eng.asp).
277. Described as a Board in the translation of the Law relied upon.
278. See <http://www.oic.go.th/iwebstat/istatyear.asp?language=En>.
279. Available at: [http://www.freedominfo.org/documents/uganda\\_ati\\_act\\_2005.pdf](http://www.freedominfo.org/documents/uganda_ati_act_2005.pdf).
280. It is not entirely clear what this Committee's mandate is but it is presumably a body that sets internal rules for the judicial system.
281. Section 39 of the version of the Law relied upon for this chapter refers to sections 35 and 40 but we assume this is a mistake, since the sections dealing with appeals are actually sections 37 and 38.
282. See, for example, the South African Protected Disclosures Act, 2000 and the Public Interest Disclosure Act 1998 of the United Kingdom.
283. The European Court has on some occasions founded a right of access to information on other rights, for example to family life or privacy. See the chapter of this book on International Standards and Trends.
284. Available online at: <http://www.cfoi.org.uk/foiact2000.html>.
285. The Freedom of Information (Scotland) Act 2002. Available at: <http://www.hms.gov.uk/legislation/scotland/acts2002/20020013.htm>.
286. These are available at: <http://www.dca.gov.uk/foi/reference/legislation.htm#coverage>.

- 287.** Formally the Freedom of Information (Amendment) Bill. Available at: <http://www.publications.parliament.uk/pa/cm200607/cmbills/062/2007062.pdf>.
- 288.** See [http://www.bbc.co.uk/blogs/opensecrets/2007/06/maclean\\_bill\\_jacks\\_a\\_lords\\_spo.html](http://www.bbc.co.uk/blogs/opensecrets/2007/06/maclean_bill_jacks_a_lords_spo.html). See also: <http://www.cfoi.org.uk/#other>.
- 289.** See <http://www.justice.gov.uk/news/newsrelease251007c.htm>.
- 290.** This is also implicit in the Code of Practice (see below), which stipulates that the purpose of providing assistance to applicants is to clarify the request, not to determine the motivation for the request (paragraph 9).
- 291.** Adopted on 25 November 2004. Available at: <http://www.dca.gov.uk/foi/reference/impref/codepafunc.htm>.
- 292.** The Freedom of Information (Time for Compliance with Request) Regulations 2004, Statutory Instrument 2004 No. 3364, adopted in December 2004, extended the time limits for various bodies. Available at: <http://www.opsi.gov.uk/si/si2004/20043364.htm>.
- 293.** See below, under Exceptions.
- 294.** The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, in force 1 January 2005, paragraph 6. Available at: <http://www.opsi.gov.uk/si/si2004/20043244.htm>.
- 295.** The proposals are available at: <http://www.dca.gov.uk/consult/dpr2007/cp2806-condoc.pdf>.
- 296.** A number of different schemes have been adopted and are available at: [http://www.ico.gov.uk/Home/what\\_we\\_cover/freedom\\_of\\_information/publication\\_schemes/model\\_schemes.aspx](http://www.ico.gov.uk/Home/what_we_cover/freedom_of_information/publication_schemes/model_schemes.aspx).
- 297.** The Freedom of Information (Removal and Relaxation of Statutory Prohibitions on Disclosure of Information) Order 2004, which came into force on 1 January 2005. Available at: <http://www.opsi.gov.uk/si/si2004/20043363.htm>.
- 298.** This law has been widely criticised. See, for example, ARTICLE 19 and Liberty, *Secrets, Spies and Whistleblowers: Freedom of Expression and National Security in the United Kingdom* (2000, London, ARTICLE 19 and Liberty).
- 299.** See <http://www.justice.gov.uk/news/newsrelease251007c.htm>.
- 300.** This is in addition to the total exclusion from the ambit of the Law of those security bodies. See above, under Scope.
- 301.** Data Protection Act 1998, section 6(2).
- 302.** Data Protection Act 1998, section 6(4).
- 303.** In the form of the Public Interest Disclosure Act 1998, available at: <http://www.opsi.gov.uk/acts/acts1998/19980023.htm>.
- 304.** Available at: <http://www.dca.gov.uk/foi/practitioner/index.htm>.
- 305.** The 2006 Annual Report is available at: <http://www.justice.gov.uk/publications/freedomofinformationquarterly.htm>.
- 306.** The 2007 Annual Report is available at: [http://www.ico.gov.uk/upload/documents/library/corporate/detailed\\_specialist\\_guides/annual\\_report\\_2007.pdf](http://www.ico.gov.uk/upload/documents/library/corporate/detailed_specialist_guides/annual_report_2007.pdf).
- 307.** In the First Amendment, available at: <http://www.usconstitution.net/const.html#Am1>.
- 308.** *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), p. 15.
- 309.** Sweden adopted legislation in 1776.
- 310.** The Swedish law originally covered Finland, then a Swedish-governed territory. Finland adopted its own protection for the right to information when it became independent in 1919 and a fully-fledged law in 1951.
- 311.** 5 U.S.C. § 552. Available at: <http://www.usdoj.gov/oip/foiastat.htm>.
- 312.** An important amendment was the Electronic Freedom of Information Act Amendments of 1996. Available at: [http://epic.org/open\\_gov/efoia.html](http://epic.org/open_gov/efoia.html).
- 313.** S. 2488, 110th Cong., 1st Sess. Available at: <http://www.govtrack.us/congress/bill.xpd?bill=s110-2488>. The bill was signed into law by the President on 31 December 2007.
- 314.** See below for information on the various laws relating to whistleblowers.
- 315.** 5 U.S.C. § 552a. Available at: <http://www.usdoj.gov/oip/privstat.htm>.
- 316.** 5 U.S.C. § 552b. Available at: <http://www.usdoj.gov/oip/gisastat.pdf>.
- 317.** 5 U.S.C. App. II. Available at: [http://www.gsa.gov/gsa/cm\\_attachments/GSA\\_BASIC/without\\_annotations\\_R2G-b4T\\_0Z5RDZ-i34K-pR.pdf](http://www.gsa.gov/gsa/cm_attachments/GSA_BASIC/without_annotations_R2G-b4T_0Z5RDZ-i34K-pR.pdf).

