

ACCESS TO INFORMATION: THE EXISTING STATE OF AFFAIRS AROUND THE WORLD

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SUMMARY: I. *The information revolution.* II. *Rationale for the information movement.* III. *The legal status of access to information.* IV. *Attributes of the right to information.* V. *Key challenges.* VI. *New directions.* VII. *Conclusion.*

It is my great pleasure to delivery an Opening Conference on freedom of information in Mexico City. This country is at the forefront of national access to information developments around the world, and this region is similarly leading the world in setting standards in this area. It gives me great pleasure, therefore, to play a part, however small, in these events.

Although the point has been made here already, I would just like to stress that my focus will be on access to public information, or the right to access information held by public bodies.

I. THE INFORMATION REVOLUTION

Let me start by highlighting some of the developments that have taken place over the last 15 years or so, because they are quite remarkable. 15 years ago, in 1990, only a handful of countries —13 to be precise— had passed access to information laws. No inter-governmental organisation (IGO) or international financial institution (IFI) had adopted a policy on openness or information disclosure. There were no authoritative international statements of note addressing the issue. And there were almost no NGOs working on this issue, outside of a few in countries which had

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adopted legislation. Indeed, even my own NGO, ARTICLE 19, did not broach this issue until well after 1990.

The picture today is very different indeed. Today, over 60 countries have passed laws giving individuals a right to access information held by public bodies and another 30 or so are in the process of doing so. Many of the numerous new constitutions adopted since 1990 include access information as a fundamental human right. All of the multilateral development banks have adopted information disclosure policies and even purely financial institutions, such as the IMF, have adopted rules on information disclosure. IGOs remain weak in this area, but the UNDP has adopted a disclosure policy and UNESCO's General Conference recently endorsed calls for that organisation to adopt an information disclosure policy. There are now a plethora of international statements on this issue, accompanied by a growing body of academic literature. Finally, there are now literally 100s of NGOs focusing on access to information —both nationally and internationally— linked by a number of different networks and email lists.

I do not think it is an exaggeration to call this a revolution. Indeed, in my opinion, these developments relating to access to information are among the most significant human rights developments in recent years.

II. RATIONALE FOR THE INFORMATION MOVEMENT

Why is all of this taking place? We can identify factors at two different levels: general developments that have facilitated the implementation of human rights since 1990 and specific factors relating to information. Globalisation —economic, political, relating to the movement of people, social and so on— has certainly played a role in facilitating the general promotion of human rights. So, obviously and importantly, has the end of the Cold War and the end of communism in Eastern and Central Europe. The world is also a lot richer now than it was a generation ago —compare Mexico of today with 20-20 years ago— and this also helps create a demand for human rights.

A number of specific factors have also played a role. Among these is the information revolution or the coming of the information age. On one level, we have come to realise the importance and power of information

and so we demand to have access to it. At the same time, the information age has made the benefits associated with access to information more tangible. Our opportunities to control corruption are greater now, we are more able to hold our leaders to account and we can feed more effectively into decision-making processes.

A second point is that the world has now reached a critical mass of achievement in terms of access to information. A campaign for access to information legislation was started many years ago in the United Kingdom, for example; by 2000, when the Freedom of Information Act was finally passed, the government could no longer ignore the fact that practically every other European country had already legislated to guarantee this right. Similarly, the German government, where a law has very recently been passed, could no longer ignore the fact that it was practically the last country in the European Union to give effect to this important right.

Third, access to information is an incredibly powerful campaigning issue. It is what I like to call an organic phenomenon: almost everyone rallies to the call, almost instinctively. It has an extremely broad appeal, having relevance to a wide range of NGOs, grassroots organisations and even businesses. It unites the political spectrum, appealing to both left-wing and right-wing parties. Powerful development and other international actors, such as the international financial institutions, provide further support for access to information campaigns. In this respect, it may be contrasted, for example, with the issue of defamation, which my organisation has been working on for many years. Although both are key freedom of expression issues, we have experienced far more success in mobilising people to fight for the right to information. In Malaysia, for example, defamation has been a very serious problem for years and yet we have not really managed to launch a serious campaign on it, whereas we easily initiated an access to information campaign last year.

Finally, it is probably true to say that access to information is more important now than it has ever been. For example, in the context of nationally controlled economies, corruption is a problem inasmuch as it undermines national output and hence wealth. Today, however, in a global corporate environment, corruption undermines competitiveness and hence national progress at a far more fundamental level. Politics is also far more cynical today than it was even 20 years ago, with politicians shame-

lessly taking advantage of every means to control information flows; the term 'spin', for example, is of relatively recent coinage. Access to information can play a role in counteracting these problems and hence is more important to us than ever.

III. THE LEGAL STATUS OF ACCESS TO INFORMATION

In those countries that have passed access to information laws, it is obviously a legal right. Where the right is enshrined in the constitution, it has a more profound status, as a human right. I would like, however, to make a much bolder claim, namely that access to information held by public bodies is encompassed by the internationally guaranteed right to freedom of expression, which includes the right to seek and receive information. This bold claim finds support in a growing body of authoritative international statements and law, which is being led by developments in Latin America.

