

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

by
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Published in 2003 by the United Nations Educational Scientific and Cultural Organisation, Regional Bureau for Communication and Information

UNESCO House, B-5/29 Safdarjung Enclave, New Delhi 110029, India
www.unesco.org/webworld

Composited and printed by Macro Graphics Pvt. Ltd.
UNESCO 2003

¹ (Malaysia: UNESCO and the Asia Pacific Institute for Broadcasting Development, 2000).

Acknowledgements

I would like to thank David Banisar, Deputy Director, Privacy International, London, UK, Mukelani Dimba, Open Democracy Advice Centre, Capetown, South Africa, Abha Joshi, Commonwealth Human Rights Initiative, New Delhi, India, and Maurice Frankel, Director, London, UK, Campaign for Freedom of Information, for their valuable comments and feedback on, respectively, the draft chapters on the United States, South Africa, India and the United Kingdom. I also like to thank UNESCO for inspiring me to write this comparative assessment and in particular to Mr. Wijayananda Jayaweera, Communication and Information Adviser for Asia

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Foreword

by **Abdul Waheed Khan**

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Information UNESCO*

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

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

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

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

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

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

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Introduction

The right to freedom of information, commonly understood as the right to access information held by public bodies, is now widely recognised as a fundamental human right. There is a massive global trend towards legal recognition of this right as countries around the world that aspire to democracy either have adopted, or are in the process of preparing, freedom of information laws. This represents an enormous change from even ten years ago, when less than one-half of the freedom of information laws now in place had been adopted.

There are a number of good reasons for growing acceptance of freedom of information as a human right. If anything, it is surprising that it has taken so long for such an important underpinning of democracy to gain widespread recognition as a right. Public bodies hold information not for themselves but as custodians of the public good. As such, this information must be accessible to members of the public in the absence of an overriding public interest in secrecy. In this respect, freedom of information laws reflect the fundamental premise that government is supposed to serve the people.

There are, however, a number of more utilitarian goals underlying widespread recognition of the right to information. The international human rights NGO, ARTICLE 19, Global Campaign for Free Expression, has described information as, "the oxygen of democracy".² Information is essential to democracy at number of levels. Fundamentally, democracy is about the ability of individuals to participate effectively in decision-making that affects them. Democratic societies have a wide range of participatory mechanisms, ranging from regular elections to citizen oversight bodies, for example of the public educational and/or health services, to mechanisms for commenting on draft policies or laws.

Effective participation at all of these levels depends, in fairly obvious ways, on information. Voting is not simply a technical function. For elections to fulfil their proper function - described under international law

² *The Public's Right to Know: Principles on Freedom of Information Legislation* (London: June 1999), Preface.

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as ensuing that "[t]he will of the people shall be the basis of the authority of government"³ - the electorate must have access to information. The same is true of participation at all levels. It is not possible, for example, to provide useful input to a policy process without access to the policy itself, as well as the reasons it is being proposed.

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

Freedom of information is also a key tool in combating corruption and wrongdoing in government. Investigative journalists and watchdog NGOs can use the right to access information to expose wrongdoing and help root it out. As U.S. Supreme Court Justice Louis Brandeis famously noted: "A little sunlight is the best disinfectant."⁴

Commentators often focus on the more political aspects of freedom of information but it also serves a number of other important social goals. The right to access one's personal information, for example, is part of basic human dignity but it can also be central to effective personal decision-making. Access to medical records, for example, often denied in the absence of a legal right, can help individuals make decisions about treatment, financial planning and so on.

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

These rationales for freedom of information legislation apply equally, if not with more force, to developing countries as to more developed

³ *Universal Declaration of Human Rights*, UN General Assembly Resolution 217 A (III), 10 December 1948, Article 21.

⁴ *Other People's Money, and How the Bankers Use It* (New York: Frederick A. Stokes Company, 1914). p. 92.

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countries. Democracy is not the preserve of a few select countries but a right of citizens everywhere. Every country in the world needs adequate checks and balances on the exercise of public power, including through freedom of information and the public oversight this enables. Freedom of information can be particularly effective in exposing corruption where there are few other safeguards, as grassroots experience in India with this right has amply demonstrated.⁵

Freedom of information is most commonly understood primarily as a right to access information held by public bodies upon request. This is a central aspect of the right, but it clearly goes beyond that. One further element, addressed in most freedom of information laws, is the obligation on public bodies to publish, even in the absence of a request, key information, for example about how they operate, their policies, opportunities for public participation in their work and how to make a request for information.

One further aspect of this right is starting to emerge. Unlike the other two aspects of the right, which relate to information already held by public bodies, this third aspect posits a positive obligation on States to ensure that certain key categories of information are available. International NGOs like ARTICLE 19, for example, have argued that States are under a substantive positive obligation to ensure that citizens have access to information about human rights violations.⁶ This is of particular importance in the aftermath of a period of serious human rights violations, as part of a renewed commitment to democracy and to respect rights.

In such cases, it may not be enough simply to provide access to information already held by public bodies; it may be necessary to go further and collect and compile new information to ascertain the truth about the past abuses. The importance attached to this is reflected in the truth commissions appointed in a number of countries. It is essential that information about past abuses is readily available in an accessible form if the nation as a whole is to be able to deal with those abuses and move on.

Over the past 10 years, there has been a dramatic growth in formal recognition of the right to freedom of information. Numerous

⁵ See ARTICLE 19, Centre for Policy Alternatives, Commonwealth Human Rights Initiative and Human Rights Commission of Pakistan, *Global Trends on the Right to Information: A Survey of South Asia* (London: 2001), under 2.8.1 India, The MKSS Movement, pp. 72-75.

⁶ *Who Wants to Forget? Truth and Access to Information about Past Human Rights Violations* (London: ARTICLE 19, 2000), p. 5. Online at www.article19.org/docimages/869.htm

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international bodies, including the UN and all three regional systems for the protection of human rights, have recognised the fundamental importance of this right, along with the need for legislation to guarantee it in practice. Many newly democratic countries have adopted new constitutions which explicitly recognise this right. In other countries, superior courts have interpreted long-standing constitutional guarantees of freedom of expression as embracing the right to freedom of information.

Perhaps most significant, however, is the veritable wave of freedom of information laws sweeping the globe. Such laws have been adopted by countries in every region of the world over the past 10 years, with the possible exception of the Middle East, and in many more countries, laws are in an advanced stage of preparation.⁷ Notwithstanding their natural tendency towards secrecy, governments are realising that they can no longer resist the imperative to pass legislation guaranteeing a right to access the information they hold.

The laws which have been adopted certainly vary considerably in terms of the extent to which they guarantee the right of access in practice. Some, like the Zimbabwean Access to Information and Protection of Privacy Act,⁸ serve more as fronts for repressive media legislation than to ensure access to public information. Most, however, are inexorably forcing the governments to which they apply to be more open.

This study begins with an overview of the international basis for the right to freedom of information. This overview considers both authoritative international statements, as well as relevant national developments, as evidence of global acceptance of this right. The next section describes the best practice standards to which freedom of information legislation should aspire.

These sections are followed by analyses of the laws of 10 different countries from all regions of the world, namely Bulgaria, India, Japan, Mexico, Pakistan, South Africa, Sweden, Thailand, the United Kingdom and the United States. The choice of countries was based on a number of factors including geographic distribution, progressive and/or long-standing legislation and the familiarity of the author with the country/legislation. Each country section is organised under the same set

⁷ David Banisar reports that as of July 2002, over 40 countries had adopted laws and another 30 were in the process of doing so. *Freedom of Information and Access to Government Records Around the World*, online at: <http://www.freedominfo.org/survey/>, Overview.

⁸ No. 5 of 2002. CAP. 10:27.

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of headings. A brief introduction is followed by headings on the right of access - subdivided into definitions and process - the duty to publish, exception, appeals and promotional measures.

The study also analyses the policies of two intergovernmental organisations, the UNDP and the World Bank. The former follows the same format as the country analyses, given its relative similarity in structure, while the analysis of the World Bank uses unique headings, given fundamental differences in the nature of its policy.

The country/intergovernmental organisation sections are followed by a comparative analysis which draws out the main similarities and differences between the various laws/policies. This analysis is supplemented by a table setting out the different exceptions in the different laws/policies, provided at Annex 1.

International Standards and Trends

A number of international bodies with responsibility for promoting and protecting human rights 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, Commonwealth, OAS, COE and AU. This is supplemented by growing consensus at the national level of the importance of freedom of information as a human right and as a fundamental underpinning of democracy, as reflected in the inclusion of a right to freedom of information in many modern constitutions, as well as a dramatic increase in the number of countries which have adopted legislation giving effect to this right in recent years. Collectively, this amounts to clear international recognition of freedom of information as a human right.

This chapter sets out the evidence for a right to information, describing the various international statements as well as related developments in various sectors, such as the environment and information about human rights. It also outlines key developments at the national level, including jurisprudence reaffirming the right, constitutional guarantees and legislative moves.

The United Nations

Within the UN, freedom of information was recognized early on as a fundamental right. In 1946, during its first session, the UN General Assembly adopted Resolution 59(1), which stated:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.⁹

In ensuing international human rights instruments, freedom of information was not set out separately but as part of the fundamental right

⁹ 14 December 1946

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of freedom of expression, which includes the right to seek, receive and impart information.

The *Universal Declaration of Human Rights* (UDHR), adopted by the UN General Assembly in 1948,¹⁰ is generally considered to be the flagship statement of international human rights. Article 19, binding on all States as a matter of customary international law, guarantees the right to freedom of expression and information in the following terms:

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

The *International Covenant on Civil and Political Rights* (ICCPR), a legally binding treaty, was adopted by the UN General Assembly in 1966¹¹ and, as of December 2002, had been ratified by some 149 States. The corresponding provision in this treaty, also Article 19, guarantees the right to freedom of opinion and expression in very similar terms to the UDHR.

In 1993, the UN Commission on Human Rights¹² established the office of the UN Special Rapporteur on Freedom of Opinion and Expression.¹³ Part of the Special Rapporteur's mandate is to clarify the precise content of the right to freedom of opinion and expression and he has addressed the issue of freedom of information in each of his annual reports since 1997. After receiving his commentary on the subject in 1997, the Commission called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications."¹⁴

In his 1998 Annual Report, the Special Rapporteur stated clearly that the right to freedom of expression includes the right to access information held by the State: "[T]he right to seek, receive and impart information

¹⁰ Resolution 217 A (III), 10 December 1948.

¹¹ Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976.

¹² The Commission was established by the UN Economic and Social Council (ECOSOC) in 1946 to promote human rights and is composed of 53 representatives of the UN Member States, rotating on a three-year basis. It is the most authoritative UN human rights body and meets annually for approximately six weeks to discuss and issue resolutions, decisions and reports on a wide range of country and thematic human rights issues.

¹³ Resolution 1993/45, 5 March 1993.

¹⁴ Resolution 1997/27, 11 April 1997, para. 12(d).

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. ..."¹⁵ His views were welcomed by the Commission.¹⁶

In November 1999, the three special mandates on freedom of expression - the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression - came together for the first time under the auspices of the human rights NGO, ARTICLE 19, Global Campaign for Free Expression. They adopted a Joint Declaration which included the following statement:

Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.¹⁷

The UN Special Rapporteur significantly expanded his commentary on freedom of information in his 2000 Annual Report to the Commission, noting its fundamental importance not only to democracy and freedom, but also to the right to participate and to realisation of the right to development.¹⁸ 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".¹⁹ Importantly, at the same time, the Special Rapporteur elaborated in detail on the specific content of the right to information.²⁰

The UN has also recognised the fundamental right to access information held by the State through its administration of the territory of Bosnia and Herzegovina. In 1999, the UN High Representative to Bosnia and Herzegovina²¹ required the various governments under his authority to adopt freedom of information legislation in accordance with the

¹⁵ 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.

¹⁶ Resolution 1998/42, 17 April 1998, para. 2.

¹⁷ 26 November 1999.

¹⁸ 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.

¹⁹ *Ibid.*, para. 43.

²⁰ *Ibid.*, para. 44. See the chapter on Features of an FOI Regime.

²¹ A mandate established by UN Security Council Resolution 1031, 15 December 1995, in accordance with the Dayton Peace Agreement.

highest international standards, in order to implement in practice the right to freedom of expression.²² This has now been done and a freedom of information law is in place in Bosnia and Herzegovina.²³

The Commonwealth

The Commonwealth has taken important concrete steps during the last decade to recognise human rights and democracy as fundamental component to the system of shared values which underpin the organisation. In 1991, it adopted the *Harare Commonwealth Declaration* which enshrined its fundamental political values, including respect for human rights and the individual's inalienable democratic right to participate in framing his or her society.²⁴

The importance of freedom of information, including the right to access information held by the State, has been recognised by the Commonwealth for more than two decades. In 1980, the Law Ministers of the Commonwealth, meeting in Barbados, stated that "public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information."²⁵

More recently, the Commonwealth has taken a number of significant steps to elaborate on the content of that right. In March 1999, the Commonwealth Secretariat brought together a Commonwealth Expert Group to discuss the issue of freedom of information. The Expert Group adopted a document setting out a number of principles and guidelines on the right to know and freedom of information as a human right, including the following:

Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial

²² Decision of the High Representative, *Decisions on the restructuring of the Public Broadcasting System in BiH and on freedom of information and decriminalisation of libel and defamation*, 30 July 1999.

²³ The Freedom of Access to Information Act was adopted by the Bosnia and Herzegovina State Government in October 2000, by the Republika Srpska Government in May 2001, and by the Government of the Bosnia and Herzegovina Federation in June 2001.

²⁴ Commonwealth Heads of Government Meeting, 20 October 1991, paras. 4 and 9. See also the Millbrook Commonwealth Action Programme, Commonwealth Heads of Government Meeting, 12 November 1995.

²⁵ Quoted in "Promoting Open Government: Commonwealth Principles and Guidelines on the Right to Know", background paper for the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development (London: 30-31 March 1999).

International Standards and Trends

arms of the state, as well as any government owned corporation and any other body carrying out public functions.²⁶

These principles and guidelines were adopted by the Commonwealth Law Ministers at their May 1999 Meeting in Port of Spain, Trinidad and Tobago. The Ministers formulated the following principles on freedom of information:

1. Member countries should be encouraged to regard freedom of information as a legal and enforceable right.
2. There should be a presumption in favour of disclosure and Governments should promote a culture of openness.
3. The right of access to information may be subject to limited exemptions but these should be narrowly drawn.
4. Governments should maintain and preserve records.
5. In principle, decisions to refuse access to records and information should be subject to independent review.²⁷

The Law Ministers also called on the Commonwealth Secretariat to take steps to promote these principles, including by assisting governments through technical assistance and sharing of experiences.

The Law Ministers' Communiqué was considered by the Committee of the Whole on Commonwealth Functional Co-operation whose report, later approved by the Heads of Government,²⁸ stated:

The Committee took note of the Commonwealth Freedom of Information Principles endorsed by Commonwealth Law Ministers and forwarded to Heads of Government. It recognized the importance of public access to official information, both in promoting transparency and accountable governance and in encouraging the full participation of citizens in the democratic process.²⁹

²⁶ Quoted in *Promoting Open Government: Commonwealth Principles and Guidelines on the Right to Know*, background paper for the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development (London: 30-31 March 1999).

²⁷ *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).

²⁸ The Durban Communiqué (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 57.

²⁹ *Communiqué*, Commonwealth Functional Co-operation Report of the Committee of the Whole (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 20.

The Commonwealth Secretariat has taken some concrete steps to promote freedom of information in member countries. It is in the process, for example, of drafting model laws on freedom of information, personal information and privacy.

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.

Organization of American States

Article 13 of the *American Convention on Human Rights* (ACHR),³⁰ a legally binding treaty, guarantees freedom of expression in terms similar to, and even stronger than, the UN instruments. In a 1985 Advisory Opinion, the Inter-American Court of Human Rights, interpreting Article 13, recognised freedom of information as a fundamental human right, which is as important to a free society as freedom of expression. The Court explained:

Article 13 ... establishes that those to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds.... [Freedom of expression] requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.³¹

The Court also stated: "For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinion", concluding that "a society that is not well-informed is not a society that is truly free."³²

³⁰ Adopted at San José, Costa Rica, 22 November 1969, entered into force 18 July 1978.

³¹ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, para. 30.

³² *Ibid.*, paras. 32, 70.

International Standards and Trends

In 1994, the Inter-American Press Association, a regional NGO, organised the Hemisphere Conference on Free Speech, which adopted the Declaration of Chapultepec, a set of principles on freedom of expression.³³ The principles explicitly recognise freedom of information as a fundamental right, which includes the right to access information held by public bodies:

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

Although the Declaration of Chapultepec originally had no formal legal status, as Dr Santiago Canton noted when he was OAS Special Rapporteur for Freedom of Expression, it "is receiving growing recognition among all social sectors of our hemisphere and is becoming a major point of reference in the area of freedom of expression."³⁴ To date, the Heads of State or Governments of 22 countries in the Americas, as well as numerous other prominent persons, have signed the Declaration.³⁵

The Special Rapporteur, whose Office was established by the Inter-American Commission on Human Rights in 1997,³⁶ 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 Commission, 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

³³ Mexico City, 11 March 1994.

³⁴ *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.

³⁵ The countries are Argentina, Bolivia, Belize, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Puerto Rico, Uruguay and the United States of America.

³⁶ See IACHR Press Release No. 2/98, 6 March 1998, paras. 14-15.