318. Banisar, D., *Government Secrecy: Decisions without Democracy* (2007: People For the American Way Foundation and OpenTheGovernment.org), Executive Summary, p. 7.
319. *Department of Justice v. Tax Analysts*, 492 US 136 (1989), pp. 144-145.
320. Indeed, these are explicitly excluded by a reference in paragraph (f)(1) to 5 U.S.C. § 551(1). Available at: <http://www.archives.gov/federal-register/laws/administrative-procedure/551.html>.
321. Available at: [http://www.intelligence.gov/0-natsecact\\_1947.shtml](http://www.intelligence.gov/0-natsecact_1947.shtml).
322. Section 7 of the OPEN Government Act.
323. Available at: <http://www.usdoj.gov/oip/executiveorder13392.htm>.
324. *A Report on Federal Agency FOIA Backlog*, published by the National Security Archives in 2006, identifies many public bodies with requests pending over 10 years and an oldest request of 17 years. Available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB182/index.htm>.
325. Available at: <http://www.archives.gov/federal-register/codification/executive-order/12600.html>.
326. The rules relating to this are described below under Appeals.
327. *The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines* were adopted by the Office of Management and Budget on 27 March 1987, 52 Fed Reg 10012. Available at: [http://www.whitehouse.gov/omb/inforeg/foia\\_fee\\_schedule\\_1987.pdf](http://www.whitehouse.gov/omb/inforeg/foia_fee_schedule_1987.pdf).
328. Available at: <http://www.archives.gov/isoo/policy-documents/eo-12958-amendment.pdf>. The original Executive Order 12958, adopted by President Clinton on 17 April 1995, is available at: <http://www.fas.org/sgp/clinton/eo12958.html>.
329. Available at: <http://www.fas.org/sgp/clinton/reno.html>.
330. The text of the Memorandum is available at: <http://www.usdoj.gov/oip/011012.htm>.
331. OPEN Government Act, section 10.
332. Apparently actions of this sort are extremely rare and even more rarely upheld by the courts.
333. Available at: [http://f1.findlaw.com/news.findlaw.com/hdocs/docs/gwbush/sarbanes\\_oxley072302.pdf](http://f1.findlaw.com/news.findlaw.com/hdocs/docs/gwbush/sarbanes_oxley072302.pdf).
334. For an overview of the complex situation regarding whistleblowers in the US, see: <http://whistleblowerlaws.com/protection.htm>.
335. Available at: <http://www.usdoj.gov/oip/executiveorder13392.htm>.
336. OPEN Government Act, section 10.
337. All of these are available at: [http://www.usdoj.gov/oip/04\\_6.html](http://www.usdoj.gov/oip/04_6.html).
338. P. 7. The Report is available at: [http://www.usdoj.gov/oip/ag\\_report\\_to\\_president\\_13392.pdf](http://www.usdoj.gov/oip/ag_report_to_president_13392.pdf).
339. P. 13 *et seq.*

# Comparative Analysis

As the survey above demonstrates, countries all over the world are recognising that individuals have a right to access information held by public bodies and that legislation is needed to give practical effect to this right. The survey indicates that there are significant areas where national legislation is reasonably consistent, but that there are also areas of divergence. This chapter looks at the different issues dealt with in right to information laws, pointing out consensus themes, as well as areas of disagreement. It also highlights some of the more imaginative or innovative approaches adopted in different countries.

141

## The Right of Access

Establishing a right to access information held by public bodies is the fundamental reason for adopting a right to information law, and most legislation does this pretty clearly. In some cases, such as the laws of Mexico and Jamaica, this is set out as a free-standing right, subject to the regime of exceptions. In other cases, for example in Thailand and the United Kingdom, the right is cast in more procedural terms, providing that anyone may make a request for information and, subject to certain conditions – procedural and substantive – have the information communicated to him or her. It is not clear whether this makes much difference in practice, although a more rights-based approach may prove important over time.

Some laws – for example those of South Africa and Jamaica – provide for a right of access to documents or records while most others provide for a right of access to information. A few, like Uganda, provide for a right of access to both. There are problems with restricting the right of access to documents, since most applicants will not have a specific document in mind when lodging their information requests. There have been problems in some cases with officials applying an unduly rigid understanding of a right to documents to reject, instead of responding in substance to, requests. At the same time, where an applicant can specify a particular document, he or she should obviously be given access to it. In this respect, the Ugandan approach may have some advantages.

In many countries, the law includes principles governing access or sets out its purposes or functions. These can be a useful to clarify the underpinnings of the law and as an interpretive tool, helping to clarify ambiguity or the conflicts between openness and other public interests that are bound to arise. Principles that are found in different laws, many occurring frequently, include promoting transparent, accountable and effective government, controlling corruption, fostering public participation, enhancing the ability of the public to scrutinise the exercise of public power, promoting a democratic and human rights culture and the rule of law, improving public record management, and building public understanding and an informed citizenry.

Some laws also include a number of more pragmatic 'instructions' among their principles, such as establishing practical mechanisms to access information, and ensuring that access is rapid, inexpensive and not unduly burdensome. Azerbaijan also sets as principles such things as judicial protection for the right of access and the principle of responsibility of public bodies for violating the law. In a few countries – including Uganda and Kyrgyzstan – the principles refer to the quality of the information to be provided, in particular that it be accurate or truthful. This seems inconsistent with the main thrust of a right to information law, which is to provide access to the information held by public bodies, whether or not that information happens to be correct.

Finally, in some cases, the law refers specifically to the balance to be achieved between openness and protecting secrecy interests. In India, for example, the law refers to the need to "harmonise these conflicting interests while preserving the paramountcy of the democratic ideal" (preamble). The Azerbaijani law provides that classification shall not be unduly extensive. Other laws refer simply to a need to balance the right of access against overriding public or private interests.

There is some discrepancy in the way different laws define information and/or documents. The key definition is normally the one relating to the subject of the right, whether this be 'information' or 'records' or something else (such as 'official information'). Some laws, for example that of Azerbaijan, include multiple definitions – in that case of 'information', 'private information' and 'documented information' – some of which do not strictly appear to be relevant. This is problematical inasmuch as it may cause confusion.

Most laws define information and/or records broadly to include all forms in which content may be recorded, whether in written form, electronically or in some other storage system. The Indian law even specifically lists samples as forms of information. In some cases, such as Sweden and Japan, there are specific exclusions from the definition of information. Indeed, the Swedish law uses the definition of information as a sort of surrogate internal deliberative processes exception, providing that only documents relating to matters which have been finally settled are covered, subject to certain exceptions. It is preferable to keep the regime of exceptions in one place. More serious is the fact that excluding information at the definitional stage means that various safeguards, such as the requirements of harm to a legitimate interest and the public interest override, will not apply.

In most cases, the right applies to all information regardless of the purpose for which it is held. Some laws, however – such as those of Jamaica, Mexico and Japan – restrict the scope, for example to information held for official purposes or in connection with the functions of the public body. The Bulgarian law goes even further, being formally limited to information relating to social life. These restrictions unnecessarily limit the right to information. They have no legitimate basis since the right to information should not depend on the deemed usefulness or role of the information. Furthermore, they require officials to make threshold decisions which may be very important in terms of access to information, which is both an unwanted obligation for them and in many cases an opportunity for abuse.

All laws apply to information actually held by a public body; some laws – such as those of Peru and the United States – also require that the information be under the 'control' of the public body which may prove somewhat narrower. The Swedish law stipulates that information is 'held' even if it has been sent to the private address of an official, as long as it falls within the scope of official information. Other laws extend to information that may be accessed by a public body. The Indian law, for example, applies to information held by private bodies that may be accessed under a law, while the United Kingdom law is broader, applying to information held by another body on behalf of a public body. The Swedish law applies to all information which is available for transcription by a public body and the Peruvian law even extends to information financed by the public budget.