Within the UN system, the Special Rapporteur on Freedom of Opinion and Expression has repeatedly referred to the fundamental right to access information held by public bodies. Last year, for example, that mandate, in common with the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, adopted a resolution which stated, among other things:

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

The Commission on Human Rights has not gone quite that far but has called on States to consider this issue, and has even recommended that States take into consideration the ARTICLE 19 Principles on access to information. The UN Human Rights Committee has often called on States, in the context of regular country reports, to adopt access to information laws as a consequence of their freedom of expression obligations. Given that the mandate of the Committee is entirely circumscribed by the

provisions of the *International Covenant on Civil and Political Rights*, this can be taken as strong evidence that the Committee understands the right to freedom of expression as encompassing a right to access information held by public bodies.

At the regional level, the *Declaration of Principles on Freedom of Expression in Africa* very clearly identifies access to information as a basic human right. The *Inter-American Declaration of Principles on Freedom of Expression* similarly identifies access to information as a basic human right. This is backed up by a resolution of the OAS General Assembly which, while it falls a bit short of calling access a human right, does refer to it as a freedom and a “requisite for the very exercise of democracy”. It also notes that States are “obliged to respect and promote” access to information. A case decided recently by the Inter-American Commission on Human Rights held very clearly that access to public information was a right, and this case is currently before the Inter-American Court of Human Rights, expected to be decided in March 2006.

Perhaps ironically, Europe, the birthplace of the idea of a right to access public information, is somewhat less forceful in calling for respect for this as a human right. A resolution by the Committee of Ministers of the Council of Europe recognises the importance of access to information, and calls on States to adopt legislation guaranteeing it, but does not refer to it as a right. The European Court of Human Rights, for its part, has consistently refused to recognise a right of access as an aspect of the right to freedom of expression, although it has grounded such a right in the right to family life and privacy, in my view a serious shortcoming. On the other hand, the Council of Europe has now committed itself to preparing a legally binding treaty on access to information, which has the potential to be a very important development in this area.

Taken together, I would say that this is a very impressive body of law and comment which signals the growing strength of the idea of access to information as a fundamental human right.

IV. ATTRIBUTES OF THE RIGHT TO INFORMATION

ARTICLE 19 has set out nine key principles on freedom of information, all of which are central to proper implementation of this human right. However, I would like to identify here four central elements of a

system for the protection of access of information, along with some supporting elements.

First, an access to information law should establish a presumption in favour of disclosure. In most cases, this will reverse the pre-existing practice of secrecy which hitherto prevailed in the public sector. This presumption should apply to all public bodies, defined broadly, and should apply to all of the information they hold. As an example of the breadth of definition of information, a Swedish request for information related to the ‘cookies’ on the Swedish Prime Minister’s computer. The request was granted, and the information disclosed that there were in fact no cookies on his computer; in other words, at that time, the Swedish Prime Minister did not use the Internet. The point is simply that the right covers all sorts of information, regardless of how it is held.

Second, the law should set out clear procedures for accessing information. Although this is rather mundane, it is at the same time fundamental to the successful functioning of an access to information regime. The law should, for example, make it easy to file a request (it should be possible to file one electronically or orally and, as necessary, requesters should be given assistance in filing their requests), strict timelines should be established for responding to requests, notice should be required to be given of any refusal to grant access to information and at least the outlines of the fee structure for successful requests should be provided.

Third, and very importantly, the law should establish clearly those cases in which access to information may be denied, the so-called regime of exceptions. On the one hand, it is obviously important that the law protect legitimate secrecy interests. On the other hand, this has proven to be the Achilles heel of many access to information laws. The UK Freedom of Information Act 2000, for example, is in many ways a very progressive piece of legislation. At the same time, it has a vastly overbroad regime of exceptions, which fundamentally undermines the whole access regime.

As with all restrictions on freedom of expression, exceptions to the right to access information must meet a strict three-part test. First, the law must set out clearly the legitimate interests which might override the right of access. These should specify interests rather than categories. For example, it should refer to privacy rather than personal records and national security rather than the armed forces. Second, access should be de-

nied only where disclosure would pose a risk of harm to a legitimate interest. The harm should be as specific as possible. For example, rather than harm to internal decision-making, the law should refer to impeding the free and frank provision of advice. Finally, the law should provide for a public interest override in cases where the overall public interest would be served by disclosure, even though it might harm a legitimate interest. This might be the case, for example, where a document relating to national security disclosed evidence of corruption. In the long term, the benefit to society of disclosing this information would normally outweigh any short-term harm to national security.

The relationship of access to information legislation with secrecy legislation poses a special problem. If the access law contains a comprehensive, if concise, statement of the exceptions to access, it should not be necessary to extend these exceptions with secrecy legislation. Given that secrecy laws are normally not drafted with open government in mind, and given the plethora of secrecy provisions that will often be found scattered among national laws, it is quite important that the access law should, in case of conflict, override secrecy legislation. Even more important is a rule specifying that administrative classification of documents cannot defeat the access law. In this context, it is worth noting that classification is often simply a label given by the bureaucrat who happens to have created a document, and that this cannot possibly override the principles set out in an access to information law.