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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.³⁷

In October 2000, in an important development, the Commission approved the *Inter-American Declaration of Principles on Freedom of Expression*,³⁸ which is the most comprehensive official document to date on freedom of expression in the Inter-American system. The Preamble reaffirms the aforementioned statements on freedom of information:

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

The Principles unequivocally recognise freedom of information, including 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.

It is, therefore, clear that in the Inter-American system, freedom of information is protected as a human right.

Council of Europe

The Council of Europe (COE) is an intergovernmental organisation, composed of 43 Member States. It is devoted to promoting human rights, education and culture. One of its foundational documents is the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR),³⁹ which guarantees freedom of expression and

³⁷ Note 34, p. 24.

³⁸ 108th Regular Session, 19 October 2000.

³⁹ E.T.S. No. 5, adopted 4 November 1950, entered into force 3 September 1953.

information as a fundamental human right at Article 10. Article 10 differs slightly from guarantees found in Articles 19 of the UDHR and ICCPR, and Article 13 of the ACHR, in that it protects the right to "receive and impart", but not the right to "seek", information.

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

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

In 1994, the 4th European Ministerial Conference on Mass Media Policy adopted a Declaration recommending that the Committee of Ministers consider "preparing a binding legal instrument or other measures embodying basic principles on the right of access of the public to information held by public authorities."⁴¹ Instead, the Committee of Ministers opted for a Recommendation on access to official documents, adopted on 21 February 2002.⁴² A copy of this recommendation is provided in Annex 4. The Recommendation provides for a general guarantee of the right to access official documents, noted below, as well as specific guidance on how this right should be guaranteed in practice:

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.

African Union

Developments on freedom of information at the African Union have been a more modest. However, the African Commission on Human and

⁴⁰ 25 November 1981, p. 2.

⁴¹ Declaration on Media in a Democratic Society, DH-MM (95) 4, 7-8 December 1994, para. 16.

⁴² R(2002)2.

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Peoples' Rights adopted a *Declaration of Principles on Freedom of Expression in Africa* at its 32nd Session in October 2002.⁴³ 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.

⁴³ 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, The Gambia.

International Jurisprudence

Only the European Court of Human Rights has so far directly considered claims for a right to receive information from public bodies. It has looked at this issue in at least four key cases, *Leander v. Sweden*,⁴⁴ *Gaskin v. United Kingdom*,⁴⁵ *Guerra and Ors. v. Italy*⁴⁶ and *McGinley and Egan v. United Kingdom*.⁴⁷ In the first three cases, the Court found that the guarantee of freedom of expression did not include a right to access the information sought. The following interpretation of the scope of Article 10 from *Leander* features in similar form in all three cases:

[T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access... nor does it embody an obligation on the Government to impart... information to the individual.⁴⁸

By using the words, "in circumstances such as those of the present case", the Court has not ruled out the possibility of a right to freedom of information under Article 10. However, given the specific nature of the requests which were rejected in these three cases (see details below), it would be a very limited right.

The Court did not, however, refuse to recognise a right of redress in these cases. Rather, in all four cases, it found that to deny access to the information in question was a violation of the right to private and family life, under Article 8 of the Convention.

In the first case, *Leander*, the applicant was dismissed from a job with the Swedish government on national security grounds, but was refused access to information about his private life, held in a secret police register, which had provided the basis for his dismissal. The Court held that the storage and use of the information, coupled with a refusal to allow the applicant an opportunity to refute it, was an interference with his right to respect for private life. The interference was, however,

⁴⁴ 26 March 1987, Application No. 9248/81, 9 EHRR 433.

⁴⁵ 7 July 1989, Application No. 10454/83, 12 EHRR 36.

⁴⁶ 19 February 1998, Application No. 14967/89.

⁴⁷ 9 June 1998, Application Nos. 21825/93 and 23414/94.

⁴⁸ *Leander*, para. 74.

justified as necessary to protect Sweden's national security.⁴⁹ It is interesting to note that it ultimately transpired that Leander was in fact fired for his political beliefs and he was offered an apology and compensation by the Swedish government.

The *Leander* ruling was followed by *Gaskin*, *Guerra* and then *McGinley* and *Egan*. In the first case, the applicant, who as a child had been under the care of local authorities in the United Kingdom, had applied for but was refused access to case records about him held by the State. In *Guerra*, the applicants, who lived near a "high risk" chemical factory, complained that the local authorities in Italy had failed to provide them with information about the risks of pollution and how to proceed in event of a major accident. In *McGinley and Egan*, the applicants had been exposed to radiation during nuclear testing in the Christmas Islands, and claimed a right of access to records regarding the potential health risks of this exposure.

In all three cases, the Court held that there was no *interference* with the right to respect for private and family life, but that Article 8 imposed a *positive obligation* on States to ensure respect for such rights:

[A]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life.⁵⁰

In *Gaskin*, the Court held that the applicant had a right to receive information necessary to know and understand his childhood and early development, although that had to be balanced against the confidentiality interests of third parties who contributed information. Significantly, this placed a positive obligation on the government to establish an independent authority to decide whether access should be granted if a third party contributor is not available or withholds consent. Since the government had not done so, the applicant's rights had been breached.⁵¹

In *Guerra*, the Court held that severe environmental problems may affect individuals' well-being and prevent them from enjoying their homes, thereby interfering with their right to private and family life. As a result, the Italian authorities had a positive obligation to provide the

⁴⁹ *Leander*, paras. 48, 67.

⁵⁰ *Guerra*, para. 58.

⁵¹ *Gaskin*, para. 49.

applicants with the information necessary to assess the risks of living in a town near a high risk chemical factory. The failure to provide the applicants with that essential information was a breach of their Article 8 rights.⁵²

In *McGinley and Egan*, the Court held that the applicants did have a right to access the information in question. However, the government had complied with its positive obligations through the establishment of a process by which access to the information could be obtained, which the applicants had failed to use.⁵³

Although these decisions of the European Court recognize a right of access to information, they are problematic. First, the Court has proceeded cautiously, making it clear that its rulings were restricted to the facts of each case and should not be taken as establishing a general principle.⁵⁴ Second, and more problematical, relying on the right to respect for private and family life places serious limitations on the scope of the right to access information. This is clear from the *Guerra* case, where it was a considerable leap to find, as the Court did, that severe environmental problems would affect the applicants' right to respect for their private and family life. Although the Court made that leap in *Guerra*, based on obvious implications of justice and democracy, it is far from clear that this will always be possible. In effect, the Court has backed itself into a corner. It would have been far more logical and coherent if the Court had simply recognised freedom of information as part of the right to freedom of expression.

Information in Specific Areas

Information on the Environment

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

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each

⁵² *Guerra*, para. 60.

⁵³ *McGinley and Egan*, paras. 102-103.

⁵⁴ See, for example, *Gaskin*, para. 37.

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individual shall have appropriate access to information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. ...⁵⁵

In 1998, as a follow-up to the Rio Declaration, Member States of the United Nations Economic Commission for Europe (UNECE) and the European Union signed the legally binding *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (the Aarhus Convention).⁵⁶ The Preamble, which sets out the rationale for the Convention, states in part:

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

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

The Convention, which came into force in October 2001, requires State Parties to take legal measures to implement its provisions on access to environmental information.⁵⁷ Most of those provisions are set out in Article 4, which begins by stating:

- (1) Each Party shall ensure that ... public authorities, in response to a request for environmental information, make such information available to the public ...
 - (a) Without an interest having to be stated.

The Convention recognises access to information as part of the right to live in a healthy environment,⁵⁸ rather than as a free-standing right. However, it is the first legally binding international instrument which sets out clear standards on the right to freedom of information. Among other things, it requires States to adopt broad definitions of "environmental information" and "public authority",⁵⁹ to subject exceptions to a public

⁵⁵ UN Doc. A/Conf.151/26 (vol. 1).

⁵⁶ 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.

⁵⁷ *Ibid.*, Article 3(1).

⁵⁸ *Ibid.*, Article 1.

⁵⁹ *Ibid.*, Articles 2(2)-(3).

interest test,⁶⁰ and to establish an independent body with the power to review any refusal to disclose information.⁶¹ As such, it represents a very positive development in terms of establishing the right to information.⁶²

Information on Human Rights

There have also been moves within the international community to recognise a special aspect of the right to freedom of information in relation to human rights. In 1998, the UN General Assembly adopted the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* [the Declaration on Human Rights Defenders].⁶³ Article 6 specifically provides for access to information about human rights:

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

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

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

A right to access information regarding human rights is also found in some national contexts. In South Africa, for example, the obligation to provide access to information has been extended to private bodies where that information is required for the exercise or protection of any right. Section 32 of the 1996 Constitution of South Africa provides:

⁶⁰ *Ibid.*, Article 4(4).

⁶¹ *Ibid.*, Article 9.

⁶² For the most part, the standards set out in the Convention are consistent with ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Expression Legislation* (London: ARTICLE 19, 1999). A summary of the Principles may be found at the end of this section. They are on ARTICLE 19's website in full, see: www.article19.org/docimages/512.htm.

⁶³ Resolution 53/144, 8 March 1999.

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1. Everyone has the right of access to - ...
 - b. any information that is held by another person and is required for the exercise or protection of any rights.

This is given effect in Section 50 of the Promotion of Access to Information Act.⁶⁴

These provisions effectively secure individual access to any information the State holds regarding human rights and human rights abuse. ARTICLE 19, however, has long argued that States are under a substantive positive obligation in this area, including to ensure the availability of information about human rights violations. We have, for example, argued that the right to freedom of expression, "long recognised as crucial in the promotion of democratic accountability and participation, also places an obligation upon governments to facilitate the uncovering of information about past human rights violations."⁶⁵ In other words, it is not enough for individuals simply to have access to whatever information the State already holds. The State must also ensure that information about past human rights violations is readily available, including by collecting, collating, preserving and disseminating it, where necessary.

National Developments

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

Constitutional Interpretation

A number of senior courts in countries around the world have held that the right to access information is protected by the general

⁶⁴ Act No. 2, 2000.

⁶⁵ *Who Wants to Forget? Truth and Access to Information about Past Human Rights Violations* (London: ARTICLE 19, 2000), p. 5. Online at www.article19.org/docimages/869.htm

International Standards and Trends

constitutional guarantee of freedom of expression. For example, as early as 1969, the Supreme Court of Japan established in two high-profile cases the principle that *shiru kenri* (the "right to know") is protected by the guarantee of freedom of expression in Article 21 of the Constitution.⁶⁶

In 1982, the Supreme Court of India ruled that access to government information was an essential part of the fundamental right to freedom of speech and expression in Article 19 of the Constitution:

The concept of an open Government is the direct emanation from the right to know which seems implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosures of information in regard to the functioning of Government must be the rule, and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the Court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.⁶⁷

In South Korea, the Constitutional Court ruled in two seminal cases in 1989 and 1991 that there was a "right to know" inherent in the guarantee of freedom of expression in Article 21 of the Constitution, and that in certain circumstances the right may be violated when government officials refuse to disclose requested documents.⁶⁸

In some countries, notably the United States, national courts have been reluctant to accept that the guarantee of freedom of expression includes the right to access information held by the State. The US Supreme Court has held that the First Amendment of the Constitution, which guarantees freedom of speech and of the press, does not "[mandate] a right to access government information or sources of information within government's control."⁶⁹ However, this may be because the First Amendment is cast in exclusively negative terms, requiring Congress to refrain from adopting any law which abridges

⁶⁶ Repeta, Lawrence, *Local Government Disclosure Systems in Japan*, National Bureau of Asian Research, Paper Number 16, October 1999, p. 3.

⁶⁷ *S.P. Gupta v. President of India* [1982] AIR (SC) 149, p. 234.

⁶⁸ Sung Nak-in, *Korea Country Report* (English summary), presented at the Asian Conference on Civil Society and Access to Government-Held Information, Tokyo, Japan, 13-14 April 2001.

⁶⁹ *Houchins v. KQED, Inc.*, 438 US 1 (1978), p. 15.

freedom of speech.⁷⁰ International, and most constitutional, protection for freedom of expression is more positive, recognising that in some cases State action is necessary to ensure respect in practice for this key democratic right.

Specific Constitutional Provisions

A number of countries specifically include the right to information among the constitutionally guaranteed human rights. Sweden is an interesting example, as the whole of its Freedom of the Press Act, adopted in 1766, has constitutional status. This Act includes comprehensive provisions on freedom of information. During the last decade, many countries which have recently adopted multi-party systems, or are otherwise in transition to democracy, have explicitly included the right to freedom of information in their constitutions. Examples include Bulgaria (Article 41), Estonia (Article 44), Hungary (Article 61(1)), Lithuania (Article 25(5)), Malawi (Article 37), Moldova (Article 34), the Philippines (Article III(7)), Poland (Article 61), Romania (Article 31), the Russian Federation (Article 24(2)), South Africa (Section 32) and Thailand (Section 58).

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

Every person shall have the right to file a petition (of *habeas data*) to see any information that public or private data banks have on file with regard to him and how that information is being used to supply material for reports. If the information is false or discriminatory, he shall have the right to demand that it be removed, be kept confidential or updated, without violating the confidentiality of news sources.

Freedom of Information Legislation

Freedom of information laws, giving practical effect to the right to access information, have existed for more than 200 years, but very few are

⁷⁰ The relevant part of the First Amendment states: "Congress shall make no law ... abridging the freedom of speech, or of the press, or of the right of the people to peacefully assemble, and to petition the Government for a redress of grievances."

more than 20 years old. However, there is now a veritable wave of freedom of information legislation sweeping the globe and, in the last ten years, numerous such laws have been passed, or are being developed, in countries in every region of the world. The growing imperative to pass freedom of information legislation is indicative of its status as a human right.

The history of freedom of information laws can be traced back to Sweden where, as noted above, freedom of information has been protected since 1766. Another country with a long history of freedom of information legislation is Colombia, whose 1888 Code of Political and Municipal Organization allowed individuals to request documents held by government agencies or in government archives. The USA passed a freedom of information law in 1967⁷¹ and this was followed by legislation in Australia,⁷² Canada⁷³ and New Zealand,⁷⁴ all in 1982.

A large number of countries have passed freedom of information laws since then⁷⁵ including:

- ◆ **Asia:** Hong Kong,⁷⁶ India,⁷⁷ Japan,⁷⁸ Pakistan,⁷⁹ South Korea,⁸⁰ Thailand.⁸¹
- ◆ **Middle East:** Israel.⁸²
- ◆ **Africa:** South Africa.⁸³
- ◆ **Americas:** Belize,⁸⁴ Jamaica,⁸⁵ Mexico,⁸⁶ Peru⁸⁷ and Trinidad and Tobago.⁸⁸

⁷¹ USC Title 5, Section 552.

⁷² Freedom of Information Act, 1982.

⁷³ Access to Information Act, Chapter A-1.

⁷⁴ Official Information Act, 1982.

⁷⁵ For an up-to-date overview of these developments see Banisar, David, *Freedom of Information and Access to Government Records Around the World*, online at: <http://www.freedominfo.org/survey/>.

⁷⁶ Code on Access to Information, March 1995.

⁷⁷ Freedom of Information Act, 2002.

⁷⁸ Law Concerning Access to Information Held by Administrative Organs, 1999.

⁷⁹ Freedom of Information Ordinance 2002.

⁸⁰ Act on Disclosure of Information by Public Agencies, 1998.

⁸¹ Official Information Act, December 1997.

⁸² Freedom of Information Law, Law 5758-1998, May 1998.

⁸³ Promotion of Access to Information Act, Act No. 2, 2000.

⁸⁴ Freedom of Information Act, 1994.

⁸⁵ Access to Information Act, 2002.

⁸⁶ Federal Transparency and Access to Public Government Information Law, 2002.

⁸⁷ Freedom of Information Law, 2002.

⁸⁸ Freedom of Information Act, 1999.

- ◆ **Europe:** Albania,⁸⁹ Bosnia and Herzegovina,⁹⁰ Bulgaria,⁹¹ the Czech Republic,⁹² Estonia,⁹³ Georgia,⁹⁴ Hungary,⁹⁵ Latvia,⁹⁶ Lithuania,⁹⁷ Moldova,⁹⁸ Slovakia,⁹⁹ Russia,¹⁰⁰ Ukraine¹⁰¹ and the United Kingdom.¹⁰²

In addition, a number of States in all regions have prepared and are considering draft freedom of information legislation. There is, therefore, a very significant global trend towards adopting freedom of information legislation.

Intergovernmental Organisations

These national developments find their parallel in the adoption of information disclosure policies by a growing number of inter-governmental organisations (IGOs). Many IGOs, which for most of their existence operated largely in secret, or disclosed information purely at their discretion, are now acknowledging that public access to the information that they hold is a right, not a privilege. A significant milestone in this process was the adoption of the 1992 Rio Declaration on Environment and Development, which put enormous pressure on international institutions to implement policies on public participation and access to information.

Since the adoption of the Rio Declaration, the World Bank¹⁰³ and all four regional development banks - the Inter-American Development Bank,¹⁰⁴ the African Development Bank Group,¹⁰⁵ the Asian

⁸⁹ Law No. 8503 on the right to information over the official documents, 1999.

⁹⁰ The Freedom of Access to Information Act, October 2000.

⁹¹ Access to Public Information Act, 2000.

⁹² Freedom of Information Law, 1999.

⁹³ Public Information Act, 2000.

⁹⁴ Law of Georgia on Freedom of Information, 1998.

⁹⁵ Act No. LXIII of 1992 on the Protection of Personal Data and the Publicity of Data of Public Interest.