Some laws, such as the Jamaican law, exclude information already accessible to the public. While it is legitimate to leave in place existing information disclosure systems, there are disadvantages to this inasmuch as the conditions for access under those laws may be more restrictive, or more expensive, than under the right to information law.

There are two main approaches when it comes to defining which bodies are covered by a right to information law. First, and most common, is simply to define the bodies covered and then let any borderline issues be dealt with on a case-by-case basis. Second, some laws provide a list of bodies covered. This has the virtue

of being clear, but it may also be excessively limited and rigid, which could be a problem over time. The United Kingdom law uses the list approach but also provides that the Secretary of State may designate additional public bodies. This helps mitigate the rigidity of the list but also has its problems since it opens the window to some political influence over the scope of bodies covered. Perhaps an ideal solution would be to combine both systems, providing a generic definition, but also a list of bodies which are specifically covered.

Many countries include all three branches of government – administrative, legislative and judicial – within the scope of the right to information law while others, such as the United States and Japan, restrict the scope of the law to the executive. In some cases – such as Jamaica, South Africa and Thailand – the law covers the courts but only in relation to their administrative functions. There is no reason in principle why the legislative and judicial branches should not be covered, as long as the regime of exceptions protects legitimate secrecy interests, and experience in those countries that do cover all three branches of government supports this view. Furthermore, limiting the scope of the law to certain branches of government runs contrary to the idea of access to information as a human right, which should, as a result, apply to all public bodies.

Mexico has adopted a novel approach to the question of coverage, providing for a very detailed set of obligations for administrative bodies, and then placing the legislative and judicial branches of government under a generic obligation effectively to do their best to meet the same standards, without actually describing in detail how this should be done. If this proves to be successful, which remains uncertain, it could prove a good model for other countries.

The scope of national legislation may be affected by constitutional limitations. The Mexican approach, for example, seeks to accommodate the limited power of the legislature to impose rules on other branches of government or on constitutionally independent bodies. In other countries, this does not appear to be a problem; the Peruvian law, for example, applies to independent constitutional bodies. Many federal States – such as the United States and Mexico – also face political division of powers issues so that the national laws apply only to federal public bodies. This problem is often addressed through the adoption, by the individual states or provinces that make up the country, of their own, sub-national, right to information laws. Although a federal State, in India the law applies to both national and state-level public bodies.

Another area of divergent practice is with respect to public corporations. In most countries the law does extend to public corporations, although this is not always the case, for example in Sweden. In Japan, a separate, parallel law applies to public corporations. In the United Kingdom, only bodies fully owned by the State are covered, while in Jamaica, 50% ownership is sufficient. In principle, and consistently with the idea of a human right to information, all public bodies should be covered, regardless of whether they take a corporate form.

The scope of many laws extends beyond public corporations and includes private bodies which receive funding through public contracts or which otherwise carry out public functions. The Indian law, for example, applies to bodies which are owned, controlled or substantially financed by government. In South Africa, coverage is extended to all bodies exercising a public power or performing a public function pursuant to any legislation. The Kyrgyz law extends to bodies financed by the State, specifically including bodies focusing on health, education, information activities and so on. The Azeri law goes even further, applying, albeit in more limited form, to all bodies operating under a public contract in various spheres – including education, healthcare and culture – as well as legal entities enjoying a dominant or monopoly market position.

The involvement of the State in a corporation should normally signal a public interest in its operations. State control over a corporation – which is ensured by 50% ownership but is often present with much lower percentage of share ownership – should engage this principle. A similar rationale should apply to the use of State funds or the use of State power, in particular as expressed in legislation, to determine public roles for private companies.

In a number of countries, there are specific exclusions from the law. In Jamaica, for example, the Governor-General and security forces are excluded, while in the United Kingdom the special forces (i.e. the intelligence services) are not included. South Africa, for its part, does not include the Cabinet or members

of parliament. These are unfortunate exclusions; any legitimate secrecy interests would be better dealt with through the regime of exceptions than through blanket exclusions of this sort.

South Africa is unique among the countries surveyed and, to the best of the author's knowledge, in the world, in placing private bodies, defined as commercial entities, under an obligation to disclose information needed for the exercise or protection of any right. Private bodies hold a wealth of information which should be accessible in the public interest. At the same time, the scope of access and modalities by which this should be exercised are different than for public bodies and there have been some teething problems in South Africa.<sup>340</sup> More thought on these matters may be required to ensure that any obligation to disclose for private bodies is effective and appropriate.

In most countries everyone, regardless of citizenship, can claim the right, although in some countries this right is restricted to citizens or residents. The Peruvian law specifically provides that a request for information may not be denied based on the identity of the requester. There are fairly obvious reasons for extending the right to everyone, and it has not proved to be a significant additional cost or burden in those countries where this is the case.

## Procedural Guarantees

There are some variations among different laws in terms of the rules for processing requests for information but this is an area where, on balance, the various laws demonstrate a relatively high degree of consistency. Virtually all laws provide for requests to be made in writing, including electronically, setting out the name and contact details of the applicant, along with a sufficiently detailed description of the information sought to enable it to be identified. In some countries – such as South Africa, Azerbaijan and Kyrgyzstan – requesters can make requests orally or even by phone.

144

In most countries, no reasons need to be given for a request. The Indian law specifically provides that no personal details may be required other than for purposes of contacting the applicant, in Kyrgyzstan public officials may not inquire as to the use to which requested information will be put, while in Uganda the belief of an official as to the reasons for a request may not be taken into account. On the other hand, some countries, such as Sweden, do provide for supplementary information, potentially including reasons, to be taken into account where necessary to process the application, for example to establish whether or not an exception might apply.

Many laws specify that requests must be submitted to particular officials, such as appointed information officers, while others simply provide that a request may be lodged with the public body which holds the information.

In some countries, requests must be formally acknowledged, providing an immediate paper trail in case of problems and for appeal purposes. In Azerbaijan and Kyrgyzstan, requests must be logged on a central register containing the name of the official receiving the request, the date and details of how the request has been processed and finally dealt with.

Most laws also provide specifically for assistance to be provided to applicants, for example where they are having problems describing the information sought in sufficient detail or where they cannot make a written request either because they are illiterate or due to disability. In India, such assistance extends to helping the disabled actually access information which has been disclosed. The level of assistance required varies but many laws simply refer to 'reasonable' assistance. In Kyrgyzstan, assistance is put on a more structural footing with the law requiring application forms with instructions on the back to be made available at post offices.

