BACKGROUND PAPER 3

on

FREEDOM OF INFORMATION

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1. INTRODUCTION

It is increasingly being recognised that governments hold information not for themselves but, rather, on behalf of the public and that, as a result, public bodies should provide access to that information. This recognition is reflected in the explosive growth in the number of access to information laws that have been adopted around the world, as well as the numerous authoritative international statements on the issue.

Today, around 75 countries have laws on the books granting individuals a general right to access information held by public bodies, and imposing an obligation on public bodies to proactively disclose key types of information. In 1990, only 13 countries had such laws. Furthermore, most of the international financial institutions, including the World Bank and all of the regional development banks, as well as a growing number of other inter-governmental organisations, have adopted information disclosure policies. Nepal enacted its own law, the Right to Information Act, in 2007.[1]

Access to information laws reflect the fundamental premise that government is supposed to serve the people. There are, however, a number of more practical ideas underlying the recent widespread recognition of the right to information. ARTICLE 19 has described information as "the oxygen of democracy";[2] information is essential to democracy at a number of levels. The ability of individuals to participate effectively in decision-making that affects them depends, in obvious ways, on information. Elections can never meet their goal – described under international law as ensuring that "[t]he will of the people shall be the basis of the authority of government"[3] – if the electorate lacks access to information which enables it to form an opinion.

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

Access to information is also a key tool in combating corruption and wrongdoing. Investigative journalists and watchdog NGOs can use the right to access information to expose wrongdoing and help root it out. As U.S. Supreme Court Justice Louis Brandeis famously noted, "A little sunlight is the best disinfectant."

Access to information laws also serve a number of important social goals. The right to access one's personal information, for example, is part of respect for basic human dignity, but it can also be central to effective personal decision-making. Access to medical records, for example, can help individuals make decisions about treatment, financial planning and so on.

Finally, access to information laws can help facilitate effective business practices. Commercial requesters are, in many countries, one of the most significant user groups of such

[1] Right to Information Act, 2064 (2007).
[2] *The Public's Right to Know: Principles on Freedom of Information Legislation* (London: June 1999), Preface. Available online in Russian at http://www.article19.org/pdfs/standards/foi-the-right-to-know-russian.pdf.
[3] *Universal Declaration of Human Rights*, UN General Assembly Resolution 217A(III), 10 December 1948, Article 21.

laws. Public bodies hold a vast amount of information of all kinds, much of which relates to economic matters and which can be very useful for enterprises. The potential for increasing the effectiveness of business is an important benefit of access to information laws, and helps answer the concerns of some governments about the cost of implementing such legislation.

2. THE RIGHT OF ACCESS: INTERNATIONAL STANDARDS

A number of international bodies have authoritatively recognised the fundamental and legal nature of the right to freedom of information, as well as the need for effective legislation to secure respect for that right in practice. These include the UN, the Organisation of American States, the Council of Europe and the African Union.

2.1. The United Nations

The UN Special Rapporteur on Freedom of Opinion and Expression has addressed the issue of freedom of information in each of his annual reports since 1997. After receiving his commentary on the subject in 1997, the Commission on Human Rights (CHR) called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications."[4] Significantly, in his 1998 Annual Report, the Special Rapporteur stated clearly that the right to access information held by the State is included in the right to freedom of expression: "[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems. …"[5] His views were welcomed by the CHR.[6]

The UN Special Rapporteur significantly expanded his commentary on freedom of information in his 2000 Annual Report to the CHR, noting its fundamental importance not only to democracy and freedom, but also to the right to participate and to realisation of the right to development.[7] He also reiterated his "concern about the tendency of Governments, and the institutions of Government, to withhold from the people information that is rightly theirs".[8] Importantly, at the same time, the Special Rapporteur elaborated in detail on the specific content of the right to information.[9]

In their 2004 Joint Declaration, the three special mandates on freedom of expression at the UN, OSCE and OAS stated:

> 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.[10]

[4] Resolution 1997/27, 11 April 1997, para. 12(d).
[5] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14.
[6] Resolution 1998/42, 17 April 1998, para. 2.
[7] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 42.
[8] *Id.*, para. 43.
[9] *Id.*, para. 44. See section 3.
[10] Joint Declaration of 6 December 2004. This document can be accessed at

2.2. Regional standards

All three main regional systems of human rights – within the Americas, Europe and Africa – have formally recognised the importance of freedom of information as a human right. The following section describes the development of these standards.