⁹⁶ Law on Freedom of Information, 1998.

⁹⁷ Law on the Right to Receive Information from the State and Municipal Institutions, 2000.

⁹⁸ The Law on Access to Information, 2000.

⁹⁹ Act on Free Access to Information and Amendments of Certain Acts (The Freedom of Information Act).

¹⁰⁰ Law on Information, Disclosure and Protection of Information, 25 January 1995, Act No. 24-FZ.

¹⁰¹ Law on Information, 2 October 1992, Law No. 2657-XII.

¹⁰² Freedom of Information Act, 2000, Chapter 36.

¹⁰³ The World Bank Policy on the Disclosure of Information (Washington, D.C.: World Bank, 1994).

¹⁰⁴ OP-102 Disclosure of Information, Inter-American Development Bank, December 1994.

¹⁰⁵ Disclosure of Information Policy, African Development Bank Group.

Development Bank¹⁰⁶ and the European Bank for Reconstruction and Development¹⁰⁷ - have adopted information disclosure policies. Although the World Bank's Policy is flawed in important respects, the Bank has taken concrete steps to review it, which have increased the number of documents available. The regional development banks have largely followed the World Bank's lead and the disclosure policies that they have adopted are very similar.

In 1997, the United Nations Development Programme (UNDP) also adopted a Public Information Disclosure Policy, on the basis that information is key to sustainable human development and also to UNDP accountability.¹⁰⁸ The Policy enumerates specific documents that shall be made available to the public and provides for a general presumption in favour of disclosure, subject to a number of exceptions.¹⁰⁹ In terms of process, the Policy establishes a Publication Information and Documentation Oversight Panel which can review any refusal to disclose information. The Panel consists of five members - three UNDP professional staff members and two individuals from the not-for-profit sector - appointed by the UNDP Administrator.¹¹⁰

In May 2001, the European Parliament and the Council of the European Union adopted a regulation on access to European Parliament, Council and Commission documents.¹¹¹ Article 2(1) states:

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

The Regulation has several positive features, including a narrow list of exceptions, all of which are subject to a harm test. The Regulation also provides for an internal review of any refusal to disclose information, as well as an appeal to the courts and/or the

¹⁰⁶Confidentiality and Disclosure of Information, Asian Development Bank, August 1994.

¹⁰⁷Policy on Disclosure of Information, European Bank for Reconstruction and Development, 1996.

¹⁰⁸Public Information Disclosure Policy, UNDP, 1997. See para. 3.

¹⁰⁹Paras. 6, 11-15.

¹¹⁰Paras. 20-23.

¹¹¹Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

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Ombudsman.¹¹² However, there are also problems with the Regulation. For example, some key exceptions are not subject to a public interest override.¹¹³ Furthermore, the Regulation allows a Member State to require other States not to disclose documents without its prior approval.¹¹⁴

¹¹²Articles 7 and 8.

¹¹³Article 4(1).

¹¹⁴Articles 4(5) and 9. The Regulation has been harshly criticised by some freedom of information watchdog groups. See, for example, European Citizens Action Service, European Environmental Bureau, European Federation of Journalists, the Meijers Committee, and Statewatch, "Open letter from civil society on the new code of access to documents of the EU institutions," 2 May 2001.

Features of an FOI Regime

As the survey in this book indicates, the various freedom of information laws and policies around the world vary considerably as to their content and approach. At the same time, they all have a common goal of promoting access to information held by public bodies. This chapter describes the international and comparative standards that should underpin freedom of information legislation.

ARTICLE 19 has published a set of principles, *The Public's Right To Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles),¹¹⁵ setting out best practice standards on freedom of information legislation. These Principles are based on international and regional law and standards, evolving state practice (as reflect-ed, *inter alia*, in national laws and judgments of national courts) and the general principles of law recognised by the community of nations. ARTICLE 19 has also published *A Model Freedom of Information Law*,¹¹⁶ which translates the Principles into legal form. Both of these publications are reproduced here as, respectively, Annex 1 and Annex 2.

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).¹¹⁷ 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.¹¹⁸ Other useful standard-setting documents include the principles adopted by the Commonwealth Law Ministers (Commonwealth

¹¹⁵ (London: 1999).

¹¹⁶ (London: 2001).

¹¹⁷ 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.

¹¹⁸ Recommendation R(2002)2 the Committee of Ministers to Member States on access to official documents, adopted on 21 February 2002. See Principle IV. The Recommendation is reproduced in Annex 3.

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Principles),¹¹⁹ the *Declaration of Principles on Freedom of Expression in Africa* (African Principles),¹²⁰ and the Aarhus Convention.¹²¹

Despite the fact that legislation in different countries varies considerably, there are some common themes which can be identified as regular features of a freedom of information regime. Furthermore, certain mechanisms or standards in national legislation can be identified as best practice approaches, justified by the principle of maximum disclosure, which should be promoted in other countries.

It was argued in the previous chapter that freedom of information, and particularly the right to access information held by public bodies, is a fundamental human right, part of the right to freedom of expression. The ARTICLE 19 Principles also draw on established jurisprudence regarding the right to freedom of expression, which includes the right to information. As noted above, this right permits of some restrictions. For example, Article 19(3) of the *International Covenant on Civil and Political Rights* (ICCPR),¹²² states:

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

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

Similar rules on restrictions are recognised in regional human rights treaties and many national constitutions. Pursuant to this provision, restrictions must meet a strict three-part test.¹²³ International jurisprudence makes it clear that this test presents a high standard which any interference must overcome. The European Court of Human Rights, for example, has stated:

¹¹⁹ *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).

¹²⁰ 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, The Gambia.

¹²¹ 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.

¹²² UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.

¹²³ See, *Mukong v. Cameroon*, views adopted by the UN Human Rights Committee on 21 July 1994, No. 458/1991, para. 9.7.

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Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.¹²⁴

First, the interference must be provided for by law. This requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."¹²⁵ Second, the interference must pursue a legitimate aim, such as those listed in Article 19(3) of the ICCPR. Third, the restriction must be necessary to secure one of those aims. The word "necessary" means that there must be a "pressing social need" for the restriction. The reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be "proportionate to the aim pursued."¹²⁶

In the area of freedom of information, this three-part test implies that the law should conform to the principle of maximum disclosure. The principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only where there is an overriding risk of harm to a legitimate interest. It also implies that systems and processes should be established which ensure that members of the public can in practice access information and that public bodies should make all reasonable efforts to facilitate this access.

This chapter is organised around 9 headings, based on the 9 principles set out in *The Public's Right To Know*.

Principle 1. Maximum Disclosure

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

The principle of maximum disclosure encapsulates the basic rationale underlying freedom of information legislation and a version of this is explicitly stated as an objective in a number of national laws. An

¹²⁴See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No.13778/88, 14 EHRR 843, para. 63.

¹²⁵*The Sunday Times v. United Kingdom*, 26 April 1979, Application No.13166/87, 2 EHRR 245, para. 49 (European Court of Human Rights).

¹²⁶*Lingens v. Austria*, 8 July 1986, Application No.9815/82, 8 EHRR 407, paras. 39-40 (European Court of Human Rights).

important aspect of this principle, also widely respected in national laws, is that the body seeking to deny access to information bears the onus of proving that it may legitimately be withheld, central to the idea of a presumption of openness.¹²⁷

Another aspect of this principle is that the scope of the law should be broad.¹²⁸ Everyone, not just citizens, should benefit from the right and an individual requesting access should not have to demonstrate any particular interest in that information. Information, or records, should be defined broadly to include all information held by the body in question, regardless of form, date of creation, who created it and whether or not it has been classified. This is also respected in most national laws, apart from classified information, which some national laws do admit as an exception.

More controversial is the scope of the obligation to disclose in terms of the bodies covered. No public bodies should be excluded from the ambit of the law; every legitimate secrecy interest can be addressed through an appropriate regime of exceptions. Many laws do not include the courts or legislative bodies, but the experience of those that do shows that this is perfectly possible. Given the rationale of freedom of information legislation, it is hard to justify excluding these bodies or, indeed, any public bodies. 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 certain information.

Principle 2. Obligation to Publish

Public bodies should be under an obligation to publish key information

It is not enough for the law simply to require public bodies to accede to requests for information. Effective access for many people depends on these bodies actively publishing and disseminating key categories of information even in the absence of a request.¹²⁹ The scope of this obligation depends to some extent on resource limitations, but the amount

¹²⁷ See Commonwealth Principle 2.

¹²⁸ See the Aarhus Convention, Articles 2(2)-(3).

¹²⁹ See the African Principles IV(2).

of information covered should increase over time, particularly as new technologies make it easier and cheaper to publish and disseminate information.

Principle 3. Promotion of Open Government

Public bodies must actively promote open government

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.¹³⁰

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 legislative oversight through annual reports. The law should at least allocate responsibility for ensuring that this need is actively addressed, for example to an information commissioner, human rights commission or ombudsman.

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 oversight body. Prosecutions under provisions of this sort tend to be rare in those countries which do have them, but it sends a clear signal that obstruction will not be tolerated.

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. The broadcast media can play a particularly important role in countries where newspaper distribution is low or illiteracy widespread. Another useful tool, provided for in many laws, is the publication of a simple, accessible guide on how

¹³⁰See the UN Standards.

to lodge an information request. Again, it is best if the freedom of information law at least allocate responsibility for this to an oversight body.

A third important aspect of promoting open government is promoting better record maintenance by public bodies.¹³¹ 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. A number of national laws address this in different ways, for example by giving a minister or the administrative oversight body a mandate to set and enforce standards for record maintenance. 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.

Principle 4. Limited Scope of Exceptions

Exceptions 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 problematical parts of many existing laws. In many cases, otherwise very effective laws are largely undermined by an excessively broad or open regime of exceptions. On the other hand, it is obviously important that all legitimate secrecy interests are adequately catered to 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 three-part test

- ◆ the information must relate to a legitimate aim listed in the law;
- ◆ disclosure must threaten to cause substantial harm to that aim; and

¹³¹ See Commonwealth Principle 4.

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- ◆ 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.¹³² 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;
 - 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.

Many laws also provide that public bodies do not have to fulfil requests for information which is already published or where the request is vexatious or repetitive.

It is not, however, legitimate to refuse to disclose information simply because it relates to one of these interests. The disclosure must pose a real

¹³²See Commonwealth Principle 3.

risk of serious harm to that interest.¹³³ The defence forces hold a lot of information that is tangential to their operations, for example, relating to purchases of food or pens. Access to this information clearly cannot be denied simply on the basis that it relates to defence. The second part of the test thus permits information to be withheld only where disclosure would threaten substantial harm to a legitimate aim.

In some laws, the exceptions are themselves subject to limits to take into account cases where there will be no harm to the legitimate aim. Examples of how exceptions could be limited would include where the information is already publicly available or where the affected third party has consented to disclosure. This is a good practice as it helps to provide greater clarity to the question of whether or not disclosure would cause harm.

Many freedom of information laws contain exceptions which do not include harm tests, often referred to as class exceptions. In a small number of cases, these may be legitimate because the interest itself already incorporates a harm test. This is the case, for example, with exceptions relating to legally privileged information. However, in almost every other case, class exceptions are not legitimate.

The third part of the test states the need for a public interest override.¹³⁴ No matter how carefully the regime of exceptions is crafted, there will always be some information that is exempt even though it is in the public interest to disclose it. Even more importantly, circumstances may mean that the overall public interest is served by disclosure even though that disclosure will harm a legitimate aim. An example would be sensitive military 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. This is recognised in Principle IV(2) of the Council of Europe 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.¹³⁵

¹³³See the UN Standards.

¹³⁴See the Aarhus Convention, Article 4(4).

¹³⁵*Ibid.*

Where only part of a record is exempt, the rest of the record should be disclosed where it may reasonably be separated from the whole.

Although not part of the three-part test for exceptions set out above, overall time limits on withholding information are also very useful and these are found in many national laws. Providing for time limits on withholding creates a presumption that information which has been withheld will eventually become subject to disclosure. Given the tendency of most governments to excessive secrecy, these at least ensure that most information is disclosed over time. In general, time limit systems also allow for extensions, but only where the authorities can demonstrate an ongoing risk to a legitimate aim.

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.¹³⁶

Processes for accessing information are complex and this normally occupies a large part of existing freedom of information laws. It is useful to require public bodies to appoint an individual as Information Officer, who bears overall responsibility for ensuring that the body meets its obligations under the law. Requests should normally be required to be in writing, although the law should also make provision for those who cannot meet this requirement, for example by requiring the public body to assist them. Assistance should also be provided where a request is deficient, for example because it fails adequately to describe the information sought. Receipts should be provided as evidence of a request.

The law should set out clear timelines for responding to requests, which should be reasonably short. In some cases, laws provide for unrealistically short timelines, which are sure to be breached frequently, undermining respect for the law. A Model Freedom of Information Law sets a timeline of 20 working days for responding to requests, subject to

¹³⁶COE Recommendation V.

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extension for another 20 days where strictly required. Where the request is for information needed to safeguard life or liberty, the response must be provided within 48 hours.¹³⁷

The response to a request should take the form of a written notice stating any fee, the form in which access will be provided and, where access to all or part of the information is denied, reasons for that denial along with information about any right of appeal. Where the public body in question does not hold the information requested, it should be required to provide reasonable assistance to the requester to locate it.

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.¹³⁸

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.

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.¹³⁹ 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. Review should not be limited to the question of disclosure of information, but should cover all aspects of the process including timelines, fees, form of access, and so on.

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.¹⁴⁰ It does not matter whether the law establishes a new independent body or allocates this task to an existing body, such as the human rights commission or an ombudsman. What is

¹³⁷Note 116, section 8.

¹³⁸See COE Recommendation VII.

¹³⁹See the Aarhus Convention, Article 9, African Principle IV(2), Commonwealth Principle 5, COE Recommendation IX and the UN Standards.

¹⁴⁰South 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.

important is that the body be adequately protected against political interference.

The procedures before this administrative appeals body should be designed to operate as quickly, fairly and cheaply as possible. It should have full powers to review any document held by a public body, *in camera* if necessary, as well as powers of investigation and to compel witnesses and the like. It should also have the power to issue binding decisions, enforceable through the courts where necessary.

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. In some national laws, this right is limited to the requester, to avoid a situation where public bodies abuse this right to delay access or to deter all but the most determined and well-off requesters.

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,¹⁴¹ but practically every law does allow for some charges for access. There are a number of costs to public bodies which may theoretically be charged, including searching for documents, preparing them, reviewing whether or not they are covered by an exception and the actual cost of providing access, for example by duplication.

Different laws take different approaches to fees. Some limit charges to the cost of duplication, perhaps along with a set application fee. Others group requests into different categories, charging less for public interest or personal requests. Still others allow requesters to occupy a certain amount of public time, for example 2 hours, 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.

¹⁴¹ See COE Recommendation VIII.

Principle 7. Open Meetings

Meetings of public bodies should be open to the public

The ARTICLE 19 Principles include the idea of open meeting, 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.

Principle 8. Disclosure Takes Precedence

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

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 freedom of information law. If the principle of maximum disclosure is to be respected, indeed, if the culture of secrecy is to be addressed, the freedom of information law must take precedence over these laws.¹⁴² This should, where possible, be achieved by interpreting these laws in a manner which is consistent with the freedom of information law. However, where potential conflicts cannot be resolved through interpretation, the provisions of the freedom of 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, so there should be no need for this to be extended by secrecy laws. Some system of resolving conflicts is necessary to avoid placing civil servants in a position where they are prohibited from divulging information under a secrecy law and yet required to do so under the freedom of information law. Resolving this in favour of openness is clearly consistent with the basic presumption underlying freedom of information.

Over time, a commitment should be made to review all laws which restrict the disclosure of information, with a view to bringing them into

¹⁴²UN Standards.

line with the freedom of information law.¹⁴³ This is particularly important in legal systems where it is not possible to provide for the dominance of one law over others.

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.¹⁴⁴ Even the best system of exceptions will be unable to address every situation where disclosure is warranted and individuals seeking to disclose information in the public interest should not be required to undertake a complex balancing of different public interests. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment requirement.

Wrongdoing in this context should include commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body. It should also include exposure of a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not. Whistleblowers should benefit from protection as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing.

In some countries, this protection is set out in a separate law rather than being included in the freedom of information law. Some countries also condition this protection on a requirement that the individual in question first approach certain individuals or oversight bodies, so that problems can be addressed through official channels rather than through the media. Although this is legitimate in theory, in practice where there is a problem with corruption or other wrongdoing, official channels are often implicated and therefore ineffective. Also, many individuals may be reluctant to use official channels, where they can be identified and

¹⁴³See African Principle IV(2).

¹⁴⁴See African Principle IV(2).

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potentially targeted in subtle ways. As a result, any conditioning of this protection should ensure that the potential problems with official channels are taken fully into account.

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.

Country Profiles

Bulgaria

Introduction

The Bulgarian Access to Public Information Act,¹⁴⁵ was adopted on 22 June 2000, implementing in practice the constitutional guarantee of access to information.¹⁴⁶ The Act has already been amended once, in 2002, to take into account problems with the original version. In addition, a secrecy law, the Law on the Protection of Classified Information, was passed in April 2002. This is an important development given that the access Act leaves the definition of secret information to other legislation.

The Right of Access

The Act states its purpose as the regulation of social relations relating to the access of public information.¹⁴⁷ Pursuant to Article 4, citizens, as well as foreigners inside the country and legal entities, are entitled to access public information subject to the conditions and procedures set forth, unless another law provides for a special procedure to seek that information. This opens up the possibility of another law providing for less effective, or more expensive, access undermining the freedom of information law.