Most laws provide set time limits for responses to requests for information, ranging from 7 days (Azerbaijan) to around 30 days (various), and most also require the information to be provided as soon as possible, with the time limit set as a maximum. Almost all allow for an extension of the time limit, for

example where the request is complex, requires a search through records not located at the main office or requires consultations with others. Often, any time taken by applicants – for example to respond to questions for clarification or to pay fees – is not taken into account in determining the response time. In many countries, a failure to respond within the time limits constitutes a deemed refusal of the request. In Peru, an unacceptably ambiguous response also constitutes a deemed refusal.

A number of countries – including India and Azerbaijan – have shorter time limits in special cases. In both India and Azerbaijan, a 48 hour time limit applies where the information is needed to protect life or liberty and Azerbaijan further provides for a 24 hour time limit where the information is needed urgently. In the United States, special time limits apply to cases of compelling need – including a threat to life or safety, or where there is an urgent need to information the public about government activity – in which case the information must be provided within ten days.

The United Kingdom law has a special (longer) set of time limits where the public interest override is under consideration. In a number of countries – including Japan, Bulgaria and Uganda – different (longer) time limits apply where third party notice is required. Some countries – including Jamaica and Uganda – also allow for extended time limits under certain conditions, such as where the information is about to be published. This can problematically delay requests where the extended time limits are not carefully circumscribed.

Most countries provide for the transfer of requests – or for the applicant to be notified – where information is held by another public body. The standard for effecting such a transfer varies, ranging from where the original body does not hold the information – Uganda, Bulgaria – to where the information is more closely connected to the work of another body – United Kingdom, India – to where this is ‘justifiable’ – Japan. In Thailand, the test is whether the information was prepared by and marked as confidential by another body. In Sweden, the body receiving the request must respond to it, outside of exceptional cases set out specifically in law, such as where the ‘security of the realm’ is in issue. In some cases – such as Jamaica, South Africa and Thailand – the original body itself effects the transfer while in others – such as Mexico – the applicant is simply informed. In the United Kingdom, direct transfers are permitted only where the other body confirms it holds the information and the transfer is not likely to be opposed by the applicant; otherwise, the applicant is simply informed.

145

Most laws also require public bodies to give written notice of their responses to requests. For requests which are being granted, the notice may include any fees and the form in which the request is to be granted, perhaps along with the right to appeal against these; where the request is refused, the notice normally includes the reasons for such refusal, preferably by reference to a specific legal provision, along with information about the right to appeal against the refusal. This allows the requester to determine whether or not to pursue any appeal options and also provides a basis for the appeal, should one be brought.

Various countries have more specific rules. In Peru, a refusal notice must additionally note the time the information is expected to remain confidential. In Bulgaria, a notice granting access must specify the time limit within which access may be ‘claimed’ while a refusal notice must either be signed for by the applicant or be sent by registered post. In both the United States and Kyrgyzstan, a refusal notice must include the name of the official responsible for the decision. In the United States, the quantity of information denied must also be provided, while in Kyrgyzstan, the details not only of specific appeal rights but also of bodies in the locality which deal with human rights and information issues must be provided.

Many countries allow applicants to select from among a number of forms of access, such as inspection of the document, a transcript, an electronic copy, a photocopy or an official copy. The Indian law provides further for inspection of public works and for samples, while the Bulgarian law provides for verbal responses. The form specified may usually be refused in certain cases, for example where this would harm the record, unreasonably divert the resources of the public body or infringe copyright. In some countries – including South Africa and Azerbaijan – the law specifically provides for access in the language preferred by the applicant, if the record exists in that language. The Ugandan law provides for special access by the disabled, at no extra cost.

The issue of how much effort public bodies should be required to make to present information in a form in which it is usable for the applicant or to extract information from different forms in which it may be held

is a complex one. In some countries – such as Thailand and Peru – the law specifically provides that the right of access does not extend to the processing of information, while the South African law limits this to extraction of information by machine. In practice, most countries do in fact make some effort to extract information from various electronic formats but within limits.

Various systems apply to fees. There are four main costs involved in the provision of information, namely the cost of searching for the information, any costs associated with preparing or reviewing the information, the cost of reproducing or providing access to the information and the cost of sending the information to the requester, where this applies. Some countries, such as Mexico, Jamaica and Peru, restrict fees to the cost of reproducing the information; in Peru, charging other costs is considered to be an obstruction of access and can attract sanctions.

Many laws – including those of India, Japan and Sweden – make provision for a central body to set the schedule of fees; in Japan, for example, this is set by Cabinet Order. This avoids a patchwork of fee structures at different public bodies and tends to limit inflationary fee pressures. Many countries also provide for fee waivers in certain cases, such as for the poor; South Africa has established a specific income level below which no charges may be levied.

In some countries, different fee regimes apply to different sorts of information. For example, in Mexico, access to personal data is free, while in Azerbaijan, Sweden and Bulgaria, there are no charges for inspection of information or for making one's own copy. In some countries, only actual costs may be charged.

The United States law contains detailed provisions relating to fees, distinguishing between commercial requesters, which may be charged for search, duplication and review of documents, educational or scientific institutions, which may be charged only for duplication, and other requesters, who may be charged for search and duplication. For the latter two groups, there is a waiver for the first two hours of search and first 100 pages of copying. Finally, fees are effectively waived for public interest requests, which covers the media and many NGOs. Other countries – including Kyrgyzstan and Sweden – also provide certain amounts of time and photocopying for free.

Regardless of the system used, it is important to keep fee levels low so they do not exert a chilling effect on the willingness of individuals to lodge requests for information. How best to address this will vary from country-to-country, depending on factors such as wealth, engagement with the public sector and so on.

Sweden is relatively unique in requiring public bodies to prepare a register of all documents they hold, with a few exceptions, for example, documents which are deemed to be of little importance; Azerbaijan has also introduced a similar requirement in its law. The registers themselves are normally public documents, available online, which clearly facilitates information requests enormously.

## **Duty to Publish**

Most of the laws surveyed – with the exceptions of those of Sweden, South Africa and Japan, where more general rules might still apply – impose a duty on public bodies to publish certain key information, even in the absence of a request. This is in recognition of the fact that effective promotion of access to information held by public bodies requires more than passive provision of information in response to requests. Indeed, it is increasingly being recognised that this is one of the most important systems for promoting access to information held by public bodies. Many of the newer right to information laws – such as those of Peru (2002), Azerbaijan (2005), India (2005) and Kyrgyzstan (2007) – have extensive rules on proactive or routine publication.

Most laws provide a list of the categories of documents that must be published, such as information about their general operations, about the services they provide and about how to request information. The specific list varies considerably from country to country; the detail in the country chapters will not be

repeated here. In most cases, the documents subject to proactive publication are still subject to the regime of exceptions.

In the United Kingdom, in contrast, the law requires public bodies to come up with publication schemes, which then need to be approved by the independent Information Commissioner. Alternatively, public bodies can simply adopt the appropriate model publication scheme provided by the Commissioner. The approval of the Commissioner may be time limited, or may be withdrawn, allowing for progressive increases in proactive disclosure over time. This is a flexible approach, and allows for change over time. At the same time, it requires active oversight by an independent body, in this case the Information Commissioner, and it may also lead to differences in the scope of information published by different public bodies. Some countries, like Mexico, essentially adopt the first approach, but provide for oversight of the system by an independent body.