The fourth key element in an access to information regime is the right to appeal any refusal of access to an independent body. Ultimately, of course, one can normally appeal to the courts but experience has shown that an independent administrative body is essential to providing requesters with an accessible, rapid and low-cost appeal. In Mexico, of course, you have the Federal Institute of Access to Public Information (IFAI) to which appeals may be directed. The role of this body is particularly important in terms of interpreting exceptions to the right of access, given the complexity and sensitivity of this aspect of the system.

There are a number of other key elements to an access to information regime. First, although the core of an access system is request driven, the law should also place an obligation on public bodies to disclose, proactively or routinely, information of key importance. This ensures at least a minimum platform of information flow to the public and of openness in government.

Public bodies should be under an obligation to undertake a number of promotional measures to ensure full implementation in practice of the access regime. The precise measures will vary from country-to-country but they should include such things as training for public officials, public education about the access law, sanctions for officials who wilfully obstruct access, a system for reporting on measures taken to promote access, incorporating the provision of information into corporate incentive schemes and tracking information requests and how they have been dealt with within each public body.

V. KEY CHALLENGES

There are a number of central challenges to the successful implementation of an access to information regime. First, it is, as has been noted above, key to ensure that the regime of exceptions is not interpreted unduly broadly. Particularly difficult exceptions include those relating to national security and internal-decision making. The Mexican law, along with the South African law, provide good examples of appropriate legislative drafting in this area.

Another key problem is that of delay in terms of actually adopting an access law. Long-standing campaigns in countries like Indonesia, Nigeria and the Philippines attest to this problem.

In some countries, the authorities simply fail to respect the provisions of the law. Although the South African law on access to information is generally considered to be one of the best in the world, research indicates that there is a 70% rate of what has come to be termed 'mute refusal', which signifies a complete failure to respond to a request for information. Mute refusal is emerging as one of the leading problems in implementing access to information laws.

Some access to information systems fail to identify an oversight body. This is a particular problem in relation to appeals and, importantly, in relation to the interpretation of exceptions and other provisions of the law. While, in most countries, one can ultimately appeal to the courts, the experience of countries which have not provided for an administrative oversight body has highlighted the need for a quick, low-cost and accessible appeals system. In some countries, such as South Africa, moves are underway to amend the access law to provide for an oversight body.

Finally, in some cases, a signal lack of interest on the part of civil society, or potential requesters, has led to a failure to implement an effective access regime. The UNDP, for example, adopted a reasonably progressive policy on information but received practically no requests for information during the early years of the policy being in force. As a result, the policy effectively became defunct; recent efforts to request UNDP information have led to a process which, it is hoped, will reinvigorate the policy.

VI. NEW DIRECTIONS

A number of new directions have started to emerge as aspects of the right to access public information. One of the key new areas of openness has been in relation to international financial institutions (IFIs), most of which have adopted openness policies in recent years, starting with the World Bank in 1993. The problem with these systems for openness is that they are, by-and-large, simply publication schemes, rather than systems to promote openness. In most cases, they include a list of documents subject to disclosure, rather than principles setting out a regime of openness.

In 2003, a meeting between NGOs which historically focused on promoting openness at the national level and groups traditionally focusing on the international financial institutions produced the Global Transparency Initiative (GTI), a movement which promotes openness at the IFIs. The movement is currently producing a Charter on IFI Transparency, which is available on the group's website. Recently, the GTI has been involved in successful campaigns to promote more progressive disclosure policies at the Asian Development Bank, the World Bank and the European Investment Bank.

Another new development involves moves by openness advocates to promote greater openness in the corporate world, particularly among trans-national corporations (TNCs). The global movement for corporate social responsibility (CSR) has been extremely successful in fields such as the environment and labour standards, and it can reasonably be expected to have some impact on transparency as well. ARTICLE 19 has produced a study of TNC openness and we hope to host a conference to

discuss how to take this work forward and to set more progressive openness policy standards for TNCs soon.

A third new direction is the adoption of openness standards by NGOs themselves. ARTICLE 19, for example, has adopted its own transparency policy, as part of an effort to make a commitment to the standards that we believe others should respect.

Finally, I would like to raise the issue of what minimum standards should apply to the information that governments hold. The right to access information, as it is normally understood, applies only to information which public bodies already hold. However, it is becoming increasingly obvious that States need to ensure the production of certain types of information. This is most clear in relation to instances of serious human rights abuse, and this region of the world has seen a number of truth commissions investigating such abuses. I would argue, however, that States' obligations in this area extend beyond instances of human rights abuse, and that they should ensure provision of information on a range of social events of great importance, perhaps particularly involving harm of some sort, such as safety failures, environmental risks and so on.

VII. CONCLUSION

Regardless of one's view on the right to information, there can be little doubt that there has been a global revolution in terms of recognition of citizen's right to access information held by public bodies. It is now widely considered to be both a fundamental human right, as well as a cornerstone of democracy. Mexico has played an important role in setting this global agenda, and it remains at the forefront of access to information developments. I hope it will continue to play this role, to the benefit of all of us.