Article 6 sets out the principles governing access to information, which include ensuring openness and accuracy of information, securing conditions for equal access, protecting the right to access information and guaranteeing the security of society and the State.

Definitions

Public information was defined in the original Act as any information relating to social life which gives citizens an opportunity to form opinions about the public bodies which are covered by the Act, irrespective of how

¹⁴⁵ Available at: <http://www.aip-bg.org/documents/access.htm>.

¹⁴⁶ Bulgarian Constitution, 1991 Article 41.

¹⁴⁷ Article 1.

it is physically stored.¹⁴⁸ This was amended, due to problems with subjective interpretation of this provision and the Act now provides simply that public information is any information "created, received or kept" by the bodies covered by the Act, "which has not been defined as state or another protected secret by law." While this removes the earlier problem, it does introduce a problem of its own, namely the wholesale exclusion from the operation of the Act of any information defined as secret by another law. It would be better to include all information within the ambit of the Act and then to provide for a comprehensive regime of exceptions to protect any legitimate interests.

The Act also excludes certain types of information from its ambit, including information that may be obtained in the course of the provision of administrative services and information which is kept in the State archives. It is not clear why these types of information have been excluded but this is not consistent with the practice in most countries.¹⁴⁹

Article 3 defines two sets of public bodies. The first are "State bodies, their territorial units and local self-governance bodies" and the second are bodies which are subject to public law and individuals and legal entities which are funded from the consolidated budget, to the extent of that funding. The difference takes on some relevance in relation to exceptions (see below). The media had previously been included in this definition but were removed as part of the amendment process. This is a broad definition but it is not clear whether private bodies that undertake public functions but without public funding are included.

Process

Unusually, requests may be made in either oral or written form, provided that where an oral request is refused, it may be followed-up with a written request. This is presumably to avoid any disadvantage that might otherwise result from making an oral request. The request must contain the name and contact details of the requester, as well as a sufficient description of the information sought and the form in which access is desired. Requests must be registered by the public body in question.¹⁵⁰

A requester must be notified in writing of a decision regarding his or her request as quickly as possible but in any case within 14 days, unless

¹⁴⁸ Article 2(1).

¹⁴⁹ Article 8.

¹⁵⁰ Articles 24 and 25.

the application is for a large number of documents and more time is needed to respond, in which case an extension of up to 10 days may be made, provided that the applicant must be notified of this. The notice shall, if access is being granted, state the extent of access, the time within which access may be had, which shall be at least 30 days, the location for access, the form of access and the costs. A refusal to grant access shall state the "legal and factual grounds for the refusal", as well as the date and the right of appeal. In both cases, the notice must either be signed for by the applicant or sent by registered post. The applicant must appear to access the information within the time limit provided.¹⁵¹ It would be preferable if the law also provided for the satisfaction of requests by mail and even email.

Where the information sought is not sufficiently clearly described, the applicant shall be given up to 30 days to rectify the problem, and the 14-day time limit for a response shall start from after the clarification has been made. Where the body to whom the original request was made does not have the information, but knows that it is held by another public body, it shall forward the request to that other body within 14 days.¹⁵²

The Act sets out different time limits and procedures where the consent of a third party is required. In that case, the time limit may be extended by another 14 days and the third party must be contacted within 7 days. Any disclosure must comply with any conditions imposed by the third party in giving his or her consent. Where a third party refuses to consent to the disclosure of the information, any part of the document which may be provided without affecting that party's interests shall be severed from the rest of the document and disclosed.¹⁵³

The Act provides for information to be provided in four different forms, namely inspection of the record, a verbal explanation, a paper copy or another type of copy. The information shall be provided in the form requested unless this is not technically feasible, it results in an unjustified increase in costs or it may lead to an infringement of copyright. The first two forms of access shall be provided free of charge, while charges for the latter two forms shall be according to a schedule determined by the Minister of Finance, which shall not exceed the actual costs incurred. A justification must be provided to the requester regarding any fees which are charged. Requesters must be informed on the spot

¹⁵¹ Articles 28, 29, 30, 34, 38 and 39.

¹⁵² Articles 29 and 32.

¹⁵³ Article 31.

about these forms of access and the charges relating thereto. Persons with disabilities may request access in a form that corresponds to their needs.¹⁵⁴

The first set of public bodies, namely State bodies, their territorial units and local self-governance bodies, but apparently not the other set, is required by the amendments to appoint information officers with responsibility for dealing with access requests.¹⁵⁵ It is not clear why this obligation has been limited in this way.

Duty to Publish

The Bulgarian Act includes strong provisions on the duty to publish. Public bodies must "promulgate" official information contained in their official documents, as well as other categories of information required to be published by law.¹⁵⁶ Public bodies must also disseminate information about their activities, either in published form or through announcements. Article 14(2) requires public bodies to disseminate information which may prevent a threat to life, health, security or property, which corrects previously disseminate information that was inaccurate, or which is required by another law to be disseminated. It also calls for the dissemination of information that could be of public interest, even if it is otherwise confidential, where the public interest in receiving it outweighs the risk of harm to the protected interest. This public interest override in relation to the duty to publish is an interesting innovation not found in most other laws. Interestingly, no public interest override applies to requests for information.

The Act also provides for the publication, on a regular basis, of information about the public body, including a description of its powers, structure, functions and responsibilities, a list of formal documents issued within the scope of its powers, and the name, contact details and working hours of the office authorised to receive requests for information.¹⁵⁷ The Minister of the State Administration is required to publish, on an annual basis, a summary of this information, which "shall be made available in every administration for review by the citizens."¹⁵⁸

¹⁵⁴ Articles 20, 21, 26 and 27.

¹⁵⁵ Transitional and final provisions of the amendments.

¹⁵⁶ Article 12.

¹⁵⁷ Article 15.

¹⁵⁸ Article 16.

The precise scope of these obligations to publish is unclear. Information of 'public interest' could be a very, even excessively, broad term, depending on how it is interpreted in practice.

Exceptions

The Act does not, unlike most freedom of information acts, include a comprehensive list of exceptions. Instead, information classified as secret by other laws is excluded from the definition of public information and the Act also specifically states that such information shall not be disclosed.¹⁵⁹ This is unfortunate and contrary to the international standards noted above. Although a number of laws from other countries do leave secrecy laws in place, most at least include their own set of exceptions.

The Act also includes a number of further exceptions scattered throughout its provisions. In general, these are not subject to harm tests and none of them are subject to a public interest override. Article 2(3) provides that the Act does not apply to personal data. This is unfortunate, particularly in the absence of a public interest override. Public bodies hold a wide range of personal data and it would be preferable if the law restricted any exception to information the disclosure of which would actually harm a legitimate privacy interest. Article 5 provides that the right of access may not be exercised in a manner which undermines others' rights or reputation, national security, public order, national health and moral standards. It is not clear whether this operates to restrict the use of public information, in which case it is probably redundant given the existence of numerous laws on this, or to restrict access to information. In the latter case, this is an extremely broad and vague prohibition which is very likely to be abused.

Article 13(2) sets out some restrictions on access to administrative public information, including where it relates to preparatory work on an official document and has no significance in itself (although the amendments now require it to be published after the document has been adopted). The same article also excludes information relating to ongoing negotiations. Both exceptions are limited in time to 20 years, but this is the only such time limit in the Act itself.¹⁶⁰

¹⁵⁹ See Articles 2(1) and 7(1). See also Article 9(2).

¹⁶⁰ Section 37 of the Law on the Protection of Classified Information also provides for time limits to the classification of information.

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

The Act provides for severability of exempt information, stating that access may either be full or partial.¹⁶¹ Where information has already been published, the public body is required to direct the requester to that information, rather than to provide it themselves.¹⁶²

Appeals

The 2002 amendments have added an administrative level of appeal to the "higher ranking administrative body under the Administrative Procedure Act."¹⁶³ It would appear, however, that there is still no right of appeal to a specialised, independent administrative body.

The Act also provides for appeals to the courts, which have the power to repeal or amend the original decision and, where they do so, access shall be provided according to the court ruling. Where it so requests, the court may examine all evidence, including the information in question, *in camera* if necessary.¹⁶⁴

Promotional Measures

The Act provides for few promotional measures. It does, however, provide for sanctions whenever a civil servant fails to respond within the applicable time limits, fails to respect a court order granting access, does not respect conditions in a third party consent or, in the case of bodies subject to public law and private bodies funded through the consolidated budget, fails to provide access to public information.

¹⁶¹ Article 7(2). See also Article 37(1).

¹⁶² Article 12(4).

¹⁶³ Article 39a.

¹⁶⁴ Articles 40 and 41.

India

Introduction

The Indian Freedom of Information Bill, 2002,¹⁶⁵ was finally passed into law in December 2002, after many years of public debate and after freedom of information laws had been passed in a number of Indian States. Official recognition of the right to information in India finds its genesis in Supreme Court decisions holding that it is included in the constitutional guarantees of freedom of speech and expression.¹⁶⁶ This being the case, it was almost impossible for the government to resist passing a freedom of information law, although it took rather longer than human rights activists would have expected or wanted.

The Right of Access

The Act provides that every citizen shall have the freedom of information, defined as the right to obtain information from public authorities, subject to the Act.¹⁶⁷ The Act extends to the whole of India,¹⁶⁸ apart from the State of Jammu and Kashmir, for particularly constitutional reasons.¹⁶⁹ A very positive aspect of the Act is that its disclosure provisions take precedence over secrecy laws, and the Official Secrets Act, 1923, is specifically mentioned in this regard.¹⁷⁰

Definitions

The Act defines information as "material in any form relating to the administration, operations or decisions of a public authority".¹⁷¹ This definition is broad in terms of the type of information but limits the scope of the Act to information relating to the official work of the public authority in question. This could be problematical, for example where an authority disputed that information it held fell within the scope of this definition. The Act also defines a record as any document, microfilm, microfiche or any material reproduced by any device.

¹⁶⁵ Bill No. 98-C of 2000. Available at: <http://www.freedominfo.org/news/india/foi2002.doc>.

¹⁶⁶ See *Indian Express Newspapers (Bombay) Pvt. Ltd. v. India*, (1985) 1 SCC 641.

¹⁶⁷ Section 3.

¹⁶⁸ Subsection 1(2).

¹⁶⁹ Article 370 of the Constitution of India confers a "special status" on Jammu and Kashmir State and Parliament may make laws for it only with the concurrence of that State.

¹⁷⁰ Section 14.

¹⁷¹ Subsection 2(d).

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The Act defines 'public authority' as any body established under the Constitution or by any law, as well as any body "owned, controlled or substantially financed by funds provided directly or indirectly" by government.¹⁷² This would appear to be a broad definition, although its scope has not yet been tested. However, security bodies, as listed in the Schedule, which mentions some 19 organisations, are excluded from the ambit of the Act, along with any information supplied by them to the central government.¹⁷³

Process

Requests must be made in writing, although where individuals have difficulties with this, the Public Information Officer is required to provide "all reasonable assistance" to them.¹⁷⁴ Requests which are too general and which, given the volume of material involved, would unreasonably divert the resources of a public authority or would interfere with its activities, may be rejected, provided that the Public Information Officer must provide reasonable assistance to assist the requester to narrow the request.¹⁷⁵

Requests must be dealt with as expeditiously as possible and, in any event, within 30 days. Requests may be accepted subject to the payment of a fee or rejected where the information requested falls within the scope of an exception or the request is otherwise deemed invalid. A unique provision in the Indian law is that where the information in question concerns the life or liberty of a person, it must be provided within 48 hours.¹⁷⁶

Fees may be charged for processing requests and the Act provides for further fees, "representing the cost of providing the information", for which a deposit may be demanded. No rules relating to such fees are specified in the Act, but provision is made for rules relating to such fees to be adopted by various authorities.¹⁷⁷ The period between a request for fees and the fees being paid shall not be counted within the 30-day period for satisfying requests.¹⁷⁸

¹⁷²Subsection 2(f).

¹⁷³Section 16. Provision is also made for amending, either by adding to or deleting from, the Schedule.

¹⁷⁴Section 6.

¹⁷⁵Subsection 9(a).

¹⁷⁶Subsection 7(1).

¹⁷⁷Sections 17-19.

¹⁷⁸Ibid.

The Act includes a number of provisions concerning information provided by third parties. Where a request relates to information supplied in confidence by a third party, that party shall, within 25 days of the original request, be contacted and given an opportunity to make representations within 20 further days, provided that where the overall public interest is served by disclosure, the information shall be disclosed notwithstanding these representations. Regardless of the time limits relating to third parties, a decision regarding disclosure shall be made within 60 days of the original request.¹⁷⁹

Where a request for information is rejected, the requester is entitled to be informed of the reasons for the rejection, the period within which an appeal may be lodged and relevant information about the appellate authority.¹⁸⁰

The Act provides indirectly for a right to request the form of disclosure by defining freedom of information as the right to obtain information by various means, including inspection, certified copy or electronic means.¹⁸¹ This definition is then given force through a subsequent provision which provides that information shall normally be provided in the form requested, unless that would "disproportionately divert the resources" of the public authority or be "detrimental to the safety or preservation" of the record itself.¹⁸²

Duty to Publish

The Act requires public bodies to publish, at intervals prescribed by the government, the following information:

- (i) particulars of its organization, functions and duties;
- (ii) powers and duties of its officers and employees and the procedure followed by them in the decision making process;
- (iii) the norms set by the public authority for the discharge of its functions;
- (iv) rules, regulations, instructions, manuals and other categories or records under its control used by its employees for discharging its functions;

¹⁷⁹Section 11.

¹⁸⁰Subsection 7(3).

¹⁸¹Subsection 2(c).

¹⁸²Subsection 7(4).

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- (v) the details of facilities available to citizens for obtaining information; and
- (vi) the name, designation and other particulars of the Public Information Officer.¹⁸³

These bodies are also required to publish all relevant facts relating to important decisions and policies, concurrently with the announcement of the policy or decision, to give reasons to anyone affected by an administrative or quasi-judicial decision and, before initiating any project, to publish to those likely to be affected any information which, in the "best interests of natural justice and promotion of democratic principles", they should know.¹⁸⁴

Exceptions

Section 8 sets out the system of exceptions in the Indian Act, most of which are subject to a harm test. There is no general public interest override. Section 8 provides for exceptions where the information:

- ◆ if disclosed, would prejudicially affect the sovereignty and integrity of the country, security, strategic scientific or economic interests, or international relations;
- ◆ if disclosed, would prejudicially affect public safety and order, the detection and investigation of an offence, or a fair trial;
- ◆ if disclosed, would prejudicially affect centre-State relations;
- ◆ relates to Cabinet papers or the deliberations of the Council of Ministers;
- ◆ contains minutes or records of advice made during a decision-making process prior to the actual policy decision;
- ◆ contains trade or commercial secrets protected by law, the disclosure of which would prejudicially affect the legitimate commercial interests of a public authority or which would cause unfair gain or loss to any person; or
- ◆ may result in the breach of parliamentary privileges or the contravention of an order of the court.

¹⁸³Subsection 4(b).

¹⁸⁴Subsections 4(c)-(e).

Country Profiles

All exceptions apart from the first one listed above are absolutely limited to 25 years, after which all information must be disclosed. However, where a dispute arises as to the date from which the 25 years needs to be measured, the decision of the government on this matter shall be final.¹⁸⁵

Section 9 further exempts information which is required by law to be published, where the information is likely to be published within 30 days of the request, information that has already been made available in published form and information the disclosure of which would involve an "unwarranted invasion of privacy".

Where part of the information requested is exempt, the Act provides for the disclosure of the remaining information where it may "reasonably be severed" from the exempt information. In this case, the requester must be informed that part of the information has been withheld, along with the provision of the Act under which this is being justified.¹⁸⁶

Appeals

A requester may lodge an internal appeal against any decision of a Public Information Officer within 30 days to "such authority as may be prescribed". The Law stipulates that the relevant governing authorities may make rules relating to this authority.¹⁸⁷ A second appeal may be made within 30 days of a decision in the original appeal, to the central government or other relevant authority, depending on the circumstances. Both of these appeals must be decided within a further 30 days. Where relevant, third parties shall be given a reasonable opportunity to be heard.¹⁸⁸

The Act makes no provision for appeal to an independent authority. Indeed, it specifically provides that no appeal shall lie from decisions made pursuant to its provisions.¹⁸⁹

Promotional Measures

Subsection 4(a) requires public authorities to maintain their records, "in such manner and form as is consistent with its operational

¹⁸⁵ Subsection 8(2).

¹⁸⁶ Subsection 10(1).

¹⁸⁷ Sections 17-19.

¹⁸⁸ Section 12.

¹⁸⁹ Section 15.

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requirements". This is somewhat vague, but will no doubt be clarified to some extent through litigation.

Public authorities are required to appoint Public Information Officers who are responsible for dealing with requests, as well as for providing "reasonable assistance" to requesters.¹⁹⁰ Individuals who have acted in good faith pursuant to the Law are protected against sanction.¹⁹¹

¹⁹⁰Section 5.

¹⁹¹Section 13.

Japan

Introduction

The introduction of the Law Concerning Access to Information Held by Administrative¹⁹² Organs was passed in May 1999, after a long struggle by civil society to have a national law adopted. Access to public information was seen as crucial to exposing the failures of the government, about which there was growing concern in Japan as the economic miracle started to falter, and in addressing the wall of official secrecy faced by the public. This is reflected in the first article, on its purpose, which states that the goal of openness is to ensure, "that the government is accountable to the people for its various operations, and to contribute to the promotion of a fair and democratic administration that is subject to the people's accurate understanding and criticism." By the time the national law was adopted in 1999, over 900 municipalities had already adopted freedom of information laws.¹⁹³ The national law came into effect in April 2001.