2.2.1. Organization of American States

The OAS Special Rapporteur on Freedom of Expression has frequently recognised that freedom of information is a fundamental right, which includes the right to access information held by public bodies. In his 1999 Annual Report to the Inter-American Commission on Human Rights, he stated:

> The right to access to official information is one of the cornerstones of representative democracy. In a representative system of government, the representatives should respond to the people who entrusted them with their representation and the authority to make decisions on public matters. It is to the individual who delegated the administration of public affairs to his or her representatives that belongs the right to information. Information that the State uses and produces with taxpayer money.[11]

In October 2000, the Inter-American Commission on Human Rights approved the *Inter-American Declaration of Principles on Freedom of Expression*,[12] which reaffirms the right to information in the Preamble:

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

The Principles unequivocally recognise the right to access information:

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

In a landmark case decided in 2006, the first such decision by an international court, the Inter-American Court of Human Rights held that the right to freedom of expression included a right to access information held by public bodies.[13]

2.2.2. Council of Europe

In 1981, the Committee of Ministers, the political decision-making body of the Council of Europe (composed of Member States' Ministers of Foreign Affairs) adopted

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http://www.article19.org/publications/law/intergovernmental-materials.html.

[11] *Annual Report of the Inter-American Commission on Human Rights 1998, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression*, 16 April 1999, OEA/Ser.L/V/II.102, Doc. 6 rev., Chapter III, p. 24.

[12] Approved by the Inter-American Commission on Human Rights during its 108th regular session, 19 October 2000, available online in English at http://www.cidh.oas.org/declaration.htm.

[13] *Marcel Claude Reyes and Others v. Chile*, 19 September 2006, Series C No. 151 (Inter-American Court of Human Rights).

Recommendation No. R(81)19 on Access to Information Held by Public Authorities, which stated:

> I. Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities. …[14]

This was followed up by another Recommendation on Access to Official Documents, which includes the following provision:

> III
> *General principle on access to official documents*
>
> Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including national origin.[15]

The Council of Europe's Steering Committee on Human Rights is currently preparing a binding treaty on this topic.

2.2.3. African Union

In 2002, the African Commission on Human and Peoples' Rights adopted a *Declaration of Principles on Freedom of Expression in Africa*.[16] The Declaration clearly endorses the right to access information held by public bodies, stating:

> IV
> *Freedom of Information*
>
> 1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
> 2. The right to information shall be guaranteed by law in accordance with the following principles:
>   - everyone has the right to access information held by public bodies;
>   - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
>   - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
>   - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
>   - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
>   - secrecy laws shall be amended as necessary to comply with freedom of information principles.
> 3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

[14] 25 November 1981, p. 2.
[15] Recommendation R(2002)2 of the Committee of Ministers to Member States on Access to Official Documents, adopted on 21 February 2002.
[16] Adopted at the 32nd Session, October 2002. Available in English at http://www.achpr.org/english/_doc_target/documentation.html?../declarations/declaration_freedom_exp_en.html

3. FEATURES OF A FREEDOM OF INFORMATION REGIME

A number of the international standards and statements noted above provide valuable insight into the precise content of the right to freedom of information, over and above simply affirming its existence. In his 2000 Annual Report, the UN Special Rapporteur on Freedom of Opinion and Expression set out in detail the standards to which freedom of information legislation should conform (UN Standards).[17] The 2002 Recommendation of the Committee of Ministers of the Council of Europe (CoE Recommendation) is even more detailed, providing, for example, a list of the legitimate aims which might justify exceptions to the right of access.[18]

These standards find some support in the various freedom of information laws and policies around the world. Although these vary considerably as to their content and approach, the more progressive laws do have a number of common features which reflect these international standards.

