

Breathing Life into Freedom of Information Laws:

The Challenges of Implementation in the Democratizing World

By Craig L. LaMay, Robert J. Freeman, and Richard N. Winfield

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The Center for International Media Assistance (CIMA), at the National Endowment for Democracy, works to strengthen the support, raise the visibility, and improve the effectiveness of independent media development throughout the world. The Center provides information, builds networks, conducts research, and highlights the indispensable role independent media play in the creation and development of sustainable democracies. An important aspect of CIMA's work is to research ways to attract additional U.S. private sector interest in and support for international media development. The Center was one of the of the main nongovernmental organizers of World Press Freedom Day 2011 in Washington, DC.

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Preface



The Center for International Media Assistance (CIMA) at the National Endowment for Democracy commissioned this guide to making freedom of information laws more effective in cooperation with the International Senior Lawyers Project. It is intended for stakeholders in national and local governments, the media, civil society, and business.

CIMA is grateful to the authors, Craig L. LaMay, Robert J. Freeman, and Richard N. Winfield, for their research and insights on this topic. We hope that this report will become an important reference for international media assistance practitioners.

A handwritten signature in blue ink that reads "Marguerite H. Sullivan". The signature is written in a cursive, flowing style.

Marguerite H. Sullivan
Senior Director
Center for International Media Assistance

About the International Senior Lawyers Project

For 13 years, ISLP has delivered pro bono legal services of the highest caliber to grassroots nongovernmental organizations and select governments of the least-developed countries throughout the world in support of projects that advance human rights, equitable economic development, and the rule of law. With experience in nearly 50 countries, ISLP is unusual in its ability to respond rapidly and effectively to requests for assistance. ISLP's pro bono model allows it to deploy highly experienced lawyers at a fraction of the cost of other technical assistance providers, delivering more than \$12 of assistance for every dollar spent. In 2012, ISLP delivered \$12.9 million in pro bono legal services, bringing its total since beginning operations to more than \$80 million. ISLP's Media Law Working Group, headed by Richard Winfield, a co-founder of ISLP, worked with CIMA to produce this report.

Executive Summary

This report is intended to be a practical, useful guide for stakeholders in national and local governments, the media, civil society, and business to making freedom of information laws work. The authors' particular emphasis is on the role public officials and journalists must play in effectively breathing life into these laws, giving meaning to their democratic intent and legal guarantees.

Most of the world's 90-plus freedom of information (FOI) laws are recent, enacted in the last two decades, and many are exemplary on paper. But many are also poorly implemented. Surprisingly but commonly, citizens, national and local public officials, and journalists are often unaware that such laws even exist, much less how they work. Non-governmental organizations and businesses typically make more requests than journalists or citizens, but frequently the total number of requests is far below what might be expected given the scope of FOI laws, which in some developing countries apply not only to government agencies but also to private entities that receive government funds. In countries transitioning from authoritarian pasts, governments retain the habit of working in secrecy, which hobbles democracy and promotes corruption.

Often when people seek information under FOI laws and are refused, they are denied on grounds that have no basis in law, or, if denied under a statutory exemption, without explanation of why the exemption applies. Sometimes requesters are denied for reasons that amount to official inconvenience, told that the request is too time- or resource-consuming to fulfill, or that the records they want do not exist. Requesters are asked to justify their requests, or officials simply ignore them, thus saving themselves the trouble of providing any explanation. The requester's opportunity to contest an agency's denial or failure to respond is typically inadequate: Internal appeals are often met with cursory review and the same result. Ombudsmen or other oversight bodies responsible for monitoring the law rarely have the authority to compel compliance when a request has been improperly denied, and pursuing redress in courts is time-consuming and expensive. Where citizens lack faith in their judicial system, the problem is compounded.

This paper begins with a review of the theory and practice of FOI laws, which are universally recognized as critical components of a modern system of free expression. It follows with discussion of the obstacles to effective implementation, including in an appendix several interviews with stakeholders in six countries in which FOI laws have been introduced recently: Albania, Armenia, Indonesia, Jamaica, South Africa, and Ukraine. The paper then makes several recommendations, which can be summarized thusly:

Officials of national and local governments who are responsible for responding to citizens' requests for information must be properly organized, trained, funded, and protected. Those officials should be prepared to take effective measures to make FOI laws work. Leaders of the media, civil society, and business should persuade government officials to develop the political will to act promptly and effectively to make FOI laws work.

Because government touches everything, an FOI law should touch everything. Every aspect of governmental functioning has been the subject of inquiries under various FOI laws. There is no end to the potential utility of an access to information law, and that should be clearly expressed to and by officials responsible for its implementation.

It should be recognized that an FOI law is most important to average citizens at the local government level. This is true for the same reason that local news is what citizens most value: It's what actually matters to them, affecting how they raise their families, where they live, how they make their livelihoods. People are most likely to actively participate in politics and civic life at the local level. They need to be able to hold their local leaders accountable.

Many FOI laws are based on a presumption of access, stating that government records are accessible with certain exceptions; the exceptions should be based on the likelihood of harm that could arise as a result of disclosure. An FOI law should in essence state that everything is available unless disclosure would hurt an individual via an unwarranted invasion of privacy, the government in terms of its ability to do its job well on behalf of the public, or perhaps a private company vis-a-vis its competition. Embarrassment is not grounds for denial of access.

The law should not require that government officers, employees, or agencies go to unreasonable lengths to accommodate applicants. The law should not compel the government to search through the haystack for the needle, even if it is known that the needle is there, somewhere. Rather, the government should be required to respond when records can be found, generated, or extracted with reasonable effort, which is often related to the nature of the agency's filing, record-keeping or retrieval systems.

It must be recognized that public officials and government employees are more accountable than the public generally and that they enjoy less privacy than others. For instance, it is typical that salaries of public employees are accessible, and that ethics/financial disclosure requirements are often imposed on them. There are numerous situations in which certain disclosures as they pertain to private citizens would constitute an

unwarranted invasion of personal privacy but where disclosure of the same information about public officials and employees would result in a permissible invasion of their privacy, for example, records indicating attendance or misconduct.

Harness the power of information technology. Missing from most older FOI laws is proactive disclosure. It should be required that governments post material on their websites when it is significant, clearly public, and frequently requested or used by the public. The government should also now promote “smart data,” also known as “open data,” platforms that enable users to merge and analyze machine-readable data. Government should also develop its electronic information systems in a manner in which it can segregate data items that are public from those that can justifiably be withheld. This promotes maximum access, consistent with the intent of the law, while concurrently protecting privacy or the disclosure of information that is clearly exempt.

Public officials must recognize that records management and archiving are critical to sustaining the utility of an access law and, in general, the proper functioning of government. In many nations, there has been little or no policy or law concerning the management of records, and inclusion of records retention and archiving requirements in an FOI law serves as a positive element in governmental operations.

Ensure that the ombudsperson or compliance person or body is a true believer and a champion of FOI and empower that person or entity to act on behalf of the public. If providing guidance or determining rights of access is merely a job, the function will likely fail. If that person or body is passionate about FOI and is independent, even a weak law will function more effectively, and a strong law will become stronger.

Officials must regularly review the operation of the FOI law to determine its strengths and weaknesses and to recommend changes in the law to correct its deficiencies. At the very least, laws that conflict with the FOI law must be amended or repealed.

The World's Right to Know

Over the last 20 years a global right-to-information movement has created a new norm for any government that claims to be democratic. The idea that information access is a basic political right, both central to the right of free expression and an entitlement in its own right, has been endorsed by many national courts,¹ by the United Nations,² and by two prominent international courts, the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR). Perhaps especially in transition states where democratic norms are fragile, the absence of such a right means that “truth would languish and people’s participation in government would remain fragmented.”³ As one source notes, in comparative and international law “it has become untenable to argue that the public should *not* have a general right to know what their government knows and does, subject only to compelling exceptions.”⁴

When the Soviet Union collapsed in 1991, only 14 countries had freedom of information laws, but in the decade that followed 28 countries adopted one. The freedom of information movement has not been limited to developing countries. Among the established democracies to pass FOI legislation in the last two decades are the United Kingdom (2000), Japan (1999), Iceland (1996), Ireland (1997), and Germany (2005). Sources differ as to how many countries in the world now have FOI laws, but it is at least 93⁵ and as many as 99.⁶ FOI laws exist in all of North America, virtually all of Europe, much of Latin America, and several countries in Asia. The regions of the world with the fewest open information laws are Africa and the Middle East, followed by Southeast and Central Asia. Of the countries with FOI laws, 18 also have sub-national FOI laws at the state, province, or municipality level. Forty-nine other countries have drafted or approved FOI laws but have yet to bring them into force. Fifty-seven countries have no FOI law at all.⁷

One of the most remarkable developments in FOI law has been in formerly communist Europe, where by 2006 virtually all of the transition states of Central and Eastern Europe had adopted such laws. Most also included a right to information in their new constitutions.⁸ Several of these countries have in their constitutions separate additional provisions guaranteeing access to information about environmental matters, and in some cases those provisions predate the end of communist rule.⁹ A few also have enacted laws to promote transparency in campaign financing.¹⁰ The transition states adopted FOI laws for a variety of reasons, but they adopted them quickly. Most developed democracies, however, took decades to adopt freedom of information laws.¹¹ Hungary was the first post-communist state to adopt an FOI law (the Law for Protection of Personal Data and Release of Information of Importance for the Public Interest), in 1992, and Ukraine the most recent, in 2011. Today only three European states do not have a formal open information statute: Belarus, Luxembourg, and the Vatican.

Scoring and ranking countries for their freedom of information regimes is now an industry unto itself. Dozens of non-governmental organizations (NGOs) monitor freedom of information at the levels of both global and domestic governance,¹² including the activities of inter-governmental organizations (IGOs) such as international development banks.¹³ Some IGOs, notably the World Bank, also monitor the development and implementation of FOI laws.¹⁴ There are several useful surveys of access laws around the world, the most current published by the Open Society Foundations-funded network freedominfo.org, which provides summaries of FOI laws or legislation in 119 countries.¹⁵ Also useful are the reports of independent researcher Roger Vleugels, who since 2001 has published the *Fringe Journal*, a bi-weekly newsletter on information access around the world. Vleugels' 2011 overview of the world's FOI laws is a valuable resource.¹⁶ London-based NGO Article 19 (named after the 19th article of the Universal Declaration of Human Rights) provides both legal analysis and advice to right-to-know advocates on its website, as well as a template for a model freedom of information law.