The Right of Access

Any person, including non-citizens, may make a request to the head of an administrative organ for the disclosure of administrative documents.¹⁹⁴ Upon receiving a request, the head of the administrative organ is required to disclose the information, subject to the regime of exceptions provided for in the law.¹⁹⁵ The right to information is also limited by the definitions of administrative documents and administrative bodies.

Definitions

The law defines an "administrative document" as any document, drawing or electromagnetic record, prepared or obtained by an employee in the course of his or her duties, if held for "for organizational use by its employees". This is limited as there are may be other forms in which information may be held and also inasmuch as it only covers records held for official purposes. There are also two exclusions. The first relates to

¹⁹² Available at: <http://www.soumu.go.jp/gyoukan/kanri/translation3.htm>.

¹⁹³ See Repeta and Schultz, *Japanese Government Information: New Rules for Access*, <http://www.gwu.edu/~nsarchiv/nsa/foia/japanfoia.html>.

¹⁹⁴ Article 3.

¹⁹⁵ Article 5.

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records which have been published for general sale while the second governs archives which, by Cabinet Order, are specially managed as historical or cultural materials or for academic research.¹⁹⁶ It is unclear why these items have been excluded, something rarely found in other laws.

Bodies covered by the law, defined as "administrative organs", include:

- ◆ Cabinet bodies or bodies under Cabinet control that were created by law;
- ◆ administrative bodies as defined by other laws; and
- ◆ the Board of Audit.¹⁹⁷

Public corporations, of which there are many in Japan providing, among other things, basic services, are outside the ambit of the law. However, the law does require a law to be passed governing the disclosure obligations of these corporations within two years of its passage.¹⁹⁸ This obligation was fulfilled with the passage of a law to this effect on 2 November 2001.¹⁹⁹

Process

A request must contain the requester's name (or the name of a representative, for a corporate requester), address and a description of the record sought in sufficient detail to enable it to be found. Where the request is deficient, the administrative organ shall notify the requester and give him or her a suitable amount of time to remedy the problem, while also "endeavouring" to provide assistance.²⁰⁰ Requests may be transferred to another body where there is a "justifiable reason" for doing so, upon written notice being provided to the requester.²⁰¹

The law includes extensive provisions relating to consultation with a third party to whom the information relates. Such parties are given an opportunity to make representations and they are also required to be given notice 2 weeks before the information is actually disclosed, so that they may appeal the decision.²⁰²

¹⁹⁶ Article 2(2).

¹⁹⁷ Article 2(1).

¹⁹⁸ Article 44(2).

¹⁹⁹ See Repeta and Schultz, note 193.

²⁰⁰ Article 4.

²⁰¹ Article 12.

²⁰² Article 13.

A decision to disclose must normally be made within 30 days and the requester must be notified of this decision in writing. Where the request is referred back to the requester for correction or clarification, time spent revising the request is not included in the 30 days. This period may be extended for another 30 days, "when there are justifiable grounds such as difficulties arising from the conduct of business", provided that the requester must be notified of any such extension in writing, along with the reasons therefore.²⁰³

Where the request covers a "considerably large amount of administrative documents" and there is a risk that the performance of the administrative organ will be "considerably hindered" by trying to provide all of the information within the 60-day period, the head may simply disclose a "reasonable portion" within that time period, providing the rest within a "reasonable period of time." In this case, the requester must be given written notice, including of the application of this rule and the extended time limit for the remaining documents.²⁰⁴

Requesters may ask to inspect the record, to be provided with copies or for other forms of access to electromagnetic records, as specified by Cabinet Order. Their request should normally be respected, unless this poses a risk of harm to the record.²⁰⁵

Fees may be charged for both processing the request and for providing the information, pursuant to a Cabinet Order, provided that these may not exceed the actual cost of providing the information. The fee structure is required to take into account the desirability of keeping fees to as "affordable an amount as possible" and, again pursuant to a Cabinet Order, the head of the administrative organ may reduce or waive the fee in cases of economic hardship or for other special reasons.

Duty to Publish

The Japanese law does not provide for a proactive obligation to publish certain categories of information.

Exceptions

The exceptions to the obligation to disclose are set out at Article 5, which contains 6 different exceptions. Most exceptions are subject to a

²⁰³ Articles 9 and 10.

²⁰⁴ Article 11.

²⁰⁵ Article 14.

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harm test. The law also provides for a general public interest override, where "there is a particular public interest necessity", but this is couched in discretionary terms, providing only that in such cases the head of the administrative organ "may" disclose the records.²⁰⁶ Where only part of a document is covered by an exception, the rest of the document must be disclosed.²⁰⁷

The first exception relates to information about an individual where it is possible to identify that individual or, where it is not possible to identify anyone, where "there is a risk that an individual's rights and interests will be harmed." This is a very broad exception, in particular as it covers all information identifying an individual rather than information which would harm a legitimate privacy interest, or which even relates to a privacy interest. Furthermore, it is not subject to a harm test. This is mitigated to some extent by limits on this exception, for example where disclosure of the information is required, by law or by custom, or where disclosure is necessary in order to protect someone's life, health, livelihood or property. This exception also does not apply to information concerning the official activities of a public official, an important limitation on its scope.

The second exception relates to corporate information where there is a risk that the rights, competitive standing or another legitimate interest of the corporation will be harmed or where it was provided in confidence and where confidentiality is a "rational" condition. Again, this exception is limited where disclosure is necessary in order to protect someone's life, health, livelihood or property.

The third exception covers information where, "with adequate reason", the head of the administrative organ deems disclosure to pose a risk to State security or to relations with another country or international organisation, or of causing disadvantage in negotiations with another country or international organisation.

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

The fifth exception applies to internal government deliberations or consultations the disclosure of which would risk unjustly harming the

²⁰⁶ Article 7.

²⁰⁷ Article 6.

frank exchange of views or the neutrality of decision-making, unnecessarily risk causing confusion, or risk causing unfair advantage or disadvantage to anyone. This exception is largely consistent with international standards, apart from the concern with causing confusion, which is not generally considered to be a legitimate ground for limiting access to information, in part because it is an excessively subjective concept and in part because it is paternalistic in nature, contrary to the whole thrust of freedom of information laws.

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

Appeals

The law provides for the establishment of an Information Disclosure Review Board within the Prime Minister's office to consider appeals. Although the Board is within the Prime Minister's office, efforts have been made to ensure that it is independent. It is composed of nine members, of whom up to three are full-time. The Prime Minister appoints members from among people of "superior judgement" who have been recommended by both houses of parliament, which should at least ensure openness and political participation. The term of office is three years and members may be re-appointed. Members may be dismissed by the Prime Minister upon receiving approval from both houses of parliament. The grounds for dismissal are, however limited to incapacity, misconduct or having acted in contravention of their official duties. While in office, members may not be officers of political parties or associations. Finally, the law provides that members' salaries shall be determined by another law. The law also provides for a secretariat to assist the Board.²⁰⁸

Appeals may be made to the head of an administrative organ, who is then required to refer this to the Board unless the appeal is unlawful or a decision has been made to disclose the documents. The requester, the person who preferred the appeal (if different) and any third parties who have made representations must be notified of any appeals.²⁰⁹

²⁰⁸ Articles 21-26.

²⁰⁹ Articles 18-19.

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When considering an appeal, the Board may require the administrative organ to furnish it with the disputed record or request further information from the requester.²¹⁰ The law provides in detail for the processing of appeals, including representations and investigations. Appeals may then be taken to the district court.²¹¹

Promotional Measures

The law requires heads of administrative organs to establish rules providing for the "proper" management of documents, in accordance with a Cabinet Order, and make those rules themselves public. The Cabinet Order itself shall set general standards relating to the "classification, preparation, maintenance, and disposal of administrative documents".²¹²

Heads of administrative bodies are required to facilitate disclosure by providing information about the records they hold, as well as by taking other "appropriate steps". The Director-General of the Management and Coordination Agency shall establish an office for general enquiries. The latter shall also request reports on implementation from administrative organs and, annually, compile and publish a summary of these reports.²¹³

The law also includes a number of general measures to promote openness. The government is required generally to "strive to enhance measures concerned with the provision of information held by administrative organs". Local public entities are required to strive to formulate and implement information disclosure measures. Finally, approximately 4 years after the law comes into effect, the government is required to examine its effectiveness and to take necessary measures to improve the disclosure of information, based on the results of this examination.²¹⁴

²¹⁰ Article 27.

²¹¹ Article 36.

²¹² Article 37.

²¹³ Articles 38-39.

²¹⁴ Articles 40, 41 and 44.

Mexico

Introduction

Mexico became one of the first countries in Latin America to pass a freedom of information law in June 2002, with the signing into law by President Fox of the Federal Transparency and Access to Public Government Information Law.²¹⁵ The law was unanimously adopted in both chambers of the Mexican Congress, and is part of the commitment by the new administration to tackle corruption and foster democracy in Mexico. The law is among the more progressive freedom of information laws found anywhere, and includes a number of innovative features, including strong process guarantees, as well as a prohibition on classifying information needed for the investigation of grave violations of human rights or crimes against humanity.

The Right of Access

The Law provides generally in Article 2 that all information held by government may be accessed by individuals.

Definitions

The Law defines information as everything contained in documents that public bodies generate, obtain, acquire, transform or preserve. Documents, in turn, are defined as any records that documents the exercise of the functions or activities of the subjects of the Law and public servants, regardless of their source, date of creation or form. This is a broad definition, but limited by the substantive restriction to documents about functions or activities of public bodies.²¹⁶

The Law defines separately the obligations of two sets of public bodies. All public bodies, defined as "subjects compelled by the Law" are defined and then a sub-set of these, termed "agencies and entities" is also defined. The Law then provides for one system of obligations for agencies and entities, and another for 'other' subjects.

"Subjects compelled by the Law" (subjects) includes:

- ◆ the federal executive branch and the federal public administration;

²¹⁵ Available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/laweng.pdf>. Available in the Spanish original at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/lawesp.pdf>.

²¹⁶ Article 3.

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

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

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

The First Section applies to all subjects. However, the Second Section, which is very detailed, applies only to agencies and entities, effectively the executive branch of government. The Third Section, which applies to other subjects, mainly the legislative and judicial branches of government, is quite brief, containing only two Articles, but it does seek to incorporate some of the obligations and institutions provided for in Section Two. This is an innovative approach to including all three branches of government under the law, but it remains to be seen whether the obligations placed on the "other subjects" will be effective in practice.²¹⁷

Process

Each subject must establish a liaison section (see below), which effectively serves as the contact point, as well as the unit with responsibility for processing requests. Any person may, within one year of the Law coming into force, submit a request for access to the liaison section either in a letter or the approved form, including his or her name and address, a clear description of the information, any other relevant facts and the form in which he or she would like the information to be disclosed. If the information is not described sufficiently clearly, or if the individual has difficulty making a request, including because of illiteracy,

²¹⁷ See Doyle, Kate, *In Mexico, a New Law Guarantees the Right to Know*, available at: <http://www.freedominfo.org/reports/mexico1.htm>.

the liaison section must provide assistance. The Law specifically states that the motive for the request shall not be relevant to the decision whether or not to disclose.²¹⁸

Agencies and entities are required to provide information which is not classified or confidential and which they hold. Notification of their decision must be provided as soon as possible but in any event within 20 working days, and include the cost and form of access. The information must then be provided within another 10 working days, once the person has paid any fees. Where the information is classified or confidential, the Committee (a supervisory unit within all agencies and entities; see below) must be notified of this fact, along with the reasons and the Committee must then decide whether or not to ratify the classification or revoke it and grant access to the information. Similarly, when documents are not found, the Committee must be notified and, after having taken "appropriate measures" to find the information without success, confirm that the agency or entity does not hold the information. Requests which are offensive or which have already been dealt with previously do not have to be processed.²¹⁹ It is unclear what offensive refers to in this context; some other freedom of information laws refer to vexatious requests.

The provisions of the Law relating to fees are very progressive. The fees for obtaining access to information, which must be set out in the Federal Duties Law, may not exceed the cost of the materials used to reproduce the information, along with the cost of sending it. The cost of searching for the information and preparing it is thus excluded.²²⁰ Access to personal data is free, although charges may be preferred to cover the costs of delivery on this information.²²¹

Disclosure must be in the form requested, if the document will permit that.²²²

The process described above applies only to agencies and entities, not other subjects. A general attempt is made in Article 61 to require other subjects to provide information, by requiring them to "establish in their respective domains the institutions, criteria and institutional procedures

²¹⁸ Articles 40-41 and Transitory Eighth.

²¹⁹ Articles 42-48.

²²⁰ Article 27.

²²¹ Article 24.

²²² Article 42.

for granting private persons access to information according to regulations or agreements of a general nature that comply with the principles and deadlines established in this Law." They are specifically required, within a year, to set up a number of systems and bodies for this purpose, including a liaison section and procedures for access to information. They are also required to submit an annual report on the activities undertaken to ensure access to information.²²³

Duty to Publish

Article 7 of the Law provides for a broad duty to publish, subject to the regime of exceptions (classified or confidential information). It provides that subjects must, in accordance with the regulations promulgated by the Federal Institute of Access to Information (Institute) (for agencies and entities; other subjects must establish or designate their own institutes), publish 17 categories of information in a manner that is accessible and comprehensible. The categories include information about the general operations of the body, the services they offer, procedures and forms, subsidy programmes, contracts entered into, reports made and opportunities for participation. Article 12 further provides that subjects must publish information regarding the amounts and recipients of any public resources they are responsible for, reflecting the preoccupation with corruption which was an important motivation for this Law.

The Law includes precise stipulations about how this information must be made available. It must be provided in remote and local electronic means, including through a computer available to members of the public which includes printing facilities, and support must be provided to users where needed.²²⁴

The Law also includes a number of specific directions regarding the publication of information. Pursuant to Article 8, the judicial branch must make public any rulings, although individuals may object to the disclosure of their personal information. Agencies and entities must publish all rules and formal administrative arrangements, 20 days prior to their being adopted, unless this could frustrate their success. Reports by political parties and groups to the Federal Electoral Institute, as well as any formal audits of these bodies, must be published as soon as they are finalised.²²⁵

²²³ Articles 62 and Transitory Fourth.

²²⁴ Article 9.

²²⁵ Articles 10-11.

Exceptions

The Law includes a clear and narrow system of exceptions, operated largely through a system of classification, along with confidential information, although there are some potential loopholes in this system. There is no public interest override. There is, however, a strict system of time limits to classification under Articles 13 and 14, of 12 years, albeit without prejudice to other laws. This time limit may, exceptionally, be extended where the grounds for the original classification still pertain. Article 14 also contains an exceptional and extremely positive provision prohibiting the classification of information "when the investigation of grave violations of human rights or crimes against humanity is at stake." This should facilitate human rights and humanitarian work.

Articles 13 and 14 set out the categories of information that may be classified. The Institute is tasked with establishing criteria for classification and declassification of information, as well as for oversight of the system, while the heads of administrative units, defined as the parts of the subjects that hold information, are responsible for actual classification. The Institute may, at any time, have access to classified information to ascertain whether it has been properly classified. Finally, the administrative units are required to produce, biannually, an index of the files they have classified, indicating which unit produced the document, and the date and length of classification. This index may not, itself, be classified.²²⁶

Specific exceptions under Article 13 include information the disclosure of which would compromise national or public security or defence, impair ongoing negotiations or international relations, including by divulging information provided on a confidential basis by other States or international organisations, harm financial or economic stability, pose a risk to the life, security or health of an individual, or severely prejudice law enforcement, including the prevention, investigation and prosecution of crime, collection of taxes or immigration operations.

Article 14 adds to these exceptions information expressly required by another law to be confidential, commercial or industrial secrets, prior investigations, judicial files or proceedings against civil servants prior to a ruling and internal deliberative processes prior to the adoption of a final decision.

Article 18 refers to confidential information, being personal information or information provided by individuals in confidence. This is

²²⁶Articles 15-17.

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bolstered by a whole chapter on protection of personal data, which reiterates the prohibition on disclosing personal information and also gives a right to correct it.²²⁷

Information already published does not need to be provided, but the liaison section must assist the requester to locate the published information.²²⁸

Appeals

Appeals lie in the first instance to the Institute and from there to the courts. The appeal must be lodged within 15 days of the notice of refusal of access, where information has otherwise not been provided, either in full or in part, where correction of personal information is refused or to review timeliness, cost or form of access.²²⁹ The appeal must contain the name of the agency or entity, the person making the appeal and any third parties, the date the cause of the complaint arose, the action being appealed, the arguments and a copy of any formal documents relating to the case (such as a notice of refusal of access).²³⁰

A commissioner must investigate the claim and report to the whole body within 30 working days, and a decision must be made within another 20 days, although these time limits may be doubled for justifiable cause. An unusual provision stipulates that failure to rule within the time limit will be understood as an acceptance of the appeal, prompting the Institute to keep to the rules. The Institute may accept or reject the claim, or modify it, and their ruling shall include time limits for compliance.²³¹

The requester, but not the agency or entity, may appeal from the Institute's decision to the federal courts.²³²

Promotional Measures

The Law sets out its aims in Article 4, which include ensuring that everyone has access to information through simple and expeditious procedures, making the administration transparent, protecting personal information, ensuring accountability and citizen oversight, improving information management and generally promoting democratisation in

²²⁷ See Articles 21 and 25.