ARTICLE 19 has published a set of principles, *The Public's Right To Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles),[19] setting out best practice standards on freedom of information legislation. These Principles are based on international and regional law and standards, and evolving State practice. They therefore provide a useful framework in which to discuss the features of access to information legislation.

3.1. Principle 1. Maximum Disclosure

"Freedom of information legislation should by guided by the principle of maximum disclosure."

The principle of maximum disclosure holds that all information held by public bodies should presumptively be accessible, and that this presumption may be overcome only in very limited circumstances.

The principle of maximum disclosure encapsulates the basic rationale of freedom of information legislation, and is explicitly stated as an objective in a number of national laws. An important aspect of this principle, widely reflected in national laws, is that the body seeking to deny access to information bears the burden of proving that it may legitimately be withheld.[20]

Another aspect of this principle is that the scope of the law should be very broad.[21] Everyone, not just citizens, should benefit from the right and an individual requesting access should not have to demonstrate any particular interest in the information or explain the reasons for the request. Information should be defined broadly to include all information held by the body in

[17] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.
[18] Note 15, Principle IV.
[19] Note 2.
[20] *Commonwealth Freedom of Information Principles*, agreed by the 11th Commonwealth Law Ministers Meeting, Trinidad and Tobago, May 1999, Principle 2.
[21] See the *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (Aarhus Convention), UN Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the "Environment for Europe" process, 25 June 1998, entered into force 30 October 2001, Articles 2(2)-(3).

question, regardless of form, date of creation, who created it and whether or not it has been classified.

The scope of the obligation to disclose in terms of the bodies covered should also be broad. All three branches of government should be covered and no public bodies should be excluded from the ambit of the law. Public corporations should also be covered and many argue that even private bodies which are substantially publicly funded or carry out public functions should be included within the ambit of the law. In South Africa, even private bodies are required to disclose information which is needed for the protection or exercise of any right.

3.2. Principle 2. Obligation to Publish

"Public bodies should be under an obligation to publish key information."

Freedom of information implies not only that public bodies should accede to requests for information, but also that they should publish and disseminate widely documents of significant public interest.[22] Otherwise, such information would be available only to those specifically requesting it, when it is of importance to everyone. Moreover, publishing information will often be more economical than responding to multiple requests for the same information.

The scope of the obligation to publish proactively depends to some extent on resource limitations, but the amount of information covered should increase over time, particularly as new technologies make it easier to publish and disseminate information.

3.3. Principle 3. Promotion of Open Government

"Public bodies must actively promote open government."

Informing the public of their rights and promoting a culture of openness within government are essential if the goals of freedom of information legislation are to be realised. In most countries, particularly those which have not yet or have just recently adopted freedom of information laws, there is a deep-rooted culture of secrecy within government, based on long-standing practices and attitudes. Ultimately, the success of a freedom of information law depends on changing this culture since it is virtually impossible to force openness, even with the most progressive legislation.[23]

The best approach to addressing this problem will vary from country to country but, at a minimum, there will be a need to train public officials. A number of other means of promoting openness within government have been tried in different countries, including, for example, providing incentives for good performers and exposing poor performers, and ensuring oversight through annual reports which provide relevant statistics on the functioning of the FOI regime. Another useful tool to tackle the culture of secrecy is to provide for criminal penalties for those who wilfully obstruct access to information in any way, including by destroying records or inhibiting the work of the administrative body overseeing implementation of the law.

[22] See the African Principles, note 16, Principle IV(2).
[23] See the UN Standards, note 7.