Many laws – including those of Uganda, Kyrgyzstan, Peru and India – provide for regular updating of the information published, often annually. In Peru, certain financial information needs to be published on a quarterly basis, within 30 days of the end of the quarter, along with information from the previous two quarters for comparative purposes.

A number of laws address the issue of making information subject to proactive publication widely accessible. The Thai law provides for a dual approach whereby certain information must be published in the Government Gazette while other information must be made available for inspection. The idea of a sort of triage for the duty to publish is interesting, although publication in the Government Gazette may not be the best way to reach a broad audience. The United States follows the same approach but, at the same time, requires that this information be made available electronically. The Mexican law goes even further, requiring public bodies to make a computer available to the public for the purpose of accessing information, along with a printer and technical support where needed. The Kyrgyz and Azeri laws provide for dissemination via public libraries and the Internet, among others, while the Indian and Peruvian laws contain specific instructions to public bodies to use appropriate methods of dissemination, including in rural or low-population density areas.

Under the United States law, any information which has been released pursuant to a request and which is likely to be the subject of another request must be made available electronically, along with an index of such records. This provides a built-in mechanism for ensuring that important information regularly becomes available. In Mexico, all information provided in response to a request is available electronically.

The Bulgarian law is innovative, requiring public bodies to publish information where this may prevent a threat to life, health, security or property, or where this is in the overall public interest, a potentially extensive obligation. The Azeri law similarly requires information posing a threat to life, health, property, the environment or other matters of significant public interest to be disseminated immediately on a proactive basis.

Alone among the countries surveyed, the Kyrgyz right to information law makes provision for open meetings, although some countries, notably the United States, have specific laws addressing this. Open meetings are an important mechanism for promoting openness in the public sector and this approach is therefore to be commended.

The dominant trend in all countries is to make more and more information available on a proactive basis, particularly online, whether or not this is required under a right to information law. This can promote a number of efficiencies for the public sector, as well as better service provision, both as reflected tendencies to move to ever more significant forms of e-government. Given the relative ease and low cost of proactive publication over the Internet, it only makes sense that this should be promoted, among other things because it serves as a means to reduce the number of (relatively costly) requests for information. It is likely the case that the request load in countries which upload actively is far less than it would be if they did not do this. The Indian law expressly recognises the role of proactive publication in reducing the number of requests for information, specifically requiring public bodies to endeavour to increase proactive publication to this end.

## Exceptions

Most laws include a comprehensive list of exceptions, or grounds for refusing to disclose information, although a few – such as the Bulgarian and Kyrgyz laws – do not, referring instead to existing secrecy laws for this purpose. This is quite controversial and could potentially seriously undermine the openness regime (see below).

For the most part, the exceptions recognised in the different right to information laws do relate to legitimate interests, although in many cases they are cast in unduly broad terms and this is a serious problem in many laws. A few laws do contain rare or peculiar exceptions. The laws of the United Kingdom and Thailand, for example, contain exceptions relating to the royal family, while South Africa has an exceptions relating to the Internal Revenue Service and third party research. The United States law contains an exception relating to information about oil wells, according to rumour because the president at the time, Lyndon B. Johnson, was from Texas. India contains an exception for information which would incite to an offence. While inciting to an offence is a crime in most places, it is hard to see how releasing information held by public bodies could lead to this result. In general, the need for such 'special' exceptions may be questioned, since modern States have very similar (legitimate) confidentiality needs.

Beyond the interests protected by the exceptions is the difficult task of ensuring an appropriate balance between the protected interests and the need for openness. A number of means of addressing this are found in different laws.

Many laws seek to narrow the scope of exceptions in various ways. Several contain exceptions to exceptions. This approach is widely used in the South African and Ugandan laws which, along with the Japanese law, for example, do not apply the privacy exception to matters relating to the official role of public officials. The South African and Ugandan laws also limit exceptions in favour of third parties by providing that where the third party is made aware in advance that the information might be disclosed, the information shall not fall within the scope of an exception.

A number of countries – including Thailand and Jamaica – provide for release of background factual or technical documents otherwise covered by cabinet or internal deliberations exceptions. In many cases, laws provide for the release of previously exempt information after a decision has been made, a matter resolved by the courts, an investigation completed or some other 'final' stage reached. The Azeri laws contains a long list of types of information that cannot be treated as confidential, such as economic and financial information, information on benefits provided to members of the public and so on.

A difficult issue is the relationship of right to information laws with secrecy laws. In principle, it does not matter which law provides for an exception, as long as that exception is appropriate in scope, taking into account the need for openness. In practice, however, many secrecy laws do not provide for an appropriate balance, in part because they were drafted before the need for openness was recognised. Put differently, leaving in place the pre-existing regime of secrecy at the time a right to information law is adopted is likely to lead to undue secrecy.

In most countries, notwithstanding the above, right to information laws do leave in place secrecy laws, although in a few – including South Africa and India – the right to information law has overriding force. The Indian law specifically mentions that it takes precedence over the Official Secrets Act, 1923, presumably because it was recognised as being particularly problematical from a secrecy point of view. In some countries – such as Azerbaijan and Jamaica – the relationship between the right to information and secrecy laws remains unclear. A compromise solution has been adopted in Sweden, where only one secrecy law, the Secrecy Act, is recognised as legitimate. This has the virtue of being transparent and also of ruling out the many secrecy provisions that lurk in older laws in most countries. A variant on this in Japan allows only laws provided for in a special list to override the right to information law. The United States law provides some redress for the problem of 'lurking' secrecy laws, stipulating that secrecy laws remain in place, but only where they leave no discretion as to the non-disclosure of the information in question.

Another issue is the role of classification in determining the release of information under a right to information law. In most cases, classification is irrelevant and the exceptions in the right to information law, or possibly in a secrecy law, serve as the basis for decisions about disclosure. This has obvious merit, since mere administrative classification should not be able, in effect, to override legal provisions requiring disclosure. On the other hand, and formal legal rules aside, classification often have a very important bearing on disclosure in practice and a number of laws put in place measures to limit it. The Azeri law, for example, requires classified information to include a date upon which classification will expire. Under the Mexican law, classification is subject to different levels of review, including by the independent oversight body.

The three-part test for exceptions to the right to information was noted above in the chapter on Features of a Right to Information Regime. Pursuant to this test, information must be disclosed unless the public body can show a) that the information falls within the scope of an exception listed in the law; b) that disclosure would pose a risk of harm to the protected interest; and c) that this harm outweighs the overall public interest in the disclosure of the information. Few of the laws surveyed in this book strictly conform to all three parts of this test, but many do at least broadly reflect it.