There are relatively few comparative studies of FOI laws that don't rely exclusively on qualitative methods, but several are notable. Researchers Helen Darbishire and Thomas Carson did a 2006 survey for the Open Society Institute of FOI laws and their effectiveness. Their research maps and evaluates 140 requests in each of 14 countries (yielding a database of more than 1,900 requests), seven of them with FOI laws and seven without.¹⁷ In 2003, UNESCO published a comparative study by Article 19's Toby Mendel examining the right of information access in 10 countries and two international organizations.¹⁸ A follow-up report in 2008 examined the effectiveness of FOI laws in 14 countries, some of them long-standing democracies and others in the process of transitioning to democracy.¹⁹

Of particular interest are two efforts to develop reliable, replicable methodologies for evaluating and comparing FOI laws. In 2004, the Open Society Justice Initiative did a five-country pilot study²⁰ to test an FOI "monitoring tool." The tool assesses individual FOI laws against international standards, develops standardized requests for information, draws on interviews with public officials in the monitored agencies and countries, and tracks the progress of requests.²¹ The second measurement effort comes from Johan Lidberg at Australia's Murdoch University, who has developed an "international freedom of information index" with which civil society groups, journalists, scholars, and others can compare the effectiveness of FOI laws. Lidberg's index puts special emphasis on journalists' use of FOI laws and on the legal status of the "whistleblowers" who provide them with information.²²

These comparative studies indicate, as does virtually every source cited in this report, seemingly endemic problems with implementing FOI laws. The most serious problem is that state interests everywhere resist information access laws along a range of fronts that vary from national security to privacy. David Banisar, who monitors FOI laws worldwide, has written that while FOI laws are now de rigueur, many are little more than window dressing, honored in the breach if at all. Even in established democracies with FOI laws of long standing, the laws fail to deliver on their promise. The best FOI laws *on paper* are now in the world's newer democracies, but there, too, public access to information is democratic aspiration still to be fulfilled. As Banisar writes, many of the world's FOI laws "are not adequate and promote access in name only. In some countries the laws lie dormant due to a failure to implement them properly or a lack of demand. In others, the exemptions are abused by governments ... New laws promoting secrecy in the global war on terror have undercut access."²³

These problems are the focus of this report: how local and national governments, with the media development community, can make freedom of information laws more effective and thus improve the quality of democratic governance worldwide. The history of the freedom of information movement strongly suggests that the key to strengthening it will be civil society, a category that can include journalism and public affairs media.²⁴ Civil society can and should press government officials—through lawsuits if necessary—to make real the promise of FOI laws. For governments to acquire the necessary political will to do their duty and implement fully their FOI laws, civil society must become a sustained and active goad. Journalists, too, must be more active in breathing life into FOI laws. Journalism's core mission is to provide the public with the variety and quality of information that makes citizenship meaningful. Freedom of information, as discussed below, is what gives the right of free speech direction and power. Indeed, FOI laws are in some part the result of previous efforts by the media development community to create a strong enabling environment for free and independent media.

Freedom of Information and Democracy

Access to information and freedom of speech are joined at the hip; neither is truly meaningful without the other. Not by coincidence the world's first and oldest freedom of information law, Sweden's, also assured freedom of the press.²⁵ A number of democracy theorists make this argument, and all the arguments boil down to the same idea: that in a healthy democracy mere "negative freedoms"—the right to be free from government limitations on speech, for example—are not enough; citizenship requires "positive freedoms," too, such as the opportunity to ask for and receive information in pursuit of social, political, and economic goals.²⁶ A simple definition of what such a law is *for* is this:

FOI law gives citizens, other residents, and interested parties the right to access documents held by government without being obliged to demonstrate any legal interest or "standing." Under a[n] FOI law, government documents are assumed to be public unless specifically exempt by the law itself, and individuals can access them without explaining why or for what purpose they need them. In short, FOI laws imply a change in the principle of the provision of government information from a "need to know" basis" to a "right to know" basis.²⁷

Virtually all modern human rights statements embrace this concept. Article 19 of the 1948 Universal Declaration of Human Rights declares that essential to the right of "freedom of opinion and expression" is the right "to receive and impart information and ideas through any media and regardless of frontiers." Article 42 of the European Charter of Fundamental Rights provides that "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, bodies, offices and agencies of the Union, whatever their medium." Article 13 of the American Convention on Human Rights states the right of free speech includes the "freedom to seek, receive and impart information and ideas of all kinds."

Access to information is to citizenship in the information age what civil, political, and social rights were to the industrial age.²⁸ With the rise of the "administrative state" in the West in the nineteenth and twentieth centuries, and of the "developmental state" in Asia, Latin America, and Africa the second half of the twentieth century, the size of government everywhere has grown exponentially. The bureaucracies that compose the administrative state are often all but invisible to the public and lie largely beyond the reach of citizen preferences at the ballot box. The only way to hold them accountable is to open them to regular public scrutiny.²⁹ To be truly representative, a democracy has to do more than hold elections every few years, and in any case elections

do not mean much if citizens have little knowledge of how their government works. Rather a democratic government has to be continuously responsive to its citizens.

Not surprisingly, the global growth of FOI laws is in significant part the result of pressure from civil society groups (many of which were also key to democratic transitions),³⁰ and there is anecdotal evidence that civil society groups account for a much larger number of FOI requests in both developed and developing countries than do journalists.³¹ The very idea of “civil society” presupposes that citizens will monitor and respond to government policies and to propose alternatives, and they cannot do that without information. Transparency offers documented practical benefits, too. At the very least, it discourages official corruption.³² It also reduces the chances of conflict with neighboring states,³³ and it has a positive effect on economic growth by promoting efficient markets, encouraging technological innovation, and making the investment climate more reliable.³⁴

Ironically, the idea that information access is a basic civil right is in fact most vividly embraced—at least on paper—in the newly democratized states of the “Third Wave,” from Mexico to South Africa to Croatia, and not in countries with a longer democratic tradition. As recently as 2005, for example, the Grand Chamber of the European Court of Human Rights, which has repeatedly recognized “the right of the public to be properly informed” under Article 10 of the European Convention on Human Rights, had said public officials have no obligation to actively provide information.³⁵ The chamber appeared to change its mind in a 2012 case in which it recognized a right of access to information held by government authorities independent of any other fundamental right in the ECHR.³⁶ While this paper was being written, the U.S. Supreme Court offered its unanimous opinion, in a case involving the right of out-of-state citizens to make requests under another state’s FOI law, that “there is no constitutional right to obtain all the information provided by FOIA laws ... Nor is such a sweeping right ‘basic to the maintenance or well-being of the Union.’”³⁷ Many, however, would disagree.

Freedom of Information in Practice

Because FOI laws expose government officials to public scrutiny, they will almost always oppose them.³⁸ The lack of transparency allows public officials to earn rents from their monopoly on information by selectively disclosing it to individuals and institutions outside of government.³⁹ Consequently when public officials cannot stop the adoption of FOI laws, they will attempt to weaken them with broad exceptions to the presumption of openness and with vague language that allows them the discretion to withhold information.⁴⁰ Scholars, civil society groups, and others who study, monitor, or compare freedom of information laws are quick to point out that they vary considerably with respect to what parts of government they cover, the information they hold exempt, the way in which they are enforced, and the ease with which citizens can use them.

Article 19 promotes a template for what it believes a model law should look like as an appendix to its *Freedom of Information Training Manual for Public Officials*,⁴¹ and the essential elements of that model are widely endorsed by FOI advocates around the world (the manual is an excellent resource and can be found at <http://www.article19.org/data/files/pdfs/tools/foitrainersmanual.pdf>).

The most important requirement is that an FOI law begin with the presumption of openness. That presumption urges maximum disclosure of information and obligates the government to publish key government information; public bodies should promote open government and their meetings should be open for public attendance. Other requirements for a successful FOI law:

- Any exceptions to the presumption of openness must be as narrow and detailed as possible, subject to strict public interest tests, and written into the statute, not subject to revision with each change of government or so vague as to permit arbitrary denials of information.
- Citizens should be able to easily make requests for information, and those requests should be processed fairly and in a timely manner.
- Citizens should not be deterred from making requests by excessive or arbitrary costs.
- Laws that are inconsistent with the presumption of openness should be amended or repealed.
- Officials who release information should be protected from retaliation.

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- A proper open-records system must have an independent arbiter to decide the difficult cases: a court, an ombudsman, or some authority independent of the agency holding the information.⁴²

Some authors have argued that a good FOI law go further than these requirements, for example that it apply to any body, public or private, that receives public money—including private contractors, non-profits and charities, individuals, and so on.⁴³ Throughout the world, and particularly in the developed world, activities that were once the sole domain of government—operating prisons, running schools, supporting military units, etc.—are now done by private firms.⁴⁴ South Africa’s FOI law is exemplary in this regard, providing citizens access to “any information that is held by another person and that is required for the exercise or protection of any rights,” making the law applicable to private firms in both the for-profit and non-profit sectors.⁴⁵

Probably the most contentious aspect of FOI laws is the question of exemptions. Anyone who has ever read an FOI law, even a good one, can quickly see the discretion given to public authorities to withhold information for reasons of “national security,” “personal privacy,” “public security,” “commercial secrets,” “internal deliberations,” and so on. The problem in every case is not only what these terms mean, but *who* determines whether they apply to a particular piece of information; what test, if any, is used to make that determination; and whether there is a public interest test that can overcome the exemption.

Article 19 proposes a three-part test for withholding information, whatever the exemption’s stated purpose: “the [restricted] information must relate to a legitimate aim listed in the law; disclosure of the information 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.”⁴⁶ In order to withhold, the government would have to meet all three prongs of the test.

Many FOI laws have no public interest or harm tests, or have weak ones that allow government ministers to override the decisions of the information officers charged with applying those tests, such as in Great Britain. Privacy exemptions are also notoriously abused, not least because many FOI laws are also laws for the protection of personal information. FOI laws in Central and Eastern Europe are almost all of this type, presumably because of the long history of state surveillance during the communist period. National security is another contested exemption, made more so by the fact that information is such a key battleground in the war on terror.⁴⁷

For the same reason that governments will weaken FOI laws with vague language, they are not always eager to enforce them. Some sort of independent arbiter is essential when requests are delayed or refused. Several countries have independent commissions or an ombudsman in that role. Many countries have neither. The power these arbiters have depends on the enabling legislation. In some cases their opinions are advisory; in others they are binding.⁴⁸

Appeals may have to go to the courts, which can be both time-consuming and expensive and thus deter people with legitimate claims. If the judiciary itself is subject to the FOI law, it may not be a disinterested arbiter. However, an independent and professional judiciary is nonetheless critical to the enforcement of an FOI law. When a request for information is denied, applicants must be able to first make an appeal to the agency or institution to which the request was made. If that appeal fails or is ignored, the applicant should be able to appeal to an independent ombudsman or information commission that can either order disclosure or make a recommendation urging disclosure. Should that appeal fail, applicants should be able to pursue a final appeal in the courts.⁴⁹

Several newer FOI laws also impose on government agencies an obligation to publish, in other words to proactively make information about their activities and decisions public without citizens having to formally ask for it. With the Internet, the obligation to publish is both practical and essential. The 2006 Mexican FOI law is exemplary in this respect, requiring government bodies subject to the law to publish comprehensive information about their administrative structure; the functions of each internal office; a directory of personnel, including salary information; a list of all forms, documents, and procedures for which the agency is responsible; budgetary information and expenditures; any contracts, permits, or concessions the agency has made; and information about how citizens can make requests of the agency.⁵⁰

Two other critical elements of a successful FOI law are the time limits for agencies to respond and the fees they charge requesters. Timely responses to FOI law requests allow citizens to make the most effective use of the information they receive; delays frustrate the goals of government accountability and citizen participation. Some countries require agencies to respond very quickly, in as little as 24 hours (Sweden and Norway, for example), while most allow several days to a month (Canada, India, and South Africa, for example, allow 30 days for a response). The important thing, of course, is not what the law requires but what governments actually do, and a common complaint among requesters in many countries is that agencies do not respond in a timely manner

and sometimes do not respond at all. The problem is not limited to developing countries; reporters in the United States routinely note that federal and state agencies do not respond to requests within the law's time limits.⁵¹

The second critical element in an FOI law's usefulness concerns the costs citizens are expected to pay in order to get information, if any. Some expenses are real and can be significant—searching for records, reviewing, reproducing, and sending them, for example—but others are not. Some countries allow governments to charge for all four parts of that process (Great Britain), while others allow a modest fixed fee for each request (Japan). There are instances in the United States of agencies demanding exorbitant fees for information as a way of deterring requesters.⁵² It is critical that fees not be arbitrarily set, or set so high as to deter citizens from requesting information.