The general public also need to be made aware of their rights under the new legislation, and how to exercise them. Public education campaigns are needed, including through the media. Another useful tool, provided for in many laws, is the publication of a simple, accessible guide on how to lodge an information request.

A third important aspect of promoting open government is promoting better record maintenance by public bodies.[24] In many countries, one of the biggest obstacles to accessing information is the poor state in which records are kept. Officials often do not know what information they have or, even if they do know, cannot locate records they are looking for. Good record maintenance is not only important for freedom of information. Handling information is one of the key functions of modern government and doing this well is crucial to effective public management.

3.4. Principle 4. Limited Scope of Exceptions

"Exceptions to the right to access information should be clearly and narrowly drawn and subject to strict "harm" and "public interest" tests."

The regime of exceptions is one of the most difficult issues facing those drafting a freedom of information law and one of the most problematic parts of many existing laws. In many cases, otherwise very effective laws are undermined by an excessively broad or open regime of exceptions. On the other hand, it is obviously important that all legitimate secrecy interests are adequately catered to in the law, otherwise public bodies will legally be required to disclose information even though this may cause unwarranted harm.

The presumption in favour of disclosure means that the onus should be on the public body seeking to deny access to certain information to show that it may legitimately be withheld.

The ARTICLE 19 Principles set out a three-part test for exceptions as follows:

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

The first part of this test means that a complete list of all aims which may justify withholding information should be set out in the law. Which aims are legitimate is a subject of some controversy. Exceptions should at least be drafted clearly and narrowly.[25] The Council of Europe Recommendation lists the following possible grounds for restricting disclosure:

IV
Possible limitations to access to official documents

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
   i) national security, defence and international relations;
   ii) public safety;
   iii) the prevention, investigation and prosecution of criminal activities;
   iv) privacy and other legitimate private interests;
   v) commercial and other economic interests, be they private or public;
   vi) the equality of parties concerning court proceedings;

[24] See the Commonwealth Principles, note 20, Principle 4.
[25] See the Commonwealth Principles, note 20, Principle 3.

vii) nature;
viii) inspection, control and supervision by public authorities;
ix) the economic, monetary and exchange rate policies of the state;
x) the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

It is not, however, legitimate to refuse to disclose information simply because it relates to one of these interests. According to the second part of the test, the disclosure must pose an actual *risk of serious harm* to that interest.[26]

The third part of the test states the need for a *public interest override*,[27] which requires that even if disclosure of a piece of information would lead to harm, the information should still be disclosed if withholding it would lead to a greater harm. An example of this would be information which exposed corruption in the armed forces. Although this may at first sight appear to weaken national defence, eliminating corruption in the armed forces will, over time, actually strengthen it. The need for a public interest override is recognised in Principle IV(2) of the CoE Recommendation, which states:

> Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.[28]

3.5. Principle 5. Processes to Facilitate Access

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

Effective access to information requires both that the law stipulate clear processes for deciding upon requests by public bodies, as well as a system for independent review of their decisions.[29] Requests are normally required to be in writing, although the law should also make provision for those who are unable meet this requirement, such as the blind or the illiterate – for example, by requiring the public body to assist them by reducing their request to writing. The law should set out clear timelines for responding to requests, which should be reasonably short. The response to a request should take the form of a written notice stating any fee and, where access to all or part of the information is denied, reasons for that denial along with information about any right of appeal. It is also desirable and practical for the law to allow requesters to specify what form of access they would like, for example inspection of the record, or a copy or transcript of it.[30]

It is essential that the law provide for various opportunities to appeal the processes noted above. Many national laws provide for an internal appeal to a higher authority within the same public body to which the request was made. This is a useful approach, which can help address mistakes and ensure internal consistency.

[26] See the UN Standards, note 7.
[27] See the Aarhus Convention, note 21, Article 4(4).
[28] Note 15.
[29] *Id.,* Recommendation V.
[30] *Id.,* Recommendation VII.