A large overall majority of the exceptions in the various laws are subject to a harm test of one sort or another, or have built-in harm tests, although most laws have a least some exceptions that are not subject to a harm test. Certain exceptions, for example in favour of legally privileged information, effectively contain an internal harm test, since the definition of legally privileged information was developed specifically to protect overriding interests. Otherwise, the standard of harm varies considerably and this has an important bearing on disclosure of information since the higher the standards of harm, the narrower the exception will be in practice. A few examples of harm found in different laws are: 'would be likely to prejudice', 'could lead to a negative result', 'adequate reason to believe harm would result' and 'harm could reasonably be expected'.

In Sweden, the exceptions are divided into two categories, one for which harm is presumed and the other for which there is a presumption against harm. In some countries – such as the United Kingdom and Jamaica – certain officials have the power to issue certificates to the effect that disclosure of the information would harm a protected interest, thereby effectively rendering the information secret. These certificates can be very problematical from the perspective of openness, depending on their precise impact; they normally limit the standard of review by appellate bodies such as an information commissioner or even the courts.

A number of laws completely exclude certain bodies from the ambit of the law which is a radical way of avoiding not only the harm test but also any public interest override and even any consideration of whether the information should be disclosed at all. Security and/or intelligence bodies, for example, are excluded in the United Kingdom, India and Peru, while the Cabinet and courts are excluded in Uganda. Significantly, in India the exclusion does not apply to information relating to corruption or human rights abuse.

A number of countries also exclude certain types of requests. In Mexico, for example, offensive requests or requests which have already been dealt with are excluded, in the United Kingdom vexatious or repeated requests, requests for information which is already accessible and requests for information intended to be published are excluded. Information about to be published and frivolous or vexatious requests are also excluded in South Africa. Both exclusions are in principle legitimate. There is nothing wrong with leaving in place existing publication systems as an alternative to request-driven access, as long as the standards that apply – for example in terms of timeliness or cost of access – are similar. Where this is not the case, however, public bodies could use publication of information to avoid the procedures in place for requests. Similarly, vexatious, offensive or repetitive requests can impose costly burdens on public bodies and yet not advance the right to information. Again, however, where these are applied to broadly or within unduly wide discretionary limits they can be problematical.

About one-half of the laws surveyed – including the United Kingdom, India, South Africa, Uganda, Azerbaijan and Japan – have general public interest overrides. In some cases – such as South Africa, Uganda and, arguably, Thailand – the public interest override is limited to certain types of interests, such as a breach of the law or a serious risk to public safety or the environment. This approach has the advantage of being clear, whereas a general reference to the public interest may lead to difficult interpretation issues. At the same time, indeed by the same token, it is also narrow in scope, excluding a wide range of potential

public interests. A number of laws have particular public interest overrides for certain exceptions. Mexico and Peru, for example, provide for an override in relation to human rights breaches or crimes against humanity, Sweden recognises an override in relation to consumer protection, and health and safety, while Jamaica recognises one for Cabinet documents and the environment.

All of the laws surveyed provide for the partial release of information (severability) where only some of a document is confidential. This simply makes obvious sense since the fact that some information in a document is confidential cannot of itself prevent disclosure of the rest of the document.

Most of the laws provide for historical disclosure, often with different periods of time applying based on the type of exception. The Azeri law, for example, provides for release of information protected on public grounds after five years, in Uganda documents protected under the internal deliberations exception are released after ten years and the defence and international relations exceptions come to an end after 20 years. Most other laws have longer historical disclosure rules, for example of 20-30 years.

It is not proposed to list specific exceptions here; this detail is contained in the country chapters. However, a few exceptions, while common, are also problematical. For example, most laws have an exception relating to internal decision-making, or deliberative processes. This is legitimate as government needs to be able to run its internal operations effectively and to have 'time to think'. In particular, the following harms may need to be prevented:

- prejudice to the effective formulation or development of public policy;
- frustration of the success of a policy, by premature disclosure of that policy;
- undermining of the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views; and
- undermining of the effectiveness of testing or auditing procedures.

150

At the same time, if this exception is phrased in excessively broad terms, it can seriously undermine the principle of maximum disclosure and lead to a wide range of internal documents being withheld. It is, as a result, particularly important that this exception be clearly and narrowly drawn, that it be limited to protecting the specific interests noted above and that it be subject to a public interest override.

Another problematical exception is protection of good relations with other States and intergovernmental organisations. In principle, this is legitimate. At the same time, it can be problematical, particularly when used by intergovernmental organisations, since it embraces much of the information they hold. A problem is that both parties may easily claim they need to deny access to the information on the basis that disclosure would harm relations with the other party, a clearly unacceptable situation. It can also lead to a lowest common denominator situation, whereby the least open country within the information sharing 'circle' sets the standards. It can also be difficult for those not involved in the specific relationship, such as judges or information commissioners who are supposed to exercise oversight over secrecy claims, to assess whether or not the disclosure would harm a relationship.

National security is another problematical exception, which led ARTICLE 19 to produce a set of principles on this subject, *The Johannesburg Principles: National Security, Freedom of Expression and Access to Information*.<sup>341</sup> States have historically demonstrated a serious tendency to over-classify information on grounds of national security. Furthermore, as with inter-governmental relations, it is difficult for outside actors to assess the extent to which the disclosure of information might really affect national security. This leads to a situation where security claims may be accepted, even though they are completely unwarranted. As Smolla has pointed out:

History is replete with examples of government efforts to suppress speech on the grounds that emergency measures are necessary for survival that in retrospect appear panicky, disingenuous, or silly.<sup>342</sup>

Unfortunately, the reaction of many States to the problem of terrorism has been to increase secrecy rather than to bolster democracy through openness.

## Appeals

It is widely recognised that individuals should have the right to lodge complaints or appeals where they feel that their requests for information have not been dealt with properly, in particular where they have been refused access to the information sought. Different laws provide for different complaint options. An internal complaint is a common option, as is a complaint to an independent oversight body and/or the courts. Some sort of independent oversight is clearly needed since otherwise decisions on whether or not to disclose information ultimately rest on the discretion of public officials.

Many laws – including those of South Africa, the United States, Peru, India and Jamaica – provide specifically for an internal appeal, normally to a higher authority within the same body which originally refused the request. In some cases, such as in the United Kingdom, completing this appeal is a pre-requisite to lodging a higher level appeal.

Most of the laws reviewed – with the exception of South Africa, Sweden, Uganda, Peru and Bulgaria – provide for an independent oversight body to play a role in resolving access to information complaints. This is something which has proven central to the effective functioning of the right to information regime. Appeals to the courts are too time-consuming and expensive for all but a small minority of applicants, and yet it is essential that an external level of appeal be available. The importance of this is reflected in part by moves in countries which do or did not have oversight bodies to introduce them. Very recent amendments in the United States have finally established an oversight body with a mandate to help resolve complaints, while in South Africa the establishment of such a body is a key civil society demand.