²²⁸ Article 42.

²²⁹ Article 50.

²³⁰ Article 54.

²³¹ Articles 55-56.

²³² Article 59.

Mexico. Article 6 deals with interpretation, providing that interpretations which favour the principle of openness must be preferred.

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

Civil servants who fail to comply with the law in a number of ways, for example by destroying information or intentionally denying access, are administratively liable. They are also liable if they disclose classified or confidential information, one of the few provisions in the law that is likely to impede the development of a culture of openness, prompting officials to err in favour of secrecy.²³³

The Mexican Law provides for a number of interesting procedural mechanisms to promote effective implementation of the right of access. Agencies and entities must establish a "liaison section", the analogy of an information officer in some other laws, with a number of duties including to ensure fulfilment of the duty to publish, to receive and process requests for access and to assist requesters, to ensure the request process is respected, to propose internal procedures to ensure efficient handling of requests, to undertake training and to keep a record of requests for information and their outcome. These sections must be established within six months of the law coming into force and they must become operational within a further six months.²³⁴

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

²³³ Article 63.

²³⁴ Articles 28 and Transitory Third.

Country Profiles

Article 33 provides for the establishment of the Institute as an independent public body charged with promoting the right to access information, acting as an appeals body for refusals to disclose and protecting personal information. The Law includes a number of provisions designed to promote the independence of the Institute. The five commissioners are nominated by the executive branch, but nominations may be vetoed by a majority vote of either the Senate or the Permanent Commission, as long as they act within 30 days. Individuals may not be appointed as commissioners unless they are citizens, have not been convicted of a crime of fraud, are at least 35 years old, do not have strong political connections and have "performed outstandingly in the professional activities".²³⁵ Commissioners hold office for six years, but may be removed for serious or repeated violations of the Constitution or this Law, where their actions or failure to act undermine the work of the Institute or when they have been convicted of a crime subject to imprisonment.²³⁶

The Institute has a long list of functions including, in addition to those already noted, interpreting the law as an administrative regulation, monitoring implementation of the Law and making recommendations in case of non-compliance, providing advice to individuals, developing forms for information requests, promoting training and preparing a simple guide on how to use the Law. It must also present an annual report to the Honorable Congress of the Union, which shall include information on requests and how they have been dealt with.

²³⁵ Article 35.

²³⁶ Article 34.

Pakistan

Introduction

The Freedom of Information Ordinance, 2002²³⁷ was adopted by the President late in 2002, perhaps ironically, given its democratic problems, making Pakistan the first country in South Asia to have such a law.²³⁸ In fact, this is the second such ordinance adopted in Pakistan. The first was adopted in 1997²³⁹ but, as a civilian Ordinance which failed to be introduced as a law in parliament, it lapsed within four months. A second Ordinance was circulated for comment in 2000, but was never adopted. The Ordinance has a number of strong process protections but it is seriously undermined by the highly excessive regime of exceptions.

The Right of Access

The Ordinance provides for a right of access to public information, stating that, "notwithstanding anything contained in any other law ... no requester shall be denied access to any official record other than exemptions".²⁴⁰ This is a strong statement of the right of access, in particular inasmuch as it means that the disclosure provisions of the Ordinance take precedence over secrecy laws. However, the definition of which records are covered is a bit unclear and the scope of the law is restricted to citizens.²⁴¹

Definitions

The term 'record' is defined in subsection 2(i) as, "record in any form, whether printed or in writing and includes any map, diagram, photography, film, microfilm, which is used for official purpose by the public body which holds the record". It is not clear whether the limitation of being used for an official purpose applies only to maps, diagrams, and so on, or to the whole definition, but the latter interpretation, though more limited, makes more sense.

²³⁷ Ordinance No. XCVI of 2002, 27 October 2002.

²³⁸ The Indian law, reviewed above, was adopted in December 2002, although it had already been under discussion for some time.

²³⁹ Freedom of Information Ordinance, 1997. Available at:
<http://www.privacyinternational.org/countries/pakistan/pk-foia-1002.html>.

²⁴⁰ Section 3.

²⁴¹ Section 12.

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However, a 'public record' is defined in section 7 to cover a much narrower range of information. Instead of defining information generally, section 7 lists the following types of information as public records:

- ◆ policies and guidelines;
- ◆ financial transaction, including property acquisition and disposal;
- ◆ information on the grant of licences, allotments and other benefits, as well as contracts and agreements;
- ◆ final orders and decisions; and
- ◆ any other record specified by the government as being a public record.

It would appear from the law that the relevant definition is public record,²⁴² although the right of access as spelt out in section 3 refers to 'official records'. This is an extremely narrow definition which excludes a wide range of information of some public importance.

The law extends to the whole territory of Pakistan,²⁴³ but it only covers federal bodies. The definition of public body includes ministries, divisions and departments of the Federal Government, the secretariat of the parliament, any office of a board, commission or council, any body established by federal statute, and courts and tribunals.²⁴⁴ It is broader than some freedom of information laws inasmuch as it covers all three branches of government, but narrower inasmuch as it does not appear to cover public corporations or private corporations which are substantially publicly funded.

Process

Any citizen may make a request for information, in the prescribed form, supplying the "necessary particulars" and paying any fee levied.²⁴⁵ Public bodies are required to assist individuals submitting requests under the Ordinance.²⁴⁶ In particular, public bodies must appoint specific officers to be responsible for handling requests, and for promoting openness generally. Interestingly, the Ordinance provides that where such

²⁴²See, for example, subsection 13(2)(d), which provides for non-disclosure of records not covered by section 7.

²⁴³Subsection 1(2).

²⁴⁴Subsection 2(h).

²⁴⁵Subsection 12(1).

²⁴⁶Section 9.

officials have not been appointed, or where they are not available for any reason, the head of the public body must discharge this function.²⁴⁷

Requests must be processed within 21 days and notice must be provided of any refusal to disclose. Where information is provided, it must be accompanied by a signed and dated certificate of authenticity. This unique provision is likely to enhance responsibility for inadequate or mistaken disclosures. Disclosure may be refused where the application is not in the proper form, the record has not be properly described, the applicant is "not entitled to receive such information", the information is not public information as defined by the Ordinance, or the information is excluded or exempt.²⁴⁸ It is not clear why any particular applicant would not be entitled to receive information which was otherwise subject to disclosure.

The Ordinance does not specify how fees are to be determined or the form in which disclosure shall be made. Instead, section 25 gives the government the power to make rules for the implementation of the Ordinance, including specifically in relation to fees and the form of disclosure. The same section also refers to the power to stipulate the form for requests for information.

Duty to Publish

The Ordinance contains only a very limited obligation to publish, covering acts and subordinate legislation, as well as other rules having the force of law. These must be published and made available at, "a reasonable price at an adequate number of outlets" to promote easy, inexpensive access.

Exceptions

The Ordinance contains two types of exception, namely exclusions and exemptions. The exclusions do not incorporate a harm test and effectively exclude information from the ambit of the law altogether while exemptions do include a harm test which must be applied on a case-by-case basis to information whose disclosure is sought. The Ordinance does not contain a public interest override. This exceptions regime seriously fails to meet international standards in this area.

Section 8 provides that the definition of public record shall not apply to the following types of information:

²⁴⁷Section 10.

²⁴⁸Section 13.

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- ◆ notings on the file;
- ◆ minutes of meetings;
- ◆ intermediary opinions or recommendations;
- ◆ bank and financial records relating to customer accounts;
- ◆ records relating to the defence forces, defence installation or connected to defence or national security;
- ◆ records classified by the government;
- ◆ personal records;
- ◆ documents supplied by third parties on an assumption of confidentiality; and
- ◆ any other records that the government, in the public interest, excludes.

These blanket exclusions do not incorporate a harm test and are not subject to a public interest override.

Sections 14 to 18 set out the exemptions from disclosure. Section 14 provides simply that there is no duty to disclose exempt information but does not prohibit such disclosure. As such, the Ordinance is not itself a form of secrecy law. All of these exemptions have harm tests, in many cases requiring significant harm to the protected interest before the information may be withheld. In this respect they differ significantly from the exclusions in section 8.

Section 15 exempts information the disclosure of which would be likely to cause "grave and significant" damage to Pakistan's interests in international relations, defined as relations with either another State or with an organisation with only States as members. Section 16 exempts information where disclosure would be likely to result in the commission of an offence, harm the detection, prevention or investigation in a particular case, reveal the identity of a confidential source, facilitate an escape from legal custody or harm the security of any building or system. Section 17 exempts information which would involve an invasion of the privacy of a third party. Finally, section 18 exempts information where disclosure would be likely to harm the economic interests of the State or a public body. This is defined as including "grave and significant" damage to the economy as the result of the premature disclosure of a tax or other instrument of economic management, or significant damage to the financial interests or activities of the public body.

The law also excludes from request-driven disclosure any document which has been published in the official Gazette or in book form and which is on sale.²⁴⁹

Appeals

Requesters have 30 days after being refused information to appeal this refusal to the head of the public body concerned and, upon failing to get the information from him or her "within the prescribed time" (this is not actually defined in the Ordinance), from there to the Mohtasib (ombudsman) or, in cases involving the Revenue Division, to the Federal Tax Ombudsman. These officials may either direct the public body to release the information or reject the complaint.²⁵⁰

If the Mohtasib, but apparently not the Federal Tax Ombudsman, finds a complaint to be "malicious, frivolous or vexatious", he or she may dismiss the complaint and fine the complainant up to Rps. 10,000 (approximately US\$1100). This could be a serious disincentive to potential complainants who are not sure of the likelihood of success of their complaint.²⁵¹

Promotional Measures

The law includes an interpretation clause, which requires interpretation to, "advance the purposes of this Ordinance", and to, "facilitate and encourage, promptly and at the lowest reasonable cost, the disclosure of information".²⁵² These are useful interpretive guidelines which, if applied, will advance the goal of openness.

The Ordinance also requires public bodies to ensure that their records are properly maintained.²⁵³ This is an important provision in a country like Pakistan, where poor record maintenance is one of the more serious obstacles to openness.²⁵⁴ It further requires public bodies to endeavour, within reason, to ensure that all public records are computerised and connected through a national network to facilitate authorised access.²⁵⁵

²⁴⁹ Subsection 12(2).

²⁵⁰ Subsection 19(1).

²⁵¹ Section 20.

²⁵² Subsection 3(2).

²⁵³ Section 4.

²⁵⁴ See ARTICLE 19, Centre for Policy Alternatives, Commonwealth Human Rights Initiative and Human Rights Commission of Pakistan, *Global Trends on the Right to Information: A Survey of South Asia* (London: 2001), under 3.5 Record-Keeping, pp. 103-4.

²⁵⁵ Section 6.

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Individuals who destroy a record which is the subject of a request or complaint with the intention of preventing its disclosure are deemed to have committed an offence under the Ordinance, subject to a fine, imprisonment for up to two years, or both.²⁵⁶ On the other hand, individuals are protected against legal suit for anything done pursuant to the Ordinance in good faith.²⁵⁷ This protects those who disclose in good faith, even if mistakenly, while punishing those who refuse to disclose, both important provisions to help effect a change in the culture of secrecy.

Section 23 states that the Ordinance is in addition to, and shall not derogate from, other laws. Although this is not stated explicitly, it may be assumed that this applies to other laws providing for disclosure, rather than secrecy laws, since section 3 provides that other laws shall not be grounds for refusing to withhold information.

²⁵⁶Section 21.

²⁵⁷Section 22.

South Africa

Introduction

South Africa has one of the most progressive freedom of information laws in the world, no doubt a reflection of the profound mistrust the apartheid era instilled in people regarding government. The 1996 Constitution of the Republic of South Africa not only guarantees the right to access information held by the State, but also to information held by private bodies which is necessary for the exercise or protection of any right.²⁵⁸ The Constitution also requires the government to pass a law giving effect to this right within three years of its coming into force.²⁵⁹ The enabling legislation, the Promotion of Access to Information Act, came into effect in March 2001.²⁶⁰

As noted, the South African Act applies to both public and private bodies. The description below describes primarily the Act as it applies to public bodies; there is a parallel, and largely overlapping, part of the Act dealing with private bodies.

The Right of Access

Definitions

A record of a public or private body is defined in section 1 simply as any recorded information, regardless of form or medium, which is in the possession of that body, whether or not it was created by that body. The Act applies to such records regardless of when they came into existence and records are deemed to be records of a body if they are under its possession or control.²⁶¹ This simple definition encompasses all information held in any form by a public or private body, giving effect to the principle of maximum disclosure. However, records requested for use in civil or criminal cases after they have been commenced and for which access is provided in other legislation are excluded from the ambit of the Act.

A public body is defined as a department of state or administration in the national, provincial or municipal spheres and any other institution exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function

²⁵⁸ Act No. 108 of 1996, Section 32.

²⁵⁹ Article 32(2) and Schedule 6, item 23 of the 1996 Constitution.

²⁶⁰ Act No. 2, 2000. Available at: <http://www.gov.za/gazette/acts/2000/a2-00.pdf>.

²⁶¹ Section 3.

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in terms of any legislation. This would not appear to include private bodies which are substantially publicly funded in the absence of legislation. The Act also does not apply to Cabinet or its committees, the judicial functions of courts and judicial officers of those courts, or an individual member of Parliament.²⁶²

The Act defines a private body as a natural person who carries on any trade, business or profession, but only in that capacity, as well as juristic persons. It thus excludes private non-commercial activities of natural persons.

Process

A requester must be given access to a record if he or she complies with the procedural requirements set out in the Act and the record is not covered by an exception, regardless of his or her reasons for wishing to access the record.²⁶³

To facilitate access, every public body is required to appoint an information officer and as many deputy information officers as are required to "render the public body as accessible as reasonably possible".²⁶⁴ Requests must be made to the information officer, in the prescribed form, and must, at a minimum, identify the records requested and the requester, and specify the form and language in which access is sought. Where a requester is unable to submit a written request, her or she may make an oral request and the information officer is obliged to reduce it to writing and provide the requester with a copy.²⁶⁵

The Act requires information officers to provide "such reasonable assistance, free of charge, as is necessary to enable" requesters to make requests. A request may not be rejected without first offering the requester this assistance.²⁶⁶ Section 21 stipulates that information officers are also required to take steps that are reasonably necessary to preserve any record which is the subject of a request, until that request has been finally determined.

A decision must be made on a request as soon as possible, and in any event within 30 days, and the requester must be notified of this. This

²⁶²Section 12.

²⁶³Section 11.

²⁶⁴Section 17.

²⁶⁵Section 18.

²⁶⁶Section 19.

period may be extended for a further 30 days where the request is for a large number of records and to comply within 30 days would unreasonable interfere with the activities of the body, where a search must be conducted in a different city or where inter-agency consultation is required that cannot reasonably be completed within the original 30 days. In this case, the requester must be notified of this fact.²⁶⁷ Pursuant to section 27, failure to give notice within the prescribed time is a deemed refusal of access. Interestingly, for the first year of operation of the Act, the period for deciding on requests is 90 days and for the second year, 60 days.²⁶⁸

Where the request is granted, the notice shall stipulate that fact, the fees to be charged, the form in which access will be given and the right to appeal the fee. Where the request is refused, in whole or in part, the notice must include adequate reasons for the denial, along with the provision of the Act relied upon, as well as the right to appeal this decision.²⁶⁹

The Act contains detailed provisions on the transfer of requests, which is allowed whenever the record in question is not in the possession of the body where the request has been filed or the record is more closely connected with another body. Such transfers must be made as soon as possible, and in any event within 14 days. This period is not additional to the time limit for responding to requests. The requester must be informed about the transfer.²⁷⁰ Section 23 provides for situations in which a record does not exist or cannot be found, in which case the requester must be notified of that fact, as well as of the steps taken to attempt to locate the record. This notification is deemed to be a refusal to grant access for purposes of appeal.

Requesters may be charged fees for requests, both for reproduction of the record and for search and preparation. Where these fees are likely to be above a predetermined limit, the requester may be asked to make an advance deposit. The Act specifically provides for the minister to exempt any person from paying the fees, to set limits on fees, to determine the manner in which fees are to be calculated, to exempt certain categories of records from the fee and to determine that where the cost of collecting the fee exceeds the value of the fee, it shall be waived.²⁷¹

²⁶⁷ Section 26.

²⁶⁸ Section 87.

²⁶⁹ Section 25.

²⁷⁰ Section 20.

²⁷¹ Section 22.

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A requester must normally be given access immediately once any access fee is paid. The Act provides for some detail in terms of the forms of access that may be requested, including a copy, inspection or viewing of the record, a transcript, an electronic copy or by extraction of the information from the record by a machine. The requester must be given access in the form requested unless this would unreasonably interfere with the operations of the public body, be detrimental to the preservation of the record or would infringe copyright. The Act also provides for special forms of access to persons with disabilities, at no extra charge. Finally, requesters may request the record in a certain language and access must be provided in this language if the record exists in that language.²⁷²

The South African Act contains details provisions on third party notice and intervention, which is the subject of the whole of Chapter 5. These provisions are complicated and do not need to be spelt out in detail here. It may be noted that, overall, they ensure that all reasonable efforts must be made to ensure that third parties are notified at every relevant stage of the proceedings and given an effective opportunity to provide input. These provisions impact on the timelines for disclosure, as well as for appeals.