FOI Laws in the Democratizing World

Of particular concern in this paper are the countries that have enacted FOI legislation in the past 20 to 30 years as part of the process of democratic transition. The greatest concentration of these countries is in Central and Eastern Europe, but the list includes countries from around the globe: South Africa, South Korea, Spain, Mexico, Thailand, Indonesia, Portugal, Guatemala, among many others. On paper, these countries' FOI laws are typically among the strongest, including most or all of the elements urged by Article 19. In addition, most of these countries have included freedom of information provisions in their new or revised constitutions. Some of the weaker new laws, by contrast, are in relatively wealthy countries with long democratic traditions—among them Ireland, Austria, Great Britain, Germany, Japan, the Netherlands, Israel, and Belgium. In several of these countries the implementation of the new laws has been slow, including in some cases after-the-fact repeals of some of the laws' most crucial provisions.⁵³ In between these two groups of countries is another group of developing countries with a mix of democratic traditions—among them India, Turkey, Pakistan, and Jamaica—that have also passed FOI legislation since 2000. On paper their FOI laws vary from poor (Pakistan) to strong (Jamaica), but as discussed elsewhere in this paper the problem with them, as in most democratizing countries, has been effective implementation.

Countries have adopted FOI laws for a variety of reasons. Civil society groups, many of which were also vital to democratic transition, have also been key in promoting and monitoring freedom of information legislation. Indirect and direct pressure from international governmental organizations (IGOs) has also played an important role. As countries offer more information to IGOs, willingly or unwillingly, they have lost their monopoly on information and their ability to hide information from the public. Romania, for example, adopted its FOI law after an EU Task Force study sharply criticized the Romanian government's response to a cyanide spill in 2000 that affected neighboring states.⁵⁴ The task force also made information on the spill available to the Romanian public, information that called into question the official version of events. In response, the Romanian government adopted a FOI law specifically on environmental information, then in July 2000 ratified the Aarhus Convention, the 1998 UN declaration calling on European governments to make environmental information available to the public.⁵⁵ Shortly thereafter the Romanian government adopted a comprehensive FOI law.

Several IGOs have themselves adopted FOI policies in the last 20 years.⁵⁶ In the literature on global governance, both IGOs and international NGOs are criticized for their lack of representation and accountability.⁵⁷ They could not pressure transition states to be transparent unless they became more transparent themselves. The trend started with the World Bank in 2001,⁵⁸ then went to other international development banks.⁵⁹ The

European Union and the Council of Europe adopted transparency policies in 2001, near the time when major EU states, particularly Great Britain and Germany, were developing FOI legislation. By 2003 the EU's Enlargement Directorate had made the promotion of FOI legislation a requirement for candidate countries. A handful of states, mostly in the former Yugoslavia, faced direct pressure from IGOs to adopt FOI legislation. The FOI law in Bosnia-Herzegovina, for example, was created by the Organization for Security and Co-operation in Europe (OSCE) at the order of the organization's high representative to the country.⁶⁰

The Challenges of FOI law Implementation

Every study of FOI laws concludes that the biggest problem with them is implementation. The “success” of any FOI law, writes one scholar, “depends heavily on the predispositions of the political executives and officials who are required to administer it. Statutory entitlements could be undermined if government institutions refuse to commit adequate resources for implementation or consistently exercise discretionary powers granted by the law in ways that are inimical to aims of the legislation.”⁶¹ The monitoring studies of FOI laws discussed in the introduction to this report found that in the countries surveyed fewer than 50 percent of requests are fulfilled and that as many as 36 percent go unacknowledged—a “mute refusal”—and the rest are in some way denied or go unfulfilled.⁶² Particularly where laws are weak to begin with, vague or narrow in their definitions of “information,” vague or broad in their lists of exemptions, lacking effective enforcement mechanisms, one cannot expect such laws to be effective. But implementation is a problem even with model laws. Several independent studies of South Africa’s FOI law, generally regarded as one of the world’s best on paper, have found extensive non-compliance. Reportedly, the South African government simply ignores about two-thirds of FOI requests, and some government agencies do not issue annual reports, as the law requires.⁶³ In 2011, South Africa passed a law that would make it a crime for journalists to report any information the government deems secret.⁶⁴ After protests, an altered version of the Protection of State Information law was passed in April 2013, but it still contains heavy criminal penalties for holding or disclosing state secrets and is strongly opposed by human rights groups and journalists. As of this writing, President Jacob Zuma had not signed the bill.⁶⁵

In other countries, legislatures have moved to limit FOI legislation. Ireland, for example, amended its FOI law in 2003 to extend the time limit for disclosure of cabinet documents from five years to ten, expand the application of national security exemptions, add new exceptions, and increase user fees.⁶⁶ In the aftermath of the terror attacks of 9/11, and under pressure to join NATO, many of the countries of Central and Eastern Europe have passed state secret laws that restrict access to public information.⁶⁷

The United States, too, has restricted access to information over the past decade. In 2003, the U.S. attorney general pledged in a memorandum to defend any federal government official who refused to release information if he or she had any “sound legal basis” to do so, overriding the previous “foreseeable harm” standard for denial. Presidential orders gave FOI officers latitude to reclassify declassified documents.⁶⁸ In 2009, the Obama administration restored the foreseeable harm standard for non-disclosure,⁶⁹ but numerous reports have described the administration as little better in its handling of FOI requests than its predecessor and by some measures worse.⁷⁰

Many FOI law implementation issues are not unique to the democratizing world—for example, poor knowledge of the law among both the public and government officials—but the legacy of the previous political regime often makes them more difficult to overcome. Many are essentially problems of political will:

Conflicting laws. Often after passing an FOI law, governments fail to adopt appropriate resolutions and make other laws consistent with them, in effect frustrating the purpose of the law by confusing both the public and officials responsible for implementing it. Laws that conflict with or undermine the FOI law need to be amended or repealed. Governments need to make clear in the law what the procedures are for supplying information, including appointing officials responsible for providing information, and for storing and documenting information held by entities subject to the law. The status of e-mail correspondence and other electronic records should be clarified.

Official confusion and timidity. Frequently changing governments, with each change leading to the reorganization or abolishment of various ministries, and with senior public officials being moved or replaced, can also lead to poor implementation of FOI laws. Absent clear guidance in the law, lower-level public officials are apt to approach FOI cases in an ad hoc or politically motivated way—or to avoid them altogether.

Poor enforcement. Mechanisms for enforcement of FOI laws are frequently inadequate. Citizens often lack confidence in the judicial system and choose not to file claims. To counter this, the judicial or alternative appeals process should be clearly and effectively organized. FOI laws should be sufficiently strong and clear that citizens can seek information without fear of their government or derision by others. If the culture of a particular region is such that few individuals are willing to challenge the government, the roles of the media and civil society groups become more important.

Inadequate funding. Lack of funding necessary to service FOI law requests properly also leads to failure. Often this stems from the difficulty of predicting the number or scope of FOI requests following the implementation of legislation.

Lack of awareness. Citizens, public servants, government officials, and even journalists often do not know about the FOI law or its provisions. Such lack of awareness means that an indispensable tool in transparent government is left unexploited.

Recommendations

A freedom of information law, it is sometimes said, is like a muscle. It only grows strong with use, and it atrophies with neglect. This report's central recommendation, therefore, is that stakeholders must be empowered to make effective use of their FOI laws. Governments need to give the law strength by training officials in its purpose and application; by creating uniform, electronic systems for the storage, searching, and publication of public information; by appointing officials responsible for implementing and enforcing the law; by funding their implementation adequately; and by sanctioning non-compliance. Journalists need to play a bigger role than they typically do in informing the public about the law, in monitoring and reporting on its implementation, and above all in using the law themselves.

For Government and Public Officials

Train and train again. Provide to public officials at all levels recurring seminars where they can learn about the philosophical underpinnings, development, and importance of transparent government and free speech; the details of their FOI laws; and how to manage information consistent with the law's purpose. Ensure that exceptions to access are clear, sensible, and in the public interest.

Make internal procedures for implementation clear. When officials are uncertain about how to handle a request, they are more likely to ignore or deny it, especially in political systems without a tradition of transparency.

Fund and support official compliance with the law. Financial, educational, legal, and technical assistance must be given to those government officers and employees responsible for implementation of the law. Officials cannot be expected to respond in a full or timely way to requests if they have neither the financial resources nor the ability to manage, retrieve, and review public records.

Ensure that time limits for officials to respond to requests are not so long as to frustrate the law's purpose but that they are also flexible and reasonable. Failure to abide by the time limits for response should enable an applicant to go forward with an administrative appeal or alternative mechanism that requires the agency to take action to comply with law.

Develop a unified system for the classification and storage of information by governmental bodies and for a unified request processing system. Without such system, governmental bodies either may not possess the information that would serve the purposes of an FOI law, or know whether they have such information.

This system should include the automated tracking of progress of requests and should allow for redaction of information with annotations to indicate the exemption used for the redaction.

Implement smart data systems. Proactive disclosure is now feasible and desirable, and in many democratizing countries required by the FOI law. Smart data systems allow citizens to search for related information across multiple government databases and to download and use that data according to their needs. Using smart data systems saves the government the time and money it would otherwise take to fulfill requests manually.

Create enforcement mechanisms other than courts. While an independent judiciary is essential as a final arbiter in FOI disputes, it is often slow and expensive to use. In addition, in many democratizing countries the judiciary is not trusted or respected. Alternative dispute mechanisms are essential. Among the possibilities are information commissioners, review boards, or ombudsmen with the authority to require compliance.

Train and empower FOI oversight bodies or ombudsmen. Whether a commission, a board of review or an ombudsman, the FOI arbiter must be trained to fully assume its distinct role and position as mediator between the state and the public. The responsible body or person should be encouraged and authorized to examine violations of rights provided by FOI laws and to levy sanctions if necessary. In addition, the FOI authority should annually publish a review of the law's operation and effectiveness and recommend amendments to correct its deficiencies.

The oversight authority must be independent and trustworthy. If it appears that the access law arbiter is under the control of the leadership of the government, it will have no credibility.

Ensure that the oversight authority can be aggressive in attempts to train and educate as many people as possible, whether in or outside government. It should be the oversight authority's obligation to alert other stakeholders—civil society groups, businesses, and journalists—to the real, practical uses of the FOI law in the civic and commercial spheres. Freedom of information discussions should be included in school curricula, ensuring that the next generation of adults and community leaders consider freedom of information an actionable right and not a mere privilege extended by the government.

Have realistic, enforceable sanctions for official non-compliance. Many FOI laws impose fines or other penalties for non-compliance. Be clear about what kinds of non-compliance are sanctionable—for example, not meeting a request within the required time period; making no attempt to meet a request; finding illegitimate excuses to avoid requests; or denying a request with no justification.

Governments could use report cards (following Canada's example) which they submit on the proportion of requests not answered within the allotted time. But all government offices subject to the law should make regular reports to the public and to other government agencies about the number and kind of requests they have received and how they responded.

Establish satisfactory whistleblower protection. Officials who in good faith disclose information under the FOI law must be protected from retribution.

For Journalists and Civil Society

Train, and train again. Journalists should receive particularly careful and thorough training to overcome skepticism and lack of experience using FOI laws to hold their government and public bodies to account. Although members of the news media do not have any special FOI rights (nor should they), they should be encouraged to understand their special responsibility to inform the public of what the government is doing and to request and obtain information to be passed on to the world that average citizens do not obtain on their own, primarily because they are busy working and raising families or are intimidated by the government.