For the most part, laws establish specific bodies for this purpose although some, such as the Kyrgyz law, allocate the task to an existing body, in that case the ombudsman. This has a number of disadvantages, including that the powers of the body are unlikely to be tailored to the specific needs of information appeals and that the body is unlikely to develop the specialised expertise required to deal properly with information appeals. At the same time, this can be an attractive option for less wealthy or smaller countries. In some countries – such as the United Kingdom and Thailand – the law provides for both an independent oversight body and a specialised tribunal with the power to hear further appeals.

Given that, at least in their complaints role, oversight bodies have to mediate between the public and officials, it is important that they be protected against interference, particularly of a political nature. Different laws take different approaches to guaranteeing the independence of these bodies. The appointments process is clearly central to this guarantee. In Japan, the Prime Minister appoints the Commissioners upon the approval of both houses of parliament. In Mexico, appointments are made by the executive branch, but are subject to veto by the Senate or Permanent Commission. In India, the President appoints, but on the nomination of a committee consisting of the Prime Minister, the Leader of the Opposition and a cabinet minister. A similar system applies in Jamaica, but without the cabinet minister. Involving more different sectors of society in the appointments process is an important way of enhancing the independence of appointments.

A number of other provisions in different laws enhance independence, including prerequisites for being appointed as a member – such as having expertise and having a strong moral record – conditions on membership – for example against individuals with strong political connections from being appointed – protection of tenure – for example through establishing limited grounds for removal – and funding mechanisms – including by linking salaries of members to pre-existing civil service grades, such as those of the judicial service.

The grounds for complaint should be broad, so that all failures to apply the law may be remedied. Specific grounds in different laws include an inability to lodge a request, failure to respond to a request within

the set time frame, a refusal to disclose information, in whole or in part, charging excessive fees and not providing information in the form sought. A catch-all for other failures is found in many laws. It is also important that the body be able to investigate breaches of its own motion, so that general failures about which complaints are unlikely to be lodged by individuals – such as a failure to respect proactive publication rules – may also be addressed.

In most cases, oversight bodies are given the necessary powers to conduct full investigations into information complaints, including to summon witnesses. Importantly, in most cases, they are empowered to request any information from public bodies, including the information to which access has been refused, which they may consider *in camera* if necessary to protect its confidentiality until a decision has been reached. Powers of enforcement are also normally provided for, sometimes by registering decisions with the courts. In a number of countries – including the United States, Uganda, India and Jamaica – the law specifically provides that the onus in case of a complaint shall be on the public body to justify any refusal to provide information. This is consistent with the idea of a right to information, which establishes a presumption that all information is subject to disclosure from which derogations must be justified.

Oversight bodies may be given the power to impose a range of remedial measures, such as to require public bodies to disclose the information, perhaps in a particular form, to lower the fee or even to compensate the applicant, to appoint information officers, to enhance the provision of training to their officials, to publish certain information on a proactive basis, to make changes to their record management systems and so on. In some cases, such as in India, the oversight body is even empowered to impose fines.

Most, but not all, right to information laws provide for an ultimate appeal to the courts. Even where appeals are specifically precluded by the law – as in India – the courts have assumed jurisdiction under administrative law rules. Significantly, in Mexico, only requesters, and not public bodies, may prefer an information appeal to the courts. This prevents public bodies from using their often considerable power to delay or prevent information disclosure.

## Sanctions and Protections

Most laws do include some sort of sanction for individuals who wilfully obstruct access to information – although some, including Thailand and Kyrgyzstan, do not – and some also provide for the direct responsibility of public bodies. In a number of countries – Jamaica, Bulgaria, South Africa and Peru – it is a criminal offence wilfully to obstruct access and conviction may lead to criminal penalties, often including imprisonment. In other countries – like Mexico – the law instead provides for administrative liability. The India law gives the oversight body the power to impose fines for obstruction, and provides for the same body to recommend disciplinary action for persistent abuse. In such cases, the burden is on the official to prove that he or she did not act improperly. In the United States, the law provides for an investigation by the Special Counsel when a question as to whether an official has acted ‘arbitrarily or capriciously’ with respect to the withholding of information.

Various particular forms of conduct are specified in different laws, such as destroying, damaging, altering, concealing or falsifying records. Other laws simply refer generically to any form of obstructing access.

Many laws also provide for protection for good faith disclosures under the law. A number of common law countries – including India, South Africa and Uganda – protect officials against any form of liability for acts done in the performance or purported performance of a duty under the law. A gloss on this in the United Kingdom is to limit protection to defamation actions, while in Jamaica, protection extends to defamation law, breach of confidence and copyright rules.

A number of countries – including Japan and Kyrgyzstan – do not provide protection for good faith disclosures. Some countries actually provide for liability for disclosing exempt information. The Swedish law, for example, provides for liability under the penal code and also imposes some forms of direct liability, in Mexico officials are administratively liable for wrongful disclosures while in Jamaica officials remain

legally liable disclosures which breach the right to information law – outside of the protections noted above – including under the Official Secrets Act. These provisions obviously inhibit the disclosure of information and are likely to perpetuate the culture of secrecy.

Only one of the laws surveyed, that of Uganda, provides specific protection for whistleblowers. On the other hand, other laws in a number of countries – the United Kingdom, South Africa, the United States – do provide this form of protection. Protecting whistleblowers is an important safety valve which can help ensure that key public interest information is disclosed.

## Promotional Measures

The range of promotional measures provided for varies considerably from law to law with some laws – such as those of Sweden, Bulgaria and Thailand – containing very few measures while other laws – such as those of Mexico, the United Kingdom, South Africa and India – contain more extensive measures.

Many laws provide for the appointment of dedicated officials – information officers – to assist in the implementation of the law. These officials undertake a range of functions from processing requests for information, ensuring that proactive publication takes place, providing assistance to applicants, proposing internal procedures to implement the law, promoting training, undertaking reporting and so on.

In Uganda and South Africa, the head of the respective public body serves this function, although deputies may be appointed to carry out the day-to-day functions. The Indian law provides for the appointment of as many dedicated officials as may be necessary. In the United States, in addition to Chief FOIA Officers, public bodies must appoint FOIA Requester Service Centers, to provide information on the status of requests, as well as FOIA Public Liaisons, supervisory officials who handle internal complaints. In Mexico, Liaison Sections carry out most ‘information officer’ functions, while Information Committees are required, among other things, to oversee classification and to establish document management criteria.

A number of laws also provide for the production of a guide to explain to the public their access to information rights and how to lodge requests, while in other countries these are produced as a matter of practice. These guides contain information on the purpose of the law, the rights of individuals to request information, the contact details of information officers, how to make a request for information, how such a request should be processed, what assistance is available, applicable fees and remedies for failures to apply the law, including available appeals.