The Act also provides for the correction of personal data, where this is not already catered for by another law.²⁷³

Duty to Publish

The Act does not list which records a public body must publish. Rather, it requires each public body to provide, at least annually, a report to the responsible minister, who is the minister responsible for the administration of justice, detailing which categories of records are automatically available in the absence of a request, including for inspection, for purchase or free of charge. The minister, in turn, must publish this information in the Gazette.

The South Africa Act also includes a unique provision which requires the government to ensure that the name and contact details of every information officer of every public body is published in every general use telephone book.²⁷⁴ It remains to be seen how effective this provision will be in practice.

²⁷²Sections 29 and 31.

²⁷³Section 88.

²⁷⁴Section 16.

Exceptions

Most exceptions in the Act contain a form of harm test and all are subject to a form of public interest override. The override applies whenever the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law or an imminent and serious risk to public safety or the environment and the public interest in disclosure "clearly outweighs" the harm.²⁷⁵ This is in some ways a limited override, but it has the virtual of avoiding potentially messy debates about how to balance different public interests. Significantly, pursuant to section 5, the Act applies to the exclusion of any other legislation that prohibits or restricts disclosure of information and which is materially inconsistent with the objects or a specific provision of the Act.

Where a record is to be published within the next 90 days, access to that record may be deferred "for a reasonable period", provided that the requester may make representations as to why he or she needs the record before that time and access shall be provided where otherwise the requester is likely to suffer substantial prejudice.²⁷⁶ In addition, requests which are "manifestly frivolous or vexatious" or the processing of which would "substantially and unreasonably divert the resources of the public body" may be refused.²⁷⁷

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

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

²⁷⁵Section 46.

²⁷⁶Section 24.

²⁷⁷Section 45.

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An unusual exception relates to information obtained by the South African Revenue Service for the purposes of enforcing tax collection legislation, perhaps based on the fact that tax collection is a particular problem in South Africa.²⁷⁸

Section 36 protects commercial information including trade secrets, information the disclosure of which would be likely to harm the commercial interests of the third party who provided it and information provided in confidence, the disclosure of which could "reasonably be expected" to put the third party at a disadvantage. This is narrower than most confidence-related exceptions, which except all information provided in confidence. Section 37 also exempts information where disclosure would constitute an actionable breach of confidence, as well as information supplied in confidence where disclosure would be likely to prejudice the future supply of such information and it is in the public interest that such information continue to be supplied.

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

Information the disclosure of which would be likely to endanger life or physical safety, the security of a building, system, other property or means of transport, or systems for protecting individuals, property or systems is also the subject of an exception.²⁷⁹

Section 39 provides in some detail for an exception related to law enforcement and legal proceedings, including law enforcement techniques, prosecution, investigations and the prevention of crime. This does not, however, apply to information about the general conditions of detention of persons in custody. Information covered by legal privilege is also exempt, unless the beneficiary of the privilege has waived it.²⁸⁰

Section 41 deals with security and international relations, exempting information the disclosure of which "could reasonably be expected to cause prejudice to" defence, security or international relations. It also exempts information which is required to be held in confidence under international law or which would reveal information supplied in

²⁷⁸Section 35.

²⁷⁹Section 38.

²⁸⁰Section 40.

confidence by or to another State or intergovernmental organisation, although this does not apply to information which has been in existence for more than 20 years. The same section includes a detailed but non-exclusive list of what this exception includes, no doubt in an attempt to limit the scope of what is otherwise always a highly problematical exception. It remains to be seen whether it will achieve that objective.

Section 42 excepts information the disclosure of which "would be likely to materially jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy". It also excepts State trade secrets or information the disclosure of which would be to cause harm to the commercial interests of a public body or which could reasonably be expected to put the body at a disadvantage in negotiations or competition. This latter part of the exception, however, does not apply to information that contains the results of product or environmental testing which discloses a serious public safety or environmental risk

Another unusual exception in the South African Act applies to research, either by a third party or the public body, the disclosure of which would be likely to expose the third party or public body, or the research or the subject matter, to "serious disadvantage".²⁸¹ This exception would normally be considered to fall largely within the scope of the confidentiality exception.

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

²⁸¹ Section 43.

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

Appeals

The Act provides for two levels of appeal, internally within the public body and, after that avenue has been exhausted, to the courts. There is no provision for an appeal to an independent administrative body, the one serious shortcoming of the South African Act.

Either the requester or a third party may lodge an internal appeal for a range of complaints including relating to access, fees, extension of time limits or form of access. Such an appeal must be lodged in the prescribed form, within 60 days (or within 30 days if third party notice is required) and be accompanied by any applicable fees. Once again, detailed provision is made for third party intervention.²⁸² An internal appeal must effectively be decided within thirty days and relevant written notice must be provided to both the appellant and any third parties of the decision, along with their right to appeal to the courts.²⁸³

An appeal to the courts must, like internal appeals, be lodged within 60 days (or within 30 days if third party notice is required) of receiving the decision in an internal appeal and may only be brought after the internal appeals process has been exhausted. The grounds include those available for an internal appeal, as well as any complaint relating to a refusal of a public body to entertain a late internal appeal. The Act requires public bodies to provide the court with any record it should request, but enjoins that court from disclosing document which are exempt.²⁸⁴

Promotional Measures

The objects of the Act are set out in section 9 and include giving effect to the constitutional right to access information, subject to justifiable limitations, giving effect to the constitutional obligation to promote a human rights culture, and generally promoting transparency,

²⁸²Sections 74-76.

²⁸³Section 77.

²⁸⁴Sections 78-80.

accountability and good governance. This underpins the Act, giving it direction. It is also given concrete effect in section 2, dealing with interpretation. Section 2 requires courts, but apparently not others who interpret the Act, to prefer any reasonable interpretation which is consistent with the objects of the Act over any other interpretation which is inconsistent with those objects.²⁸⁵

No one shall be liable for anything done in good faith pursuant to the Act. On the other hand, it is a criminal offence to destroy, damage, alter, conceal or falsify a record with intent to deny a right of access, punishable by up to 2 years imprisonment.²⁸⁶

Every public body must, within six months of the Act coming into force, compile, in at least three official languages, a manual with information about its information disclosure processes. The precise contents of the manual are set out in section 14, including information about the structure of the body, how to make information requests, services available to the public, any consultative or participatory processes and a description of all remedies. The manual must be updated annually and disseminated in accordance with regulations to that effect. Public bodies are also required to submit to the Human Rights Commission an annual report with detailed information about the number of information requests, whether or not they were granted, the provisions of the Act relied upon to deny access, appeals and so on.²⁸⁷

The Human Rights Commission is tasked with a number of promotional duties under the Act, including publishing a guide, in all eleven official languages, on how to use the Act. Section 10 sets out in some detail what must be included in the guide, including the names and contact details of every information officer of every public body, the procedures for requesting information and assistance available through the Commission. The guide must be updated every two years as necessary.

The Human Rights Commission is also tasked with providing an annual report to the National Assembly on the functioning of the Act, including any recommendations and detailed information, in relation to each public body, about requests received, granted, refused, appealed and so on.

²⁸⁵Section 6.

²⁸⁶Sections 89-90.

²⁸⁷Section 32.

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

- ◆ undertaking educational and training programmes;
- ◆ promoting the timely dissemination of accurate information;
- ◆ making recommendations to improve the functioning of the Act, including to public bodies;
- ◆ monitoring implementation; and
- ◆ assisting individuals to exercise their rights under the Act.²⁸⁸

²⁸⁸Section 83.

Sweden

Introduction

Sweden was the first country in the world to adopt a law granting citizens the right to access information held by public bodies, having adopted its Freedom of the Press Act in 1776.²⁸⁹ The Act, part of the Swedish Constitution, guarantees the right of access through Chapter 2 On the Public Nature of Official Documents. Despite the title, the right is available to everyone, not just the press.

The Right of Access

Article 1 of Chapter 2 of the Act states that "every Swedish subject shall have free access to official documents." In practice, however, anyone can claim this right and Sweden has developed a reputation, for example, for being a good country to access European Union documents. The right to access, and to correct, personal data is provided for by the Personal Data Act, 1998.

Definitions

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

Article 3 limits the scope of official documents to documents which are, "in the keeping of a public authority, and if it can be deemed under the terms of Article 6 or 7 to have been received, prepared, or drawn up by an authority" A record is considered to be "kept" by a public authority if it is available to the authority for transcription, which would include practically everything they hold. The Act specifically notes that letters and other communications addressed to civil servants which refer to official matters are official documents.²⁹⁰

Article 6 deals with which documents have been received by a public authority, including when they have arrived at such an authority or are in the hands of a competent official from that authority. Entries for competitions and tenders in sealed envelopes are not deemed to have been

²⁸⁹ Available at: http://www.oefre.unibe.ch/law/icl/sw03000_.html.

²⁹⁰ Articles 3 and 4.

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received before the time fixed for their being opened. Furthermore, measures taken solely as part of the technical processing of documents by a public authority do not qualify the document as having been received by that authority. This applies primarily to electronic records. However, this definition is still quite broad.

Article 7 provides that a document has been drawn up by a public authority only if the matter to which it relates has been "finally settled by the authority", "finally checked and approved" or "finalized in some other manner". The effect of this rule is modified somewhat by exceptions relating to ledgers or lists kept on an ongoing basis and court rulings which have been pronounced. A third exception relates to records and memoranda which have been checked and approved, excluding however, "records kept by committees of the Parliament or the General Assembly of the Church, by the Auditors of the Parliament or by auditors of local authorities, by Government commissions, or by local authorities in a matter dealt with by the authority solely in order to prepare the matter for decision".

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

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

Memoranda which have not been sent are not official documents, unless accepted for filing or where they contain factual information. For this purpose, a memorandum is an aide memoiré or other notation made for the purpose of preparing a case or matter. Likewise, preliminary outlines or drafts are not official documents unless they have been accepted for filing. This is analogous to the internal working document exception found in many freedom of information laws, but it is not subject to a harm test. Documents kept in technical storage for another body are also not official documents of the authority which stores them.²⁹¹

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

- ◆ letters, telegrams and the like drawn up by a public authority and intended solely for communication purposes;

²⁹¹ Articles 9-10.

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- ◆ documents solely for the purpose of being published in a periodical of a public authority; and
- ◆ documents which are part of a library or which have been deposited with a public authority for storage or research, along with records relating to these documents.

Only the first of these is controversial, establishing a non-harm based exception which might cover certain documents of public interest.

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

...those organs included in the state and municipal administration. The Government, the central public authorities, the commercial public agencies, the courts and the municipal boards are examples of such public authorities.²⁹²

Companies, associations and foundations are not public authorities, even if they are wholly owned or controlled by the State.²⁹³

Process

An application for access to a document should be made to the body which holds it, which shall normally decide upon the request. In cases relating to documents of "key importance to security", a statutory order may limit consideration of any requests to a particular authority. A public authority may not inquire as to an individual's motivation for requesting a document, except where this is necessary to ascertain whether or not the document is subject to disclosure.²⁹⁴ This might be the case, for example, where information is secret but if the requester only wants to use it for certain purposes, there is no risk of harm (see below under Exceptions).

Any official document subject to disclosure must be made available for inspection forthwith at the place where it is kept, in a manner that enables it to be read, viewed, etc., free of charge, to anyone who wishes

²⁹² *Public Access to Information and Secrecy with Swedish Authorities*, Chapter 2.1. Available at: <http://justitie.regeringen.se/inenglish/pressinfo/pdf/publicaccess.pdf>.

²⁹³ *Ibid.*

²⁹⁴ Article 14.

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to view it. Where necessary, this includes making equipment available for such purposes. The document may also be copied or otherwise reproduced for a fixed fee, although public authorities are not obliged to make electronic documents available other than via a print out. Applications for transcripts shall be dealt with "promptly" although specific timelines are not set out. These obligations does not, however, apply where it "presents serious difficulty" or where the requester can be provided access, without serious inconvenience, at a public authority "located in the vicinity".²⁹⁵

A particular feature of the Swedish freedom of information system, set out in Chapter 15 of the Secrecy Act, 1981, is the requirement for all public authorities to register all documents held. There are four exceptions to this rule:

1. documents which are obviously of little importance, such as press cuttings;
2. documents which are not secret and which are kept in a manner which makes it easy to ascertain whether they have been received or drawn up by a public authority;
3. documents found in large numbers which have been exempted; and
4. electronic records kept in a central registry.²⁹⁶

In general these registers are open for public inspection and an effort is now underway to ensure that they are available electronically.²⁹⁷

Exceptions

The exceptions are set out in Article 2 of Chapter 2 of the Act although, as noted above, the definition of whether a document is official also serves to limit access. Article 2(1) provides for restrictions which "are necessary having regard to" a number of interests. This can be seen as a form of harm test and it is consistent with the language used under international law for restrictions on freedom of expression.

Article 2(2) also requires any restriction to be "scrupulously specified in the provisions of a special Act of law", under which the government

²⁹⁵ Articles 12-13.

²⁹⁶ *Public Access to Information and Secrecy with Swedish Authorities*, note 293, Chapter 3.6.1.

²⁹⁷ See Banisar, David, *Freedom of Information and Access to Government Records Around the World*, under Sweden. Available at: <http://www.freedominfo.org/survey/>.

may issue detailed regulations, thus satisfying the prescribed by law part of the test for restrictions on freedom of expression. This special Act is the Secrecy Act, which sets out comprehensive grounds for secrecy, including references to other legislation and government regulations.²⁹⁸ Most, but not all, provisions of the Secrecy Act provide for some form of harm test, although in some cases these reverse the presumption in favour of disclosure by providing that the document is secret unless it is clear that no harm will result.²⁹⁹

Notwithstanding the above, several provisions of the Secrecy Act authorise the government, in special cases, to disclose particular official document. Neither the Freedom of the Press Act nor the Secrecy Act provides, however, for a public interest override.

The protected interests include the following:

- ◆ security or relations with foreign States or international organisations;
- ◆ central finance policy, monetary policy or foreign exchange policy;
- ◆ inspection, control or other supervisory functions;
- ◆ the interest in preventing or prosecuting crime;
- ◆ the public economic interest;
- ◆ protection of personal integrity and economic privacy; and
- ◆ preservation of animal or plant species.

These are, by-and-large, common restrictions, apart from the last one, which is somewhat unique. These are the only grounds for restricting access to official documents and, in such cases, a notation must be provided on the document, indicating the provision under which the restriction is authorised.³⁰⁰

The Act also provides for severability of documents where only part of the document is covered by an exception.³⁰¹ The Act, in conjunction with the Secrecy Act, also envisages that in some cases documents subject to secrecy may be made available subject to certain reservations,

²⁹⁸The regulations are contained in the Secrecy Ordinance, Swedish Code of Statutes 1980:657, reprinted in 1998:1333.

²⁹⁹*Public Access to Information and Secrecy with Swedish Authorities*, note 292, Chapter 3.3.2.

³⁰⁰Article 16.

³⁰¹Article 12.

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such as a prohibition on publication or on any use other than for research, where these would eliminate the risk of harm.³⁰² Similar reservations may be imposed by an individual when waiving their right to personal privacy. Finally, the Secrecy Act does impose limits, ranging from 2 to 70 years, on the withholding of documents.³⁰³

Appeals

An individual may appeal any refusal to provide, or limits on access. Appeals must be referred to a higher official within the public authority at the requester's demand. From there, an appeal against a decision of a minister is lodged with the government and against a decision by another public authority with the courts. An appeal against a decision by agencies of the parliament will be governed by special provisions. The special Act authorising such refusal (referred to above under Exceptions) shall "stipulate in detail" how an appeal may be lodged.³⁰⁴ There is no provision for appeal to an independent administrative body and appeals to the courts are not available for all types of requests.

³⁰² *Public Access to Information and Secrecy with Swedish Authorities*, note 292, Chapter 3.5.4.

³⁰³ *Ibid.*, Chapter 3.3.3.

³⁰⁴ Article 15.

Thailand

Introduction

The worst economic crisis in decades, coming to a peak in the late 1990s, had a profound impact on politics in Thailand, leading to the adoption of a new Constitution in October 1997, which guaranteed the right to access information held by public authorities, subject only to limited exceptions.³⁰⁵ Public anger over corruption and the lack of transparency in government, which had contributed to the crisis, had led to the adoption, three months previously, of the Official Information Act,³⁰⁶ which came into effect on 9 December 1997.

The Right of Access

The Act does not include a special provision guaranteeing the right of access to public information, outside of the procedural guarantee for this right, at section 11.

Definitions

Information is defined very broadly to include any material that communicates anything, regardless of the form that material takes. Official information is defined simply as information in the possession of a State agency, whether relating to the operation of the State or to a private individual.³⁰⁷

A State agency, the term used for public bodies, is defined broadly as, "central administration, provincial administration, local administration, State enterprise, Government agency attached to the National Assembly, Court only in respect of the affairs unassociated with the trial and adjudication of cases, professional supervisory organisation, independent agency of the State and such other agency as prescribed in the Ministerial Regulation".³⁰⁸ This effectively captures the administrative functions of the legislative and judicial branches of government. It also does not cover private bodies which are substantially publicly funded.

³⁰⁵ Section 58.

³⁰⁶ B.E. 2540 (1997). Available at: <http://www.oic.thaigov.go.th/eng/statue/Statue.htm>.

³⁰⁷ Section 4.