Encourage successful use of the law by example. If requests made by journalists or civil society groups involve events that occurred years ago, especially those involving politics, uprisings, revolutions and the like, applicants will likely experience frustration (often because records cannot be found) and a sense that the law does not work. Requests should involve records of significance to the public now, particularly in nations where pessimism reigns. A request might involve the plans for the new road or shopping area, scientific tests regarding water or air quality, or the contract involving a recent government purchase. It is obviously in the public interest to report on waste and corruption, but it may be more important to local residents to report on pollution, development, traffic, school performance, and other issues that touch them directly. By using the law themselves, by showing the public how it works, journalists are in a unique position to create an environment that promotes government transparency.

Emphasize the social and economic benefits of FOI laws. Aside from moneys recovered or saved by uncovering waste, fraud, or corruption through disclosure, there are other means of demonstrating how FOI laws save taxpayers' money. For example, vendor requests to see existing contracts or successful bids to government agencies for the purchase of goods or services can lead to lower bids in the future and thus to more cost-effective government.

Monitor implementation: When the government fails to comply with an access request, or when it complies in an outstanding manner, news outlets should tell the world. The result will often be that good things begin to happen or that bad things stop happening. Once the public is informed that certain information is public, a precedent is established, and people will not be reluctant to request equivalent material.

In the United States, for example, state press associations frequently urge news organizations to feature stories based on state FOI requests, or to report on government compliance with different kinds of access requests. NGOs and news organizations can award prizes that recognize citizens who have made effective use of an FOI law, or the government agency with the best system for responding to requests, or the best news story on access to information. They can also award "negative" prizes, for example to the government agency that is the worst in responding to FOI requests.

Civil society groups should inform the public of its right to information and the means of enforcing that right with public education or awareness campaigns. NGOs are typically among the most active users of FOI laws in both developed and developing democracies, and they are in a unique position to influence public perception and use of FOI laws. The leaders of NGOs are often well-educated, have studied abroad, are leaders in their communities, and therefore have substantial influence. They should be encouraged not only to support an FOI law, but to use the law in constructive ways as a demonstration of the law's utility.

Provide practical and legal advice for using the FOI law. Citizens often need help understanding the law, what kinds of information they can request, and how to request it. They may need further help, including legal assistance, if they are denied. Civil liberties and journalism NGOs have a special role to play in promoting and protecting citizen use of the FOI law. Sometimes these efforts can be remarkably simple, for example providing citizens with a template letter of a proper FOI request.

Conclusion

Benign neglect of freedom of information laws, notably by public officials, is not an incurable disease. It is not inevitable that an FOI law's promise of transparency will remain unfulfilled. It is not a given that FOI laws will continue to gather dust from disuse or abuse.

With guarded optimism, this report challenges the notion of incurability. The testimony of the experts presented here who succeeded in breathing life into their FOI laws offers not only hope but also practical and realizable strategies that others can emulate. These strategies work. New technologies have changed the arithmetic of compliance and implementation. Before information technology and the Internet, in order to respond to a citizen's FOI request, several government employees confronted endless paper files of official documents. The costly and time-consuming compliance process required these workers to search for, sort through, examine, photocopy, and send the hard copies of the documents to the requester. The cost and bureaucratic burdens occasioned by these processes partially explains the inertia of officialdom.

To a very large extent, the Internet and information technology have changed that. Today that same request needs only a single employee to run a routine, paperless, comparatively warp-speed computer search, and in a matter of a few clicks, forward the requested documents electronically to the requester. Indeed the report shows the practical and cost-saving benefits where national and local governments proactively post on their websites all manner of documents and information that would otherwise have required individual, manual responses to citizens' FOI requests. This represents another instance where information technology and the Internet make a virtue out of necessity.

There are other ways that implementing FOI laws can save government money. When vendors can learn what a successful bidder offered the government, and can make a better deal for the government, the taxpayers win. Corruption, that "stealth tax" that produces no public benefits but costs dearly, finds its mortal enemy in the transparency produced by a robust FOI environment.

Such an environment features local and national public officials who are trained to know the law, have obtained adequate budget appropriations, have organized their offices and operations to comply with the law, have developed internal procedures, have trained their staffs, and have committed themselves to perform their public duties.

That environment features leaders of civil society, the media, and business who are trained to know the law; who recognize that they and all citizens will benefit if it is put to work; who recognize that it is not self-executing; who agitate, train, and press national and local public officials to develop the political will to make it work; and who publicly support budget appropriations to finance its operations. That environment features oversight authorities, ombudsmen, and information commissioners who are trained to know the law, act independently and impartially, and who display their commitment to making the law work effectively and fairly.

Appendix A: Interviews with FOI Stakeholders

Albania

Right to Information Over Official Documents

Available at <http://www.freedominfo.org/regions/europe/albania/>

Gerti Shella

Executive Director, Center for Public Information Issues

Tirana, Albania

How have freedom of information laws changed in Albania? Are they more or less effective?

Requests for official information are now widely sought by various elements of society—journalists, the business community, civil society groups, individual citizens—yet access is still a challenge, and an administrative culture of secrecy and confidentiality persists.

What holes do the laws have? Why are they ineffective?

One shortcoming of the law is the time limits set out for public authorities to respond to a request. Public authorities must decide whether to respond to a request for information within 15 days, and if they decide to respond, information should be provided within 40 days from the admission of the request. This time frame has posed a problem, especially for the media; journalists claim that such a delay in receiving information hinders their work; international organizations have also criticized this time frame.

There are no common standards, regulations, or administrative guidelines followed across institutions to align their internal rules and procedures with the requirements of the ATI [Access to Information] Act; this is left to the discretion and willingness of the administration of each institution.

The actual level of funds allocated to the implementation of the ATI Act has been arguably insufficient, especially in the ministries of education and health, where the need for active, ongoing communication with citizens is critical.

To what extent do Albanian citizens understand the freedom of information laws in place?

In general, knowledge about the ATI law among civil servants is poor, although some supportive structures exist, and some officials are trying to make more information available to the public. Although there is a lack of hard data measuring the implementation of the law, most surveys conclude that many citizens are unaware of the existence of the legal framework, and most public officials (both at the central and local level) are unwilling to implement the law.

Even those citizens who *are* aware of the law identify a range of problems with the way in which it is implemented. Interviews and contact surveys conducted by the Citizen Advocacy Office [CAO] and municipal governments (e.g. in the cities of Korca and Shkodra in 2004) indicate that delays in answering requests, the need to wait in long queues for hours, lack of professionalism and poor ethics in communicating and dealing

with people's needs, lack of explanatory notices and orientation information, tardiness and absence from work posts, irresponsibility, disrespect for the law and many other problems.

Are public officials aware of their responsibility to give information to people who request it?

Civil servants, particularly at the local level, do not have enough knowledge about the legal framework for citizens' access and right to information—or how this applies to their institution. For example, many public officials are unaware of the legal deadlines for answering citizens' requests.

How are denied requests handled?

When a request for information is refused, complaints are resolved according to the Code of Administrative Procedures, and when these are exhausted, through the courts under the Code of Civil Procedure. The right to judicial review of refusals to provide information has never been exercised by citizens.

How often are requests ignored or denied?

Many public requests for information, whether from individuals or civil society organizations, are treated carelessly and often ignored. There are numerous cases of administrative silence (that is, where the administration does not provide any response, even when the time limit for providing information has been exceeded), motivated more often by political and personal interests than by structural weaknesses

Dritan Sulçebe

Expert of Coordination, International Relations and European Integration
People's Advocate

How specifically do you aid people in retrieving information?

Whenever we receive a complaint regarding the refusal of public administration to provide documents/information upon a specific request of an individual, as provided in the law, we send a formal request to the public administration asking for the grounds of refusal. If the explanation of the public administration does explain the legal base for refusal or it shows that the refusal was in violation of the provisions of the law, we send a recommendation for providing the information requested by the individual explaining why we believe that the acts of the administration refusing the information are illegal. If even after receiving our recommendation the public administration refuses to comply with the requirements of the law, we send the recommendation to the superior organ recommending not only to provide the information requested but also to start an administrative proceeding against the responsible public official, whenever his/her actions are in clear violation of the provisions of the law.

According to the law on People's Advocate, we may not take decisions forcing the administration to provide the information requested, but only issue recommendations. Filing a complaint with the People's Advocate is not part of the administrative appeal and therefore is not compulsory.

Do you think freedom of information laws in Albania are effective? If anything, what needs to be changed?

The daily implementation of the current law has shown many flaws and uncertainties related to its provision and implementation. Therefore, according to People's Advocate view, there is urgent need for changes to the law in

order to update it with the European/International standards. The changes should mainly focus on and better define:

- The right to information for all citizens without need or obligation to explain their motives
- Drafting and adoption of transparency programs
- Competencies of the People's Advocate with regard to the noncompliance by part of public administration
- Introduction to public information/documents
- Limitation on the Right to Information
- Administrative offenses and sanctions
- Competencies and procedures for the examination of appeals

Furthermore the public administration must be frequently trained in order to understand the law and apply its principles and procedures correctly.

Armenia

Law of the Republic of Armenia on Freedom of Information

Available at <http://www.legislationline.org/documents/action/popup/id/6410>

Shushan Doydoyan

President, Freedom of Information Center of Armenia

Are there practical steps that can be taken to overcome government officials' resistance to complying with the law, or their hostility to it?

Yes, there are. Some of the Freedom of Information Center of Armenia's (FOICA) activities are aimed to overcome government officials' resistance to the proper implementation of the law. One such step is training: The FOICA organizes trainings for officials helping them to improve their knowledge in the sphere of freedom of information. During 2003-2012, 2,763 officials received training on how to implement FOI legislation.

Another tool is court cases, which make officials have a sense of responsibility and not relax in cases of violation of the FOI right. FOI court cases positively affect the state of freedom of information, preventing violations. Since 2003 the Freedom of Information Center of Armenia has been carrying a mission of judicial protection of the access to information right. Until today 40 court cases have been initiated by the FOICA out of which 35 are fully completed and only 5 are still in process.

When you or the FOI Center files FOI requests, what are the typical fees you have paid? Have there been any unreasonable fees?

In general there are no fees for getting information. The Armenian Law on FOI states that a payment for getting information is not [required] for response to oral requests, for up to 10 pages of printed or copied information, or for information via e-mail. The aim of the payment is not to sell information, but to compensate the costs made by the information holder for example, for printing.

There are cases when there is a fee for particular information and these payments are regulated by other laws, for example, the law on state duties. Therefore, in some cases two laws contradict each other. For example, there is a fee at the amount of 3,000 Armenian dram (\$7.5 U.S. or 5.6 Euros) for getting information about one legal entity (copy of statute, address, etc.) from the state register. And there are about 4,000 legal entities in Armenia! Thus, for getting for example the addresses of the all legal entities of Armenia one should pay 12 million AMD (\$29,000 U.S. or 22,000 Euro), which is an unreasonable amount.

Have there been examples in which disclosure as a result of a FOI request has resulted in harm or embarrassment to the government, or an adverse reaction from the government?

Yes, there have been. For example, one of the most recent cases, which is ongoing, we have found through an information request that from the state budget about 500 million AMD (1.25 million U.S. or 920,000 Euro) was allocated to various NGOs. And a lot of money was given to NGOs that do not have even a website, are totally secret, and there is no information about the NGOs on the Internet. Moreover, the founders of several NGOs are the same. This example shows that in some cases budget money is spent inefficiently, and the society has no information about this. And the FOICA found this information and shared it with the public.



What are the biggest obstacles to freedom of information that remain today?

The biggest problem in the FOI field is the lack of culture of officials to work openly and transparently. There are also problems of violations of timeframes stated by the law to answer a request, a problem of incomplete responses, a problem of unjustified refusals.