It is, however, crucial that requesters have the right to appeal to an independent body to review decisions made by public authorities, which is reflected in most international standards.[31] Otherwise, individuals cannot really be said to have a right to access information held by public bodies and much information, for example revealing corruption or incompetence, will never be disclosed. Given the importance of rapid, cost-effective access to information, it is highly desirable that appeals should go first to an independent administrative body, and this is provided for in most of the more progressive national laws.[32]
Finally, the law should provide for the right to appeal from the administrative body to the courts. Only the courts really have the authority to set standards of disclosure in controversial areas and to ensure the possibility of a full, well-reasoned approach to difficult disclosure issues.

3.6. Principle 6. Costs

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

Fees are a controversial issue in freedom of information laws. It is widely accepted that fees should not be so high as to deter requests,[33] but practically every law does allow for some charges for access. Different laws take different approaches to fees. Some limit charges to the cost of reproducing documents, perhaps along with a set application fee. Others group requests into different categories, charging less for public interest or personal requests. Still others provide for the provision of a certain amount of information, for example 100 pages, for free and then start to charge after that. Regardless of the approach, it is desirable for fee structures and schedules to be set by some central authority, rather than be each public body separately, to ensure consistency and accessibility.

3.7. Principle 7. Open Meetings

"Meetings of public bodies should be open to the public."

The ARTICLE 19 Principles include the idea of open meetings, although in practice it is extremely rare for this to be dealt with in a freedom of information law. Some countries have separate laws on this. The reason it was included in the Principles is that the underlying rationale for freedom of information applies not only to information in documentary form, but also to meetings of public bodies.

3.8. Principle 8. Disclosure Takes Precedence

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

[31] See the Aarhus Convention, note 21, Article 9; African Principles, note 16, Principle IV(2); Commonwealth Principles, note 20, Principle 5; COE Recommendations, note 15, Recommendation IX; and the UN Standards, note 7.
[32] South Africa is a notable exception here. Some countries fear the costs of establishing yet another administrative body. However, these costs are arguably low compared to the benefits of a good freedom of information regime, for example in terms of rooting out incompetence and corruption or in promoting more effective decision-making.
[33] See CoE Recommendations, note 15, Recommendation VIII.

Most countries have a range of secrecy laws on their books, many of which are not legitimate or which include illegitimate provisions which are inconsistent with the access to information law. If the principle of maximum disclosure is to be respected, the access to information law must take precedence over these laws.[34] This should, where possible, be achieved by interpreting these laws in a manner which is consistent with the access to information law. However, where potential conflicts cannot be resolved through interpretation, the provisions of the access to information law should overrule those of conflicting secrecy laws. This is not as controversial as it sounds, at least in substance. A good freedom of information law will include a comprehensive set of exceptions which ensure that information will not be disclosed if doing so would cause unjustifiable harm; so there should be no need for this to be extended by secrecy laws.

Over time, a commitment should be made to review all laws which restrict the disclosure of information, with a view to bringing them into line with the freedom of information law.[35] This is particularly important in legal systems where it is not possible to provide for the dominance of one law over others.

3.9. Principle 9. Protection for Whistleblowers

"Individuals who release information on wrongdoing – whistleblowers – must be protected."

A freedom of information law should protect individuals against any legal, administrative or employment-related sanctions for releasing information on wrongdoing.[36] Protection of so-called whistleblowers provides an important information safety valve, ensuring that key information does indeed reach the public. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment requirement. In some countries, this protection is set out in a separate law rather than being included in the freedom of information law.

Protection from liability should also be provided to individuals who, reasonably and in good faith, disclose information in the exercise of any power or duty under freedom of information legislation. This effectively protects civil servants who have mistakenly, but in good faith, released information. This protection is important to change the culture of secrecy; civil servants should not have to fear sanctions for disclosing information or they will tend to err in favour of secrecy.

[34] UN Standards, note 7.
[35] See African Principles, note 16, Principle IV(2).
[36] See African Principle IV(2).