³⁰⁸ *Ibid.*

Process

Anyone may make a request for information not otherwise required to be published or made available for inspection, and the information shall be provided within a reasonable length of time, not actually specified, as long as the request is sufficiently detailed to identify the information in question, unless the request is for an excessive amount of information or requests are made too frequently without reasonable cause. Where the record may be damaged, the State agency may extend the period for providing the information. Information will only be provided where it is held in a form appropriate for distribution, or where it may be transferred electronically. A State agency may, notwithstanding that it holds the information, advise a requester to transfer a request to another State agency.³⁰⁹

The Act contains reasonably detailed provisions for third party notice. Third parties must be given 15 days notice and an opportunity to provide objections in writing. Where an objection is provided, it must be considered and the author provided with notice of the decision. Actual disclosure of the information must also be delayed for 15 days during which an appeal may be lodged.³¹⁰

Duty to Publish

The Thai Act provides for both a duty to publish information in the Government Gazette and for a duty to make certain information available for inspection, although neither of these obligations apply to information which is required by law to be disseminated or disclosed.³¹¹ These obligations are restricted in scope to information which came into existence after the Act came into force. The former obligation, found at section 7, covers information about the structure and organisation of the body, a summary of its main powers, duties and operational methods, contact details for the purpose of making requests, by-laws, regulations and policies, and such other information as may be determined by the Official Information Board.

Section 9 requires State agencies to make the following information, subject to the regime of exceptions, available for inspection:

- ◆ a decision which has a direct effect on a private individual;

³⁰⁹ Sections 11 and 12.

³¹⁰ Section 17.

³¹¹ Section 10.

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- ◆ any policy or interpretation not covered by section 7;
- ◆ a work-plan and annual expenditure estimate;
- ◆ a manual or order relating to work which affects the rights or duties of private individuals;
- ◆ published materials relating to their powers and duties;
- ◆ monopolistic contracts and joint ventures;
- ◆ resolutions of governing bodies established by law; and
- ◆ other information as determined by the Official Information Board.

Anyone may request access to these documents but, with the approval of the Official Information Board, the State agency may charge fees, with due regard to the need for concessions for persons with low incomes.

Exceptions

Section 3 of the Act provides that all laws which are inconsistent with it shall, to the extent of that inconsistency, be replaced by it. However, section 15(6) provides that information protected by law against disclosure is exempt. It must, therefore, be assumed that section 3 does not apply to exceptions.

Section 14 provides: "Official information which may jeopardise the Royal Institution shall not be disclosed." This involves a form of harm test, but it is not clear what precisely would be covered.

Section 15 is the main exception provision. It provides that a State agency may issue an order prohibiting the disclosure of official information in various categories, taking into account the duties of the agency, the public interest and any private interests involved. The reference here to public interest, although useful, is not the same as a public interest override, which should be couched in mandatory terms and should not be just one factor to be considered.

Section 15 provides for the following categories of exception:

- ◆ information the disclosure of which would threaten national security, international relations or national economic security;
- ◆ information the disclosure of which would undermine law enforcement;

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- ◆ internal opinions or advice, but not technical or factual reports which have been relied upon;
- ◆ information the disclosure of which would endanger the life or security of any person;
- ◆ personal information which would unreasonably encroach on privacy;
- ◆ information already protected by law or provided in confidence; and
- ◆ any other information protected by Royal Decree.

State agencies are also required to put in place systems and rules to prevent unauthorised disclosure of information, in accordance with the Rule on Official Secrets Protection.³¹²

A stronger form of public interest override is provided in section 20, which provides that officials shall not be liable for good faith disclosures where they release information for the purpose of securing an overriding public interest, and the disclosure is reasonable. This focuses on purpose rather than requiring an actual balancing of the various interests involved.

The Act also provides for time limits for non-disclosure of information. Information relating to the Royal Institution shall be disclosed after 75 years while all other information is presumed to be subject to disclosure after 20 years, although the State agency may, where it is of the opinion that the information should not yet be disclosed, extend this by up to five years. This information shall then be transferred to the National Archives Division or an appropriate other archiving body or, where provided for in the rules, destroyed.³¹³

Appeals

The Act provides for the establishment of an Official Information Board consisting of a number of Permanent Secretaries, for example, for defence, agriculture and commerce, along with the Minister appointed by the Prime Minister as chair and 9 other members, appointed by the Council of Ministers, from the public and private sectors.³¹⁴ Members hold office for 3 years, which may be renewed, and may be removed for, among other things, being incompetent or having been imprisoned.³¹⁵

³¹²Section 16.

³¹³Section 26.

³¹⁴Section 27.

³¹⁵Sections 29 and 30.

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These provisions fail to ensure the independence of this body although in practice it has garnered public respect.

Anyone who considers that a State agency has failed to publish information, to make information available or to provide information in response to a request may lodge a complaint with the Official Information Board. This right is not applicable in certain cases, including where the State agency has issued an order declaring the information exempt or an order refusing to correct personal data. These limitations seriously undermine the effectiveness of an appeal. The Board must issue a decision within 30 days, which can be extended for another 30 days upon notice to the requester.³¹⁶ The Board can also require the State agency to produce any information before it, as well as inspect their premises.³¹⁷ Failure to comply with an order of the Board in relation to summons or producing information may lead to imprisonment for up to three months and/or a fine.³¹⁸

In addition to this, the Board has a mandate to provide advice to State officials and agencies, to make recommendations regarding the enactment of regulations or rules under the Act, to provide an annual report on implementation to the Council of Ministers and to carry out other duties as entrusted to it by the Council of Ministers or Prime Minister.³¹⁹

Requesters and others may, within 15 days, appeal a decision through the Board to the Information Disclosure Tribunal, even when an order for non-disclosure has been issued. The Board shall constitute specialized Tribunals, based on the type of information in question, such as security, economy or law enforcement. Each Tribunal consists of at least three people, with government officials as the secretary and assistant secretary. The Tribunal shall decide appeals within seven days and their decisions are considered final.³²⁰

The Board, Tribunal or courts shall consider the matter without divulging the information in dispute.³²¹

³¹⁶Section 13.

³¹⁷Sections 32 and 33.

³¹⁸Section 40.

³¹⁹Section 28.

³²⁰Sections 36 and 37.

³²¹Sections 18 and 19.

Promotional Measures

The Thai Act includes few promotional measures. Officials are protected against liability for disclosing information in good faith as long as they act in accordance with the rules on non-disclosure or in the public interest (see above under exceptions).³²²

The Act also includes a chapter on protection of personal data, limiting the collection, storage and use of such data. This system also allows everyone to access their own personal data, subject to the regime of exceptions.³²³

³²²Section 20.

³²³Sections 21-25.

United Kingdom

Introduction

The United Kingdom presents an interesting conundrum on freedom of information, contrasting a vibrant media operating in an atmosphere of relatively high respect for freedom of expression with a government which has, at least until recently, been obsessed by secrecy. This explains the odd situation whereby a freedom of information law was not passed in the United Kingdom until November 2000,³²⁴ long after most established democracies had adopted such a law. Even so, the right of access will now not come into effect until January 2005, although certain other parts of the law will. The United Kingdom FOI Act includes very good process guarantees, along with a number of innovative promotional measures. At the same time, it is seriously undermined by the very extensive regime of exceptions.

The Right of Access

The first provision in the United Kingdom's FOI Act, section 1(1), provides that any person "making a request for information to a public authority is entitled" to be informed whether or not the body holds the information and, if it does, to have the information "communicated" to him. This right is not limited by nationality or residence, but it is made subject to a number of other provisions in the Act, including:

- ◆ any reasonable request by the body for further information in order to identify and locate the information;³²⁵
- ◆ the regime of exceptions (defined in the Act as exemptions);
- ◆ the payment of any fees; and
- ◆ an exception for vexatious or repeated requests.³²⁶

Definitions

The Act defines information simply as "information recorded in any form,"³²⁷ which is held by the public authority at the time the request is

³²⁴The Freedom of Information Act 2000. Available online at: <http://www.cfoi.org.uk/foiact2000.html>.

³²⁵Section 1(3).

³²⁶These reasons for non-disclosure are set out in section 1(2).

³²⁷Section 84.

received.³²⁸ It is understood that this includes any information whatsoever held by the public authorities, regardless of its form, status, date received, or whether or not it was produced by the body. However, the Act also provides that information is understood to be held by a public authority if it is held otherwise than on behalf of someone else, or if someone else holds it on behalf of the authority.³²⁹ Thus, public authorities cannot escape their obligations simply by getting someone else to hold the information.

The main means under the Act for designating public authorities³³⁰ is through a list set out in Schedule 1, running to some 18 pages. The list includes all government departments, the various legislative bodies (the Act does not cover Scotland, which has its own law, the Freedom of Information (Scotland) Act 2002), the armed forces and numerous other bodies listed individually by name. It does not, however include the special forces or, with a few small exceptions, the court system. The Act also provides that the Secretary of State may add to the list of bodies in Schedule 1 subject to certain conditions,³³¹ or more generally designate as public authorities bodies which "exercise functions of a public nature" or which provide under contract services for a public authority.³³² Finally, publicly-owned corporations, defined as bodies wholly owned by the Crown or a public authority other than a government department, are also public authorities.³³³ The Act also provides that where a body is designated as a public authority only in relation to certain information held, the obligation of disclosure is similarly restricted to that information.³³⁴

Process

Anyone wishing to access information may submit a request in writing specifying their name and address, as well as a description of the information desired. A request is deemed to be in writing if it is received electronically, as long as it is legible and capable of being used for subsequent reference.³³⁵ Public authorities are required to provide such

³²⁸Section 1(4).

³²⁹Section 3(2).

³³⁰Defined in section 3(1).

³³¹Section 4.

³³²Section 5.

³³³Section 6.

³³⁴Section 7.

³³⁵Section 8.

assistance to requesters, "as it would be reasonable to expect the authority to do".³³⁶ While the extent of this obligation is not spelt out, it would at least include advice on how to describe the information appropriately, as well as assistance in reducing a request to writing where the requester was unable to do so themselves, for example because of illiteracy or disability.

A public authority must normally either provide the information or inform the requester of its refusal to do so promptly and, in any case, within twenty working days. For the purpose of calculating the twenty days, the time between informing the requester of the fees to be paid and the date on which those fees are actually paid is not counted. The Secretary of State may, by regulation, extend this period in respect of different classes of information, to up to 60 days. Any notice of a refusal to disclose must state the exemption which is being applied and the reasons therefore.

A slightly different regime applies where disclosure depends on a consideration of the overall public interest, which may justify disclosure even of otherwise exempt material.³³⁷ In such cases, the public authority does not need to provide the information, "until such time as is reasonable in the circumstances".³³⁸ However, the requester must be notified within the twenty days that the matter is still under consideration, and this notice should give an estimate of the time within which a decision will be made.³³⁹ Where, after such a delay, the final decision is not to disclose, a further notice must be sent setting out the reasons for this.³⁴⁰

The Act allows public authorities to make disclosure of information conditional upon payment of a fee and any such fee must be paid within three months.³⁴¹ However, such fees must be in accordance with regulations made by the Secretary of State and these may prescribe that no fee is to be paid in certain cases, set a maximum fee and/or provide for the manner in which fees are to be calculated. Draft regulations prepared by the Lord Chancellor set fees at 10% of the marginal cost of locating and retrieving the information, plus the reproduction and postage costs.³⁴² This regime does not, however, apply where a different system

³³⁶Section 16.

³³⁷See below, under Exceptions.

³³⁸Section 10.

³³⁹Section 17(2).

³⁴⁰Section 17(3).

³⁴¹Section 9(2).

³⁴²Available at <http://www.lcd.gov.uk/foi/dftfees.pdf> , section 4.

of fees is prescribed by another law. Section 12 of the Act also provides that information does not need to be provided where the cost would exceed an "appropriate limit" which, in turn, shall be "as may be prescribed", currently proposed to be around £600.³⁴³ In this case, however, the information may still be provided in accordance with a different set of regulations.³⁴⁴ In practice, this system should in effect provide for two different sets of fees depending on the scale of the request, although its permissive language means that section 12 is formally an exception and would allow a public authority to refuse all larger requests.

Under the United Kingdom FOI Act, the requester may specify the form in which he or she wishes to receive the information. Three different forms of communication of the information are listed as options for the requester: in permanent or another form; an opportunity to inspect a record containing the information; or a digest or summary of the information in permanent or another form. The public authority must provide the information in the form requested, as far as to do so is "reasonably practicable", taking into account, among other things, the cost.³⁴⁵

Duty to Publish

The United Kingdom FOI Act, unlike many other such laws, does not provide a list of information that each public authority must, even in the absence of a request, publish. Rather, section 19 provides that every public authority must develop, publish and implement a publication scheme, setting out the classes of information which it will publish, the manner in which it will publish them and whether or not it intends to charge for any particular publication. In adopting the scheme, the public authority must take account of the public interest in access to the information it holds and in the "publication of reasons for decisions made by the authority".

Importantly, the scheme must be approved by the Information Commissioner. The Commissioner may put a time limit on his or her approval or, with six months notice, withdraw the approval. Furthermore, the Act provides for the development of model publication schemes by the Commissioner for different classes of public authority. As long as the

³⁴³Section 12.

³⁴⁴Section 13.

³⁴⁵Section 11.

scheme remains approved, any public authority within the relevant class may simply apply that scheme, rather than developing its own.³⁴⁶

This system seeks to incorporate a degree of flexibility in the area of publication, so that public authorities may adapt implementation in this area to their specific needs, but without granting these authorities excessive discretion, which might lead to significant variation in the extent of publication by different public authorities, as well as to levering down of responsibilities in this area.³⁴⁷ It also provides for oversight by the Commissioner without placing too great a burden on him or her, taking into account the very numerous public bodies, through the model publication scheme.

Exceptions

The United Kingdom FOI Act has a very broad regime of exceptions, referred to in the law as exemptions, reflecting an ongoing preoccupation with secrecy in government. There are three general exceptions, as well as some twenty specific ones. In terms of the three part test for exemptions, set out above, the Act partially complies. Most of the exemptions are reasonably clear, but they are not necessarily narrow and, in some cases go beyond what has been considered necessary to withhold in other countries (see the Exceptions Table).

Some of the exemptions are subject to a harm test, but the majority are not, making them class exemptions. These include: information accessible by other means (section 21), information intended to be published (section 22), information relating to security bodies (section 23), information provided confidentially by another State or inter-governmental body (section 27(2)), investigations by public authorities (section 30), court records (section 32), parliamentary privilege (section 34), formulation of government policy (section 35), communications with Her Majesty (section 37), most personal information (section 40), information provided in confidence (section 41), legally privileged information (section 42), trade secrets (section 43(1)), and information the disclosure of which is prohibited by any other law or European Community obligation (section 44). In a few cases, for example legally privileged information, these exemptions already effectively incorporate an internal harm test. Most, however, do not despite the fact that, as

³⁴⁶Section 19.

³⁴⁷Although in practice, so far, there is little uniformity in the schemes produced by different authorities, apart from those who have adopted the model publication schemes.

demonstrated by the practice in other countries, it would be possible to apply one.

The Act does provide for a public interest test, albeit in negative terms, providing that the obligation to disclose does not apply where, "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".³⁴⁸ This is a good test, requiring the grounds for exemption to outweigh those in favour of disclosure. It is, however, undermined in two key ways. First, Section 2(3) provides a long list of exemptions which are "absolute", in the sense that the public interest override does not apply. These include: information accessible by other means (section 21), information relating to security bodies (section 23), court records (section 32), parliamentary privilege (section 34), the conduct of public affairs in relation to both houses of parliament (section 36), most personal information (section 40), information provided in confidence (section 41), and information the disclosure of which is prohibited by any other law or European Community obligation (section 44). Most of these are themselves class exemptions.

The exceptions to the public interest override are wide but even more significant is the power provided for in section 53 which relate to decisions by the Commissioner in relation to the public interest override. This allows the "accountable person" at any of the public authorities covered by this section, normally a minister, within twenty days of decision by the Commissioner that the public authority is in breach of the law, to sign a certificate that, "he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure" to comply with the law. The effect of such a certificate is effectively to void the Commissioner's decision. This power is granted to all government departments, the National Assembly of Wales and any other public authority so designated by the Secretary of State. In practice, this substantially undermines the enforcement powers of the Commissioner in relation to the public interest override.

The three general exemptions are for vexatious or repeated requests (section 14), information which is already reasonably accessible to the applicant, even though this involves payment (section 21), and information intended to be published, as long as it is reasonable not to disclose it pursuant to the request, even though no date of publication has been set (section 22).

³⁴⁸Section 2(2)(b).

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As noted above, there are some twenty specific exemptions. Given the large number of exemptions, only a few which merit special attention are described here. Section 23 of the Act exempts information which was "directly or indirectly supplied to the public authority by, or relates to" the work of a long list of security bodies and oversight tribunals. For the security bodies, this exemption is in addition to their total exclusion from the ambit of the Act. Furthermore, a certificate by a minister that the information either was supplied directly or indirectly by one of these bodies, or that it relates to their work, is conclusive evidence of that fact, subject to standards of judicial review. This is a very broad class exemption indeed, which would include, for example, information on the purchase of pencils by the special forces and held by the government accounting department.

The Act contains exemptions for information "required for safeguarding national security"³⁴⁹ or the disclosure of which would prejudice defence.³⁵⁰ However, as with security bodies, a certificate by a minister that the information is required for national security is conclusive evidence of that fact.

Information is exempt if it is held by a government department or by the National Assembly for Wales and relates to the formulation or development of government policy. However, this exemption ceases to apply to statistical information, but not other information, once the policy has been adopted. Information is also exempt if it relates to ministerial communications or the operation of any ministerial private office.³⁵¹ Information is also exempt if disclosure would inhibit the "free and frank provision of advice" or otherwise prejudice "the effective conduct