Nouneh Sarkissian

Managing Director, Internews Armenia

How well has the government implemented the FOI law?

Although we have a very liberal and I would say a good law, the implementation of it is not always positive or supportive of the freedom of media and independent journalism. We also have as a part of our legal environment several other conflicting laws concerning media, and also several articles in the criminal and civil code that conflict with the FOI [law].

Does the law allow the government to charge fees for information? If there are fees—for copying or for searching costs, for example—are they reasonable?

Usually the information is free, but often the information you get is very vague or very incomplete. There are no fees for information itself, but yes, some administrative expenses should be covered. They are not mentioned in the law (in case of the amount), but sometimes state servants use this provision to try to limit the providing of information.

If you have asked for something specific, did you get it in whole or part or not at all? Was the information useful as the basis for a story?

It depends. I think that usually you get only the “official” information, figures, or only those pieces of information that they want you to have. To get real facts you have to go deeper for more investigation, maybe find personal or confidential sources, but more important you have to ask again and again and ask right questions. If you want to prepare a real story it will be not easy to do using only the information you requested. At the same time, if you are really want to find something it is very possible to get full information if you are professional enough, but it takes time and energy.

Artur Papyan, journalist

Radio Free Europe Armenia

Are there any other important FOI experiences or things I should know from your point of view?

Although my experience has mostly been positive, we have on more than one occasion been faced with a situation when we submit an FOI request but receive the response after the deadline for publication. Armenian FOI law doesn't seem to differentiate between journalists asking for information and regular citizens, so government officials have no pressure to cooperate with journalists on their deadlines when working with journalists. They have five days to respond (there are exceptions, etc), and that can be way too long. There are also certain issues with the definition of what constitutes a “state secret,” which cannot be shared with journalists.

Indonesia

Public Information Disclosure Act

Available at: <http://ccrinepal.org/files/documents/legislations/12.pdf>.

Bhimanto Suwastoyo

Editor in Chief, *The Jakarta Globe*

Can you offer specific examples of effective government implementation of the law? What about ineffective government implementation of the law?

Every government in the region, i.e., at provincial or district/municipal level, has opened its own website containing information such as basic administrative, geographic, and demographic data, regional rulings and regulations, information on investment opportunities, etc. Government ministries and institutions are also under the same obligation, opening their own websites. The contents of those websites, however, are very random. Some are really informative and interactive, while most are just plain dull, static sites with, more often than not, minimal practical uses. None, as well as none of the government ministries' websites, carry their budget accountability.

Does the law allow the government to charge fees for information? If there are fees—for copying or for searching costs, for example—are they reasonable?

The law does not stipulate any charge for information. Each ministry and institution has its own public relations, data, and information section that should provide those services for free as they each also have budget allotments.

Are there practical steps that can be taken to overcome government officials' resistance to complying with the law, or their hostility to it?

So far NGOs, especially those dealing with budget transparency, have been exerting pressure through the media for budget disclosure, with mixed results. Even disclosure of officials' wealth is not compulsory. High government officials are obligated to file a wealth report but they are not made public, nor are there any verification processes conducted. Public disclosures, in the rare case, usually follow corruption allegation or suspicion and are results of court proceedings. Compliance can only be obtained through two channels, the legal channel, which takes a long time, and through public pressure. However, since the country has still a fledgling civil society with (as of yet) no real power to exert public pressure, both channels have so far not been effective.

Have training or instruction manuals been created for officials? For journalists? For citizens? Is training in the law offered at all?

There are instructions issued by the finance ministry for transparency, both at the institutional and individual level (for the senior officials). Otherwise, there is no other form of training available on the law, including for journalists.

Is proactive disclosure required by law, or is information available only on request? What kinds of information must be made available?

No proactive disclosure requested under the law and information is available only on request. Even then, the response is mostly incomplete or non-existent, as the law does not provide clear sanctions for violations.



If you have been denied, for what reason? If appeals have been filed, on what basis?

Reasons are seldom necessary, as the law does not provide clear sanctions for those who do not abide by the law on that matter. Appeals have been filed through the legal system, usually using the state administrative court that deals with government policy and their implementations. The appeals are usually citing the law and demanding that the court order the concerned institution to disclose their budget account.

If you have asked for something specific, did you get it in whole or part or not at all? Was the information useful as the basis for a story?

Because of the long time needed to process a request, including specific ones, in government offices, journalists very seldom use that law to request information. The rare cases of demand were usually linked to in-depth investigative stories that can take months to work on. It is much easier in Indonesia to go through informal channels to obtain data or information (i.e., through an official). Demand for specific budget expenditures, made by transparency NGOs, have often provided results, but once again, such moves usually take time to process.

Abdul Khalik

Managing Editor, The Jakarta Globe

How well has the government implemented Indonesia's Freedom of Information law?

It has begun implementing the law, but the implementation has not been well supervised. Many of the public disclosures by government offices and institutions differ in the details and matters published, as there is not one institution that actually monitors the implementation. Some ministries have good disclosure online, but others have rudimentary if not useless information on their websites.

Have you (or any other journalist you know) had to access government records for a story but was denied? If so, what was the reason?

Considering the well-known slow mechanism of the bureaucracy in Indonesia, unless the journalists have more than ample time to investigate their stories, they would rather tend to seek to obtain the information from sources within the institution (official, acquaintances, part of source network, etc.) rather than seek it through the online channel.

If you have to get government records for a story, what would be the process of getting it? Is it easy? Does it take a long time?

The length of time depends on the sources chosen. Getting it through the website takes not only a long time, but sometimes the documents produced are not necessarily the correct one for the purpose. More practical is to seek the information from sources within the institution itself.

Have there been examples in which disclosure of information through an FOI request resulted in harm or embarrassment to the government? If so, what were the consequences?

Most of such requests are entered by NGOs dealing with transparency and anti-corruption. Some cases of embarrassment included the fact that a study of the budget for the House of Representatives found a large fund allotted for simple rehabilitation work on offices. The House of Representative's household affairs department consequently cut the budget allotments after the initial sums were made public by the NGO through the media.

Jamaica

Access to Information Act

Available at: http://www.jis.gov.jm/special_sections/ATI/ATIACT.pdf.

Aylair Livingstone,

Attorney-at-Law, FOI Specialist

Former director at the Jamaica Access to Information Unit

How well has the government implemented the law?

Some inroad has been made in effectively implementing and establishing an information disclosure regime in Jamaica. Ineffective implementation examples include the inadequate allocation of resources to public education, the ATI Unit, the Appeals Tribunal (this will be a recurring theme), and delays in effecting amendments to the Act that would allow it to operate better. The Official Secrets Act continues to be in effect, notwithstanding numerous representations over the years for its repeal. The government has improved its approach to records management and ICT applications and participates very readily in ATI related conferences and seminars.

Are there practical steps that can be taken to overcome government officials' resistance to complying with the law, or their hostility to it?

In many developing countries that are implementing ATI regimes, the culture of secrecy and the resistance that comes with that are persistent and will relent only with time. Inroads have however been made in Jamaica in creating a greater understanding of access to information as a human right among government officers. Practical steps continue to be taken in this regard and they include:

- Continued targeted sensitization and training sessions by the ATI Unit.
- Continued collaboration between civil society (Advisory Group of Stakeholders) and ATI administrators (Access to Information Association of Administrators) in understanding the challenges on the government side and providing recommendations and possible assistance on the civil society side.
- Continued advocacy by civil society stakeholders in promoting awareness of how the Act works and how to access information and providing practical assistance in this regard. Examples of this type of advocacy and action is evident in the establishment by the Jamaicans for Justice very early on of a help point that assists requesters in making their requests and going through the entire process up to appeals where necessary. The Jamaica Gleaner company has also recently established a resource website (diGJamaica.com), which provides the public with key facts and figures from public bodies that are organized for easy access.
- Stronger example and leadership from the top. Greater enlightened leadership is required to set this example.

How effectively can a person who requested information appeal a refusal from the government?

Regarding the effectiveness of overturning a decision to refuse access, the internal review process has been widely regarded within the broader FOI community as somewhat ineffective, especially in cases where the information requested may be regarded as “controversial.” The outcome of internal reviews are generally found to be on the conservative side, i.e., largely in keeping with the original decision.

At the Appeal Tribunal stage, the second level of appeal, its existing structure and capacity mitigate somewhat against the timely determination of appeals. Members hold other employment, thereby reducing the time that can be spent exclusively on appeals, and its administrative secretariat functions are supported by the already skeleton staff of the ATI unit. Delays in its final decisions sometimes frustrate the original objective of the requests. The Tribunal has also been criticized as being overly legalistic/formal in its deliberations, an expected result since the rules governing its proceedings are not user-friendly.

That aside, many of the tribunal’s rulings have come down in favor of the release of information, thereby removing the applicant’s need to appeal to the Supreme Court, which in itself would be costly, time consuming, and subject to further delays.

Are there exemptions in the law that are overly broad or vague, or that make it easy for officials to deny requests for information?

The exemption provisions are set out in Part III of the ATI Act. They cover information related to security, defense, international relations, the formulation of government policy, commercial confidentiality, and legal professional privilege. Some of the exemptions are quite broad and vague and thus it falls to the enforcement authority to define their scope in accordance with international standards. Two exemptions are subject to a public interest test, which requires a public body to balance the general public interest in disclosure and the public interest in maintaining the exemption. The ATI Act does not define public interest.

It has been proposed that the public interest test be applicable to all the exempting provisions. While the concept of a public interest test is a fluid one and is not commonly defined in access to information legislation globally, it has been further recommended that in order to improve the quality of the decisions made by public bodies in applying the test:

1. Guidelines should be issued by the unit that would suggest the factors that should or should not be considered in applying it. A public body should also have a procedure in place to objectively evaluate a request, and each decision should be made on its own merits, taking into account the varying factors which should be applied.
2. A statutory obligation should be imposed on public bodies to account for the public interest factors that were considered by them in arriving at a decision. A public body should be made to list all the factors it took into account in applying the test and coming to the decision to deny access. This will assist the applicant to assess whether the test was properly applied and consequently whether a review or appeal is necessary.

In its 2011 report to Parliament, the overall effect of the Joint Select Committee’s recommendations is that a public interest test will be applied to all exempt categories of information. The test will not be applied to documents that are subject to legal privilege and those affecting personal privacy. Regarding exempt

documents, related to the Cabinet under section 15, the public interest test would only become applicable after 10 years of the existence of those documents. This was previously set at 30 years.

What, if anything, would you like to see changed about the process, the enforcement, the scope, etc. of the law?

Scope

- Section 5—Certain government entities are wholly or partially exempted from the Act, including “the security or intelligence services in relation to their strategic or operational intelligence-gathering activities,” “the Governor General, in relation to the exercise of his powers and duties conferred by the constitution or any other law,” “any statutory body as the Minister may specify by order.”
- There are many government functions that are contracted out to private entities. The Act should be *mandatorily* applicable to these entities and not left to the discretion of the minister.

Process

- Lengthy Delays: Although the Act establishes that requests for information must be processed within 30 days, members of the public complain that this is not being observed. The oversight authority must be empowered to receive such complaints and to impose fines and penalties on a case-by-case basis. The Appeals Tribunal itself must also be resourced in such a manner as to enable it to carry out its duties more effectively and with dispatch.

Enforcement

- Scrap internal reviews, as this step in the appeal process causes delay and is, quite frankly, futile in the great number of cases.
- Give the Appeals Tribunal greater, investigative, order-making powers and the power to impose fines and penalties; reduce the degree of formality currently associated with appearing before it. This would largely avoid the need to invoke the jurisdiction of the courts, which in itself would be a timely and costly exercise.
- Empower the ATI Unit so that it can ensure compliance with the Act as far as possible in tandem with the Tribunal.
- Repeal the Official Secrets Act.
- Take swift action to adopt the recommendations of the Joint Select Committee.