In some countries, one central body produces the guide – in India and Mexico this is, respectively, the government and the oversight body – while in other countries – such as the United States and South Africa – each public body is required to produce its own guide. In South Africa, the Human Rights Commission must additionally produce a national guide, in all eleven national official languages.

Quite a few countries provide for minimum standards for record management. Some countries – like Mexico, Azerbaijan and the United Kingdom – give a mandate to a central body – the Federal Institute of Access to Information in Mexico, the responsible Minister in Azerbaijan and the Lord Chancellor (minister of justice) in the United Kingdom – to set standards regarding record management, as well as some system for ensuring that public bodies respect these standards. This is a good approach as it can ensure strong, uniform standards across the civil service.

Most countries provide for some sort of reporting on implementation of the law. In many countries, this task is allocated to a central body with all public bodies being under an obligation either to report regularly to this central body or to provide it with such information as it may require. In countries like India, Azerbaijan, Thailand, South Africa and Mexico, the oversight body discharges this task, while in other countries – Japan and Peru – it is done by the cabinet. In yet other countries – including Uganda and the United States – each body or ministry is required to provide its own public report. In the United States, the Attorney General

must make each such report available at a central website and also provide his or her own central report to Congress.

The reporting requirements vary but certain information is commonly required to be provided such as the number of requests received, granted and refused, the provisions of the law relied upon to refuse requests and how frequently, appeals, whether internal or to the oversight body, their outcome, the time taken to process requests, fees charged, measures taken to implement the law and recommendations for reform.

In a number of countries – Thailand, Mexico, the United Kingdom, South Africa, Azerbaijan – the oversight body has a general responsibility to promote implementation of the law which may include monitoring implementation, providing training, interpreting the law, developing forms and other implementation tools, giving advice to applicants and/or public bodies, and making recommendations for reform. In several countries – such as Jamaica, the United States and Japan – the law specifically provides for some form of periodic review of the operation of the law. In Kyrgyzstan, the law also provides for a review of all laws which restrict the disclosure of information with a view to bringing them into line with the right to information law.

---

## Notes

154

- 340. For example, private bodies have complained of the cost of producing guides on how to access information they hold.
- 341. ARTICLE 19 (London: 1996).
- 342. Smolla, Rodney, *Free Speech in an Open Society* (New York: Knopf, 1992), p. 319.

# Conclusion

At its best, the right to information can deliver important social benefits. It can provide an important underpinning of democracy, fuelling peoples' ability to participate effectively and to hold governments to account. Examples of the right to information being used to expose corruption are legion and powerful, ranging from grassroots cases linked to basic livelihoods to major corruption scandals which have brought down governments. The right to information has also been used less dramatically, but no less importantly, to ensure an efficient flow of information between government and business.

These utilitarian benefits of the right to information have been recognised since at least 1776, when the idea first found legislative recognition in Sweden. Of far more recent vintage, however, is recognition of the right to information as a fundamental human right, an aspect of the right to freedom of expression which, under international law, guarantees not only the right to impart, but also to seek and receive information and ideas.

Fifteen years ago, almost no one claimed that access to information held by public bodies was a fundamental human right. By the time the first edition of this book was published in 2003, the idea had become more established but was still largely the preserve of right to information activists, supported by a few academics and others. As this second edition goes to print, the idea has matured significantly, to the point where it is constantly referred to not only by activists but also by inter-governmental bodies, development workers and even government officials. The author has, over the years, spent considerable energy promoting the idea of the right to information as a human right, including through the first and now second editions of this book, and its growing recognition as such is a source of some satisfaction.

The first edition of this book brought together for the first time all of the key international standards supporting the idea of access to information as a human right, along with supporting national developments, and marshalled the arguments in favour of such recognition. The second edition updates the evidence and extends the arguments, which are now presented as highly persuasive.

It is important to recognise the proper status of the right to information but, as with other complex human rights, the devil is in the detail. This book seeks to elaborate in some detail on specific principles derived from international standards on the right to information, namely: a strong presumption in favour of access; good procedural means by which the right may be exercised, including through proactive publication obligations; a clear and narrow regime of exceptions; and the right to appeal breaches of the rules to independent oversight bodies.

Beyond these (still quite general) principles, the now considerable practice of different States in giving effect to the right to information in law serves as an important body of knowledge both for those promoting the adoption of a law for the first time and for those reviewing their existing law and practice with a view to reforming it. This book provides a wealth of comparative information on the practice of 14 States

from different regions around the world, all of which have pursued relatively progressive approaches to implementing the right to information.

It has often been noted that the adoption of a progressive right to information law is only the first, and in some ways the easiest, step in realising the right to information in practice. The author fully endorses this view, which is also clearly borne out in practice. Fulsome implementation requires political will, an active civil society and at least some other key democratic features, such as respect for the rule of law. While a good law is not sufficient to deliver the right to information, it is at the same time a necessary precondition. It is the platform upon which these other required features build. It is hoped that this book will assist those

promoting the right to information to build a strong legal platform in support of this key human right.

**Toby Mendel** is the Law Programme Director with ARTICLE 19, Global Campaign for Free Expression, a leading international human rights NGO based in London, a position he has held for some ten years. In that capacity, he has worked extensively on freedom of expression and right to information issues in Asia, Africa, Europe, the Middle East and Latin America, running training seminars, critiquing laws, taking cases to both national and international bodies, advising NGOs and governments, and even working with officials to prepare draft right to information laws. In addition to his work with ARTICLE 19, he has provided expertise on these issues to a wide range of actors including the World Bank, various UN and other intergovernmental bodies, and numerous NGOs. Prior to joining ARTICLE 19, Toby Mendel worked in human rights and international development, including as a senior human rights consultant with Oxfam Canada and as a human rights policy analyst at the Canadian International Development Agency (CIDA).

Toby Mendel has published widely, contributing to numerous ARTICLE 19 and other publications. He is, among other things, the author of the ARTICLE 19 publications *The Public's Right to Know: Principles on Freedom of Information Legislation* and *A Model Freedom of Information Law*. This is the second book by Mr. Mendel published by UNESCO, the first being *Public Service Broadcasting: A Comparative Legal Survey*. His published work covers a wide range of free expression issues including broadcasting, communications rights, defamation, the right to information, the rights of the child, public service broadcasting and false news. He has an honours BA in mathematics from McGill University and a first class LLB (law) from Dalhousie University.

**The importance of the right to information or the right to know is an increasingly constant refrain in the mouths of development practitioners, civil society, academics, the media and governments. What is this right, is it really a right and how have governments sought to give effect to it? These are some of the questions this book seeks to address, providing an accessible account of the law and practice regarding freedom of information, and an analysis of what is working and why.**

**“The free flow of information and ideas lies at the heart of the very notion of democracy and is crucial to effective respect for human rights...Central to the guarantee in practice of a free flow of information and ideas is the principle that public bodies hold information not for themselves but on behalf of the public.”**

From the Foreword by Abdul Waheed Khan  
Assistant Director-General  
for Communication and Information  
UNESCO