South Africa

Promotion of Access to Information Act, 2000

Available at: <http://www.acts.co.za/promotion-of-access-to-information-act-2000/>.

Charl du Plessis

Legal Reporter, The City Press, Johannesburg, South Africa

Do you find that the Promotion of Access to Information Act has been implemented well in South Africa?

I don't think PAIA has been implemented well, although I think a lot of it has been limited to technical implementation. While there's no empirical evidence or studies that I'm aware of, governmental entities have, for example, complied with things like the requirement to publish PAIA manuals and the contact details of their information officers on their websites. I do, however, think there is a tendency towards secrecy in our current administration, something that is evidenced by the fact that they recently attempted to introduce a classification law which would take precedence over PAIA.

Are there practical steps that can be taken to overcome government officials' resistance to complying with the law, or their hostility to it?

The Act does make provision for an internal appeal against a decision refusing access. This has proven to be a rather pro forma provision, because the governmental body will usually just confirm its previous ruling. Unfortunately you have to exhaust the internal appeal before you can go to court. The real practical step is an appeal to a court of law on a decision not to grant access. It is a lengthy process.

Catherine Kennedy

Director, the South African History Archive

How well do you think the government has implemented the PAIA?

Poorly, with little sign of improvement more than a decade after enactment. There is insufficient understanding of PAIA within government departments, and often little or no training provided to those officials tasked with responding to PAIA requests. This, coupled with the cultures of secrecy South Africa has inherited from our difficult past, both from the apartheid government and from the structures of the liberation struggle movements for whom secrecy was necessary for survival, has resulted in a context where the right of access to information is nascent at best. The historical lack of the right of access to information and inherited socio-economic disadvantage also means that many South Africans aren't aware of the right, and have neither the expectations nor skills to ensure PAIA is used optimally. There is also very poor records management (both print and digital) in some areas of government, which hinders ATI on a very basic level—one of the most common grounds for refusal to PAIA requests we've submitted is that the records do not exist, or cannot be found—if your records are not in good order, it's very difficult to retrieve them on demand.

Vinayak Bhardwaj

Advocacy Coordinator

Mail & Guardian Centre for Investigative Journalism

Do you find that the PAIA has been implemented well in South Africa?

In 2012, [the South African History Archive](#) surveyed all the PAIA requests that they had administered in the past year: Of 159 requests for information held by various public and private bodies, 102 were either outright refused or simply received no answer (which is deemed a refusal under the law), or 64 percent. This suggests a genuine crisis in the mechanisms that are meant to ensure the public's right to know.

However, 2013 will see the passing of an amendment to PAIA that gives new recourse to people seeking access in the form of an information commissioner who will have legal powers to force bodies to comply with PAIA requests. But this is not enough if the underlying problem is a lack of commitment to openness on the side of information holders. Information should be released proactively, in an open and accessible form, and PAIA should only be a last resort. While the "big ticket" secrets get much attention, many South Africans are denied much more basic information that they need in their daily lives and struggles. From data related to housing lists, to the water licenses of all mining operations, many civic organizations and community groups are seeking information that should already be available online and in every municipal office.

Can you offer specific examples of effective government implementation of the law? What about ineffective government implementation of the law?

As to ineffective, there are sadly too many to list! The current most egregious example we have encountered in our work is in the recent request we submitted to the Department of Public Works . In early July we had submitted a request for details of expenditure at the private presidential residence in Nkandla. The initial request was denied on the basis that the residence was a National Key Point and therefore protected by the secrecy provisions of the apartheid-era National Key Points Act, the Protection of Information Act, and the Minimum Information Security Standards. This denial flies in the face of all that PAIA stands for. In particular it contravenes section 5 of PAIA, which explicitly states that in the event of a clash between the provisions of PAIA and any other law, PAIA should prevail. In other words, when deciding how to respond to a request for information, no state body may rely on the provisions of a prior law to prevent the release of information. We subsequently appealed this decision and have taken the minister of public works to court. In subsequent argument the state has sought to rely on the security provisions of PAIA in protecting information from disclosure. However this case illustrates how PAIA is often misused, ineffectively implemented, or simply ignored by state and private bodies. Thus, any NGO, activist, researcher, or ordinary citizen is then required to take up the request for information in court, incurring huge costs, delays, and insurmountable bureaucracy to obtain any information.

Are there practical steps that can be taken to overcome government officials' resistance to complying with the law, or their hostility to it?

We are hopeful that the impending institution of an "Information Regulator" will address some of these concerns. The Information Regulator will be an appeal body to which one could refer PAIA matters once the internal appeal mechanism has been exhausted. The Information Regulator would therefore act as a penultimate step in the appeals process before going to court. Because the institution of Information Regulator would be staffed similar to a Chapter 9 body (e.g South African Human Rights Commission, Public Protector, etc). there would be no legal costs associated with this method of accessing information. However, much remains to be seen regarding how the office is staffed, whether it is adequately equipped to deal with what might be a huge backlog of requests, etc.

Ukraine

The Law on Access to Public Information, 2011

Available at: <http://www.article19.org/data/files/pdfs/laws/ukraine-the-law-on-access-to-public-information.pdf>.

Olha Sushko, Lawyer, and Taras Shevchenko, Director

Media Law Institute
Kiev, Ukraine

Can you offer specific examples of effective government implementation of the law? What about ineffective government implementation of the law?

We now have a relatively short term for providing answers to information requests: five working days (with some exceptions for complicated requests). There were doubts that it would be a realistic term, but it appeared to be quite enough. Officials prepare their answers in a timely manner, and cases of groundless delays are rare. The newly established practice of sending requests and receiving answers by e-mail works fine as well. It became the most popular way to file requests these days.

Most problems arise with requests that deal with budget expenditures and information about high-ranking officials. It is almost impossible to receive detailed city plans, too (as this information might show illegal allocation of land plots). Information administrators (officials in charge of answering requests) usually unreasonably use the legal provision on confidential information or on “for official use only” data, even when the law directly states that the requested information cannot be restricted.

There’s also a three-part test in the law that officials are supposed to use to judge requests (please see paragraph 2 of Article 6 of the law). It is very important, but in most cases it is not being used by information administrators or judges.

Do government officials fear any kind of discipline if they disclose too much information?

Yes, there are different sanctions for the disclosure of different types of restricted information. The respective offenses and crimes along with the punishments are provided for in the Administrative Offenses Code of Ukraine and the Criminal Code of Ukraine. Yet there are provisions which protect them in case their deeds were aimed at informing the society about crucial circumstances.

Are there exemptions in the law that are overly broad or vague, or that make it easy for officials to deny requests for information?

The law is well-worded itself, so it doesn’t cause such problems. The possibility to hide information comes from the law on personal data protection and on some old by-laws that contradict the law on access to information.

Andriy Shevchenko

Chairman, Free Speech Committee and member of Parliament
President of the Center for Public Media, Ukraine

How are you making sure the law is actually being implemented?

There are three general goals. First, in order to make sure the law on access to public information works, we need to change a lot of other laws which had been passed earlier, so at the moment we have registered a huge package of legislative changes that includes changes to 53 laws and 4 codes to make sure all of them work properly together with the law on access to public information. Second, we are trying to spread good practices, so we work with the bureaucrats, courts, civil activists, journalists, to make sure all of them can use the law properly, [and] we arrange a bunch of training sessions throughout country. We are trying to make sure the country knows who is doing well implementing the law. Third, we are trying to punish and teach the bad guys who do not want to do any changes, which means court cases, so we have managed to find funds from international institutions and from Ukrainian stakeholders who are willing to pay lawyers to defend journalists who are trying to get some information from the authorities or local communities.

Can you offer specific examples of effective government implementation of the law? What about ineffective government implementation of the law?

Here's one. From Soviet times we had a closed community of households outside of Kyiv that were specifically assigned to high-level bureaucrats and government officials, but the public would never be able to learn who exactly lived there and how much money was spent. So the very first day the law was enacted in 2011, a group of journalists filed a request and asked the government to disclose who exactly lived in this closed community. Three days after this request was filed, the journalists got a clear response, a list of 115 high officials who lived in this closed community and whose rent was paid from the taxpayers' pocket. Several days after that the journalists made the Ministry of Education disclose what amount of money it spent on promoting of the Ukrainian university. It had spent a huge amount of money paying for television commercials that were never actually produced, so it looked like we were able to catch a case of corruption or a huge scam. It was something like 1 million Ukrainian hryvnia spent for this nonexistent commercial, or about \$120,000, that was stolen from taxpayers' pockets.

On the other hand, I have an example where it did not work. The law on access to public information says that the income declarations of members of parliament should be all open documents, so the public can access public tax information of members of parliament. The last few years the Ukrainian journalists have been unsuccessful in getting this information from the Ukrainian government. We have some members who were willing to disclose their personal income, in declarations, but parliament itself is not doing that.

When it comes to the local governments, I would say that this law has not started working properly yet. We have seen some local governments that have worked extremely well with this law on access to public information, but we have seen a lot of closed-off administrations that do not fulfill this law yet.

Is there any resistance?

There was a huge resistance during the adoption of the law. After the law was passed, most of the changes were introduced extremely slowly. We understood it would be a long road, that it would take a long time for the freedom of information law to work properly. For the FOI law to start working properly there needed to be a change in the culture and the mindset of the bureaucracy.



Appendix B: European Court of Human Rights and Inter-American Court of Human Rights

The Evolving International Law on the Right to Information

In the past two decades, freedom of information has developed as an international and regional norm as well as a national one.

The human rights protocol of the Inter-American system has been the most advanced in guaranteeing, at a regional level, the right to access government-held information, establishing in 1985 that the right to receive information is of the same significance as the right to speak freely: “For the average citizen it is at least as important to know the opinion of others or to have access to information generally as is the very right to impart his own opinion.”¹ In 2000, the Inter-American Court of Human Rights (IACHR) recognized that “access to information held by the state is a fundamental right of every individual.”²

The seminal IACHR case involving the right of access to state-held information is *Claude Reyes v. Chile*, in which the court became the first international tribunal to recognize such a right as a component of the right to free expression. The case was brought in 1998 by a Chilean environmental NGO when the government refused to make public information about its negotiations with investors in a major logging operation. The Chilean Supreme Court rejected the NGO’s claims, and several South American human rights groups appealed to the Inter-American Commission, which in 2005 said Chile’s existing freedom of information law did not adequately protect the right of access to government information established in Article 13 of the American Convention.

When Chile refused to comply with its finding, the commission referred the case to the IACHR, which in September 2006 found for the applicants. Under Article 13.2 of the American Convention on Human Rights, the court ruled, all state-held information is presumptively public, subject only to limited exceptions.³ The court said all countries party to the convention were required to adopt laws consistent with its ruling and to repeal or reform conflicting laws; and it further ordered Chile to train public officials on the proper way to handle requests for information.⁴ As a result of the Court’s decision, Chile adopted its new law on “Transparency of the Public Service and Access to Information of State Administration” in August 2008.

In Europe, the right of access to information was first recognized by the Council of Europe in 1981, then again in 2002.⁵ Today the European Convention on Human Rights guarantees the right to receive information in 47 member countries of the Council of Europe. In 2009, 12 of the 47 signed the Convention on Access to Official Documents; the Tromsø Convention, as it is known, binds its signatories in recognizing a general right of access to official documents held by governments.⁶ In the 28 states of the European Union, the 2000 Charter of Fundamental Rights grants a right of access to EU-held documents to “any citizen of the Union, and any natural or legal person residing or having its registered office in a member state.”⁷

The European Court of Human Rights (ECHR), however, has only gradually come to recognize such a right under the convention. In 2009, after several tentative steps, the court decided that under Article 10 of the convention, government refusals to provide access to public-interest information over which they have a monopoly can constitute official censorship. The ruling came in *Tarasag a Szabadsagjogokert v. Hungary*, a case brought by the Hungarian Civil Liberties Union after it was denied a copy of a public official’s complaint questioning the legality of criminal drug legislation.⁸ Applying domestic law, the Hungarian Constitutional Court refused to

release the complaint, saying that it included personal data that could be disclosed only with the permission of the official who wrote it. The ECHR reversed, saying that the work of civil society organizations is no less important to public debate than that of journalists (and maybe more so), and that “it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of personality rights.”⁹

Prior to the Hungary case, the court’s view had been that there was no general right of access to administrative data or documents, but that there was nonetheless a “freedom to receive information” under Article 10.¹⁰ As the court had interpreted it, that phrase meant that a government could not deny a person the opportunity to receive information that someone else was willing to provide him, but unless a denial of information effectively denied an applicant of some other right under the convention, it imposed no obligation on governments to provide information when asked for it.

The ECHR first began to change course in a 2006 case from the Czech Republic, where it found that the Czech government’s refusal to provide information was a violation of the Article 10 right.¹¹ The court in the case nonetheless said the denial was justified under Article 10’s exceptions for national security, the protection of other rights, and public health. A year later the court implicitly recognized the right of access to official documents in a case from Moldova in which a news organization sought access to government contracts under which private companies were awarded substantial public funds.¹² There the court found for the plaintiffs, citing the public interest in the information and the informing role of the press.

The court in the Hungary case repeated its view that there was no explicit information-access right in the European Convention, but that in its recent decisions it had “advanced towards a broader interpretation of the notion of ‘freedom to receive information’ and thereby towards the recognition of a right of access to information.”¹³

The most recent international FOI law development comes from the African Commission on Human and Peoples’ Rights, which in April 2013 launched a Model Law on Access to Information.¹⁴ Article 9 of the African Charter on Human and People’s Rights provides that “every individual shall have the right to receive information” as part of the right to “express and disseminate his opinions.” More than a decade ago, the commission developed this idea in its Declaration of Principles on Freedom of Expression in Africa, in which it said that “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.”¹⁵ The new model law proposes that citizens should be able to get information not only from governments, but from private entities as well, and to get it “as swiftly, inexpensively and effortlessly as is reasonably possible.”¹⁶

It is important to note that many of these international legal developments, while significant, exist in a kind of legal limbo—they are not always binding on member states, which are supposed to honor them, but might not. In May 2013, for example, Hungary—the first formerly communist country to have passed an FOI law, in 1992—amended its law to make it more restrictive. The changes allow two key government agencies—the State Audit Office and the Government Control Office—to deny requests if they involve “excessive” amounts of data. The amendments also shield from public view many documents that were previously published and require requesters to justify their need for the information they seek.¹⁷

Appendix B Endnotes

1. See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, November 13, 1985.
2. See the Preamble of the *Inter-American Declaration of Principles on Freedom of Expression*, adopted at the Inter-

American Commission on Human Rights' 108th regular session, October 19, 2000. Available at <http://www.iachr.org/declaration.htm>. Accessed June 3, 2013.

3. Under Article 13.2 of the Inter-American Convention, those exceptions are limited to “respect for the rights or reputations of others; the protection of national security , public order, public health or morals.”
4. See *Claude Reyes at al. v. Chile*, Judgment of September 19, 2006. Available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf. Accessed June 3, 2013.
5. The 1981 recommendation of the Committee of Ministers said that “everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities.” See *Recommendation 19 on Access to Information Held by Public Authorities*, November 25, 1981.
6. *Council of Europe Convention on Access to Official Documents*, Tromsø, 18.VI.2009. Available at http://www.access-info.org/documents/Access_Docs/Thinking/Principles/Council_of_Europe_Convention_on_Access_to_Official_Documents.pdf. Accessed June 5, 2013. The Convention has been sharply criticized for its flaws: it does not apply to legislative or judicial bodies; has no appeals mechanism or body; does not cover important financial information, and has no time limits for processing requests.
7. *Charter of the Fundamental Rights of the European Union*, December 7, 2000, Article 42. Available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf. Accessed June 3, 2013.
8. *Tarsasag a Szabadsagjogokert (Hungarian Civil Liberties Union) v. Hungary*, ECHR, April 14, 2009.
9. *Ibid.*, para. 37.
10. Article 10 of the Convention reads in part: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”
11. *Sdruzeni Jiboceske v Czech Republic*, ECHR, July 10, 2006.
12. *Timpul Info-Magazine and Anghel v. Moldova*, ECHR, January 27, 2007.
13. *Tarsasag a Szabadsagjogokert (Hungarian Civil Liberties Union) v. Hungary*, *op. cit.*, n.8, para. 35.
14. *Model Law on Access to Information for Africa*, April 12, 2013. Available at http://www.achpr.org/files/news/2013/04/d84/model_law.pdf. Accessed June 5, 2013.
15. Principle IV, adopted at the 32nd Ordinary Session, October 17-23, 2002, Banjul, Gambia.
16. Model Law, 2013, Article 3(1)(b).
17. See “Hungary Restricts FOI Law,” [freedominfo.org](http://www.freedominfo.org), May 3, 2013. At <http://www.freedominfo.org/2013/05/hungary-restricts-foi-law-ogp-membership-questioned/>. Accessed June 5, 2013. See also “Hungary: Government Closing Down Freedom of Information,” [Transparency.org](http://www.transparency.org), May 8, 2013. Available at http://www.transparency.org/news/pressrelease/20130508_hungary_government_closing_down_freedom_of_information. Accessed June 5, 2013.

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Endnotes

1. In the developing country context, one vivid example is India, whose Supreme Court in 1982 said that “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 ... A right to know seems implicit in the right of free speech and expression.” See *S.P. Gupta v Union of India*, (1982) AIR (SC) 149, at 232. In the developed country context, France provides an example. There the Conseil d’Etat held in 2002 that under Article 34 of the country’s constitution the right to access government documents is one of the “fundamental guarantees granted to citizens for the exercise of their public liberties.” See *Ullmann*, Judgment of April 29, 2002, NO. 228830, paragraph 2.
2. See the *Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media*, November 26, 1999. These three bodies issued a second joint declaration in 2004 saying that “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.”
3. *Ibid*, 1999.
4. *Written Comments on the Case of Tarsasag a Szabadsagjogokert v Hungary, A Submission to the European Court of Human Rights from the Open Society Justice Initiative, the Financial Times, Ltd, and Access Info Europe*, September 2008, 6. Available at http://www.opensocietyfoundations.org/sites/default/files/hungary_20080901.pdf. Accessed June 4, 2013.
5. See Roger Vleugels, “Fringe Special: Overview of all FOI Laws,” September 30, 2011, at freedominfo.org/documents/Fringe%20Special%20-%20Vleugels2012oct.pdf. Accessed May 17, 2013. According to Vleugels, there are 93 national FOI laws, 180 sub-national FOI laws, and three international FOI laws. Determining the precise number of countries with an FOI law depends on several factors, above all what counts as a qualifying law. Argentina, for example, has no national FOI law, but does have a presidential edict, the Access to Public Information Regulation of 2003. So, too, with China, Niger and Tunisia. Some countries have passed FOI laws, but the laws have not come into effect; and in a few rare cases – Zimbabwe is most notorious in this regard – the FOI law actually works to frustrate access to information and to free expression generally. Still another issue is counting countries, and there, too, sources differ: Vleugels counts 199 countries in his 2011 study; the United Nations has 193 member states, the U.S. State Department recognizes 195 countries, and the International Olympic Committee recognizes 204 national Olympic committees.
6. According to the Open Society Justice Initiative, as of March 2013 there were 94 countries with FOI laws. See “List of countries with Access to Information Provisions in their National/Federal Laws or Actionable Decrees,” Open Society Justice Initiative, March 14, 2013. See also Freedominfo.org, a monitoring site sponsored by the Open Society Institute, which in October 2012 reported 93 countries with FOI laws. “93 Countries Have FOI Regimes, Most Tallies Agree.” Freedominfo.org, October 19, 2012, at www.freedominfo.org/2012/10/93-countries-have-foi-regimes-most-tallies-agree/, checked on May 17, 2013.
7. See Vleugels, 2011. By far the greatest number of countries without an FOI law are in Africa and the Middle East.

8. For example, the Hungarian constitution gives the right to “access information of importance from the public viewpoint” (Article 61.1); the Macedonian constitution states that “the establishment of institutions for public information is guaranteed” (Article 16); the Bulgarian constitution entitles citizens to “obtain information from state bodies and agencies on any matter of legitimate interest” (Article 41); the Croatian constitution gives journalists a right of access to information (Article 38); The Czech Charter of Fundamental Rights and Basic Freedoms provides a right to information (Article 17.2); the Estonian constitution gives citizens the right to “freely acquire and publicly disseminate information”; the Polish constitution has five different articles that mention the right of access to information (Articles 51, 52, 54, 61, and 74); and the Slovenian constitution protects the “right to acquire and disseminate information” (Article 39).
9. See Alexandru Grigorescu, “The Effectiveness of Freedom of Information Legislation in East Europe.” Paper prepared for the Annual Conference of the American Political Science Association, Toronto, Ontario, September 2009. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1449172. Accessed May 22, 2013.
10. “Is Europe Corrupt?” *The Economist*, London, 29 January 2000, 57.
11. Sweden was the first country to adopt a freedom of information law, in 1766, 10 years before the American Revolution and 13 years before the French Revolution, then redrafted the law in 1949. The next countries to enact FOI laws were Finland, in 1951; the United States, in 1966; and Denmark, in 1970.
12. The NGO Right2Info publishes a resource guide to FOI NGOs and Commissions around the world. See <http://www.right2info.org/resources/ngos-information-commission-ers-and-other>. Accessed June 5, 2013.
13. See, for example, the Bank Information Center, <http://www.bicusa.org/about/>. Accessed June 5, 2013.
14. See The International Bank for Reconstruction and Development/World Bank, “Governance and Public Sector Management.” Available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTOR/ANDGOVERNANCE/0,,contentMDK:23253090~pagePK:148956~piPK:216618~theSitePK:286305,00.html>. Accessed June 5, 2013.
15. See <http://www.freedominfo.org/regions/>. Accessed May 22, 2013.
16. Vleugels, 2011.
17. Helen Darbishire and Thomas Carson, *Transparency and Silence—a Survey of Access to Information Laws and Practices in 14 Countries*. (New York: Open Society Institute, 2006). Available at https://www.ip-rs.si/fileadmin/user_upload/Pdf/Publikacije_ostalih_pooblascencev/Transparency_and_Science_Justice_Initiative..pdf. Accessed May 22, 2013.
18. Toby Mendel, *Freedom of Information: A Comparative Legal Survey*. (Paris: UNESCO, 2003). Available at http://portal.unesco.org/ci/en/file_download.php/fa422efc11c9f9b15f9374a5eac31c7efreedom_info_laws.pdf. The survey examined the Organization of American States, the Council of Europe, the African Union, Bulgaria, India, Japan, Mexico and Pakistan.
19. Toby Mendel, *Freedom of Information: A Comparative Legal Survey*. (Paris: UNESCO, 2008). Available at <http://www.fas.org/sgp/foia/comparative.pdf>. Accessed May 17, 2013. The countries Mendel examined were Azerbaijan, Kyrgyzstan, Thailand, Bulgaria, Mexico, Uganda, India, Peru, the United Kingdom, Jamaica, South Africa, the United States, Japan, and Sweden.



20. Open Society Justice Initiative, *Justice Initiative Access to Information Monitoring Tool: Report from a Five-Country Study*. (New York: Open Society Institute, September 2004). The five countries in the pilot study were Armenia, Bulgaria, Macedonia, Peru and South Africa. Available at http://pdc.ceu.hu/archive/00005693/01/Access_to_Inform.pdf. Accessed May 19, 2013.
21. Merit Ulvik and M. Sadahiva, *Access to Information Monitoring*. Available at http://www.pgexchange.org/images/toolkits/PGX_A_Access%20to%20Information.pdf.
22. Johan Lidberg, "The International Freedom of Information Index," *Nordicom Review* 30(1), 2009, 167-82.
23. David Banisar, "Freedom of Information and Access to Government Records Around the World," November 30, 2006, 6. Available at http://www.freedominfo.org/documents/global_survey2006.pdf. Accessed May 21, 2013.
24. See, for example, Harkrisyati Kamil, "The Role and Initiatives of NGOs in Indonesia in Empowering Freedom of Information." Available at <http://eprints.rclis.org/9296/1/Paper-Yati-kamil.pdf>. Accessed June 5, 2013.
25. The statute was called the Freedom of the Press and Right of Access to Public Records Act. It provides that "every Swedish citizen shall be entitled to have free access to official documents in order to encourage the free exchange of opinion and the availability of comprehensive information" (Charter 2, Article 2). Courts around the world have determined that the right to receive information is a central element of the right of free expression.
26. See, for example, Alasdair Roberts, "Structural Pluralism and the Right to Information," 51 *University of Toronto Law Journal* 262, 243-71, 2001.
27. John M. Ackerman and Irma E. Sandoval-Ballesteros, "The Global Expansion of Freedom of Information Laws," 58 *Administrative Law Review* 85 (2006), 85-130, at 93. See also Article 19, "Freedom of Information Training Manual for Public Officials," Article 19, A Model Freedom of Information Law, app. 2, at 94-110. Available at www.article19.org/pdfs/tools/foitrainersmanual.pdf, accessed May 18, 2013.
28. See T.H. Marshall, *Citizenship and Social Class: And Other Essays*. (Cambridge: Cambridge University Press, 1950). Marshall's famous essay "Citizenship and Social Class" identified the essential human rights of post-war industrial age as civil, political and social.
29. See Mark Bovens, "Information Rights: Citizenship in the Information Society," *Journal of Political Philosophy* 10, 2002, 317-41, at 327. The U.S. Freedom of Information Act rose directly from congressional concern that the growth of administrative agencies empowered the executive branch at the cost of diminished congressional power. Congress' first response was to pass the Administrative Procedures Act in 1946, part of which forced administrative agencies to publish information about their rules and decisions and open them to "public comment." The Freedom of Information Act followed 20 years later.
30. See Andrew Puddephatt, *Exploring the Role of Civil Society in the Formulation and Adoption of Access to Information Laws: The Cases of Bulgaria, India, Mexico, South Africa, and the United Kingdom*. (Washington, D.C.: The International Bank for Reconstruction and Development, 2009). Available at <http://siteresources.worldbank.org/EXTGOVACC/Resources/atCivSocietyFinalWeb.pdf>. Accessed June 4, 2013. See also Thomas Blanton, "The International Movement of Freedom of Information," paper presented at the Annual Meeting of the International Studies Association, New Orleans, LA, 2002; and Article 19, *Promoting Practical Access*

to Democracy: A Survey of Information in Central and Eastern Europe, October 2002. Available at <http://www.article19.org/data/files/pdfs/publications/freedom-of-information-survey-of-central-and-e.pdf>, accessed May 21, 2013.

31. In the United States, for example, only 10 percent of federal FOI requests come from journalists. See Dylan Bushell-Embling, "FOI—The International Situation," *Australian Quarterly* 78(6), November-December 2006, 30-34, 32.
32. Daniel Kaufmann and Paul Siegelbaum, "Privatization and Corruption in the Age of Transition," *Journal of International Affairs* 50: 419-459; George Kopits and John Craig, *Transparency in Government Operations*. IMF Occasional Paper No. 158, (Washington, DC: International Monetary Fund, 1998); Ann Florini, "Increasing Transparency in Government," *International Journal on World Peace* 19(3), 3-34, 2002.
33. Bernard Finel and Kristin Lord, *Power and Conflict in the Age of Transparency*. (New York: St. Martin's Press, 2000).
34. See Daniel Kaufman and Tara Vishwanath, "Toward Transparency: New Approaches and Their Application to Financial Markets," 16 *World Bank Res. Observer* 41, 2001, 41-57.
35. See *Roche v. United Kingdom*, ECHR, October 19, 2005, in which the court said, not for the first time, that the freedom to receive information "cannot be construed as imposing on a State...positive obligations to collect and disseminate information of its own motion." See also *Guerra and others v. Italy*, ECHR, February 9, 1998; *Leander v. Sweden*, March 26, 1987; and *Gaskin v. United Kingdom*, July 7, 1989.
36. See *Gillberg v. Sweden*, ECHR, April 3, 2012. At http://www.right2info.org/resources/publications/case-pdfs/echr_gillberg-v.-sweden_judgment, accessed on May 17, 2013.
37. *McBurney v. Young*, 569 U.S. ___, (2013). The U.S. Supreme Court has many times said the constitution does not include a right of access to information. See, for example, *Houchins v. KQED*, 438 U.S. 1 (1978), at 16: "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."
38. Guy Peters. *The Politics of Bureaucracy*. (New York: Longman, 1989), 182. The U.S. FOIA is a case in point. Passed in 1966, the law originally had no fixed time for agencies to respond to requests and no sanctions for failures to respond. The law was amended by a Democratic Congress in 1974 after the Vietnam War and the Watergate scandal, but it was vetoed by President Gerald Ford. Congress then overrode Ford's veto. The law did not apply to Congress itself.
39. Joseph Stiglitz, "On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life," Oxford Amnesty Lecture, Oxford University, United Kingdom, January 27, 1999, 11; see also Daniel Kaufmann and Tara Vishwanath, "Toward Transparency: New Approaches and Their Application to Financial Markets," 16 *World Bank Res. Observer* 41, 2001, 41-57.
40. Robert Martin and Estelle Feldman, *Access to Information in Developing Countries*. (Berlin: Transparency International, 1998.)
41. Available at <http://www.article19.org/data/files/pdfs/tools/foitrainersmanual.pdf>, accessed May 19, 2013.
42. See also Thomas Blanton, "The World's Right to Know," *Foreign Policy* No. 131 (July-August, 2002), 50-58.

43. In the United States, courts in at least two states, Colorado and Connecticut, have ruled that their state FOI's do apply to private entities that perform public functions. In 2011, the U.S. Supreme Court ruled that corporations do count as "persons" under the federal FOIA and so do not have a "personal privacy" interest in records held by the government. See *F.C.C. v. AT&T*, 131 S.Ct. 1177 (2011).
44. See generally Burton A. Weisbrod, ed., *To Profit or Not to Profit: The Commercial Transformation of the Nonprofit Sector*. (Cambridge: Cambridge University Press, 1998).
45. See South African Constitution, Chapter 2, Section 32, subsection 1, 1996.
46. See Article 19, *The Public's Right to Know: Principles on Freedom of Information Legislation* (1999), available at www.article19.org/pdfs/standards/righttoknow.pdf, accessed May 19, 2013.
47. See Kristen Elizabeth Uhl, "The Freedom of Information Act Post-9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security," 53 *American University Law Review* 261 (2003).
48. The Hungarian Commissioner for Data Protection and Freedom of Information, for example, is an ombudsman whose decisions have no binding legal authority. By contrast, the Mexican Institute for Access to Information has the power of an administrative court. In New Zealand, the Human Rights Ombudsman has responsibility for implementing the nation's FOI law.
49. See Alasdair Roberts, "Access to Government Information—An Overview of the Issues," in Laura Neuman, ed., *Access to Information: A Key to Democracy*. (Atlanta, Ga.: The Carter Center, 1999). Available at <http://www.cartercenter.org/documents/1272.pdf>, accessed May 20, 2013.
50. See Kate Doyle, "In Mexico, A New Law Guarantees the Right to Know," July 9, 2002, at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/>.
51. See Scott Shane, "Survey Finds Action on Information Requests Can Take Years," *New York Times*, July 2, 2007, A1. The survey, conducted by the National Security Archive at George Washington University, found that 10 federal agencies underreported the number of pending requests to Congress, and that several had unanswered requests for information that were more than 15 years old. Of the 87 federal agencies the survey attempted to examine, 26 did not respond at all. Available at http://www.nytimes.com/2007/07/02/washington/02secrets.html?_r=0, accessed May 20, 2013.
52. See Bill Dedman, "Want Palin's E-Mails? That'll be \$15 million," MSNBC, October 17, 2008. Available at http://www.nbcnews.com/id/27228287/ns/politics-decision_08/t/want-palins-e-mails-thatll-be-million/#.UZp9brXVA8o, accessed May 20, 2013.
53. Ireland, for example, has largely gutted its FOI law, which came into force in 1997. See Meave McDonagh, "The Honeymoon is Over: Ireland Rows Back on FOI," *Freedom of Information Review*, 78-84, 2003.
54. "Report of the International Task Force for Assessing the Baia Marie Accident," December 2000. Available at http://viso.jrc.ec.europa.eu/pecomines_ext/docs/bmtf_report.pdf. Accessed May 21, 2013.
55. United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. (Geneva: UNESE). Available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>. Accessed May 21, 2013.
56. Several intergovernmental institutions have some kind of formal FOI regulation or policy or have made a

public commitment to one, including the World Bank, the European Commission, the United Nations, the UN Development Program, and UNESCO. Many IGOs have no such policy or commitment, among them the African Union, the Council of Europe, the European Free Trade Association, OPEC, Mercosur, NATO, the OAS, the OECD, the OSCE, the UN Environmental Program, the UNHCR, UNICEF, the World Health Organization and the World Trade Organization. See Vleugels, *op. cit.*, n1, 2001, 29.

57. See, for example, Jessica Matthews, "Power Shift," *Foreign Affairs*, January-February 1997, 50-66.
58. The World Bank's "Policy on Access to Information" went into effect in 2010, replacing the Bank's "Policy on Disclosure of Information" that had been in force since 2001. The major difference between the two is that the new policy is based on an obligation to publish all Bank information that is not subject to the policy's exceptions. See http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/06/03/000112742_20100603084843/Rendered/PDF/548730Access01y0Statement01Final1.pdf. Accessed May 21, 2013.
59. The international development banks that are "more or less close to a FOIA" are the International Monetary Fund, the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank. See Vleugels, 2011, 26.
60. See <http://www.freedominfo.org/regions/europe/bosnia-and-herzegovina/>
61. Alasdair Roberts, "Administrative Discretion and the Access to Information Act: An Internal Law on Open Government?" 45 *Canadian Public Administration* 175 (2002), at 176.
62. See, for example, Open Society Institute Justice Initiative, *Access to Information Monitoring Tool: Report from a Five-Country Pilot Study*, 2004. Available at http://pdc.ceu.hu/archive/00002352/01/Access_to_Inform.pdf. The study found that of 100 total requests made in five countries—Armenia, Bulgaria, Macedonia, Peru and South Africa—only 35 percent of requests were fulfilled; another 36 percent of requests received no response at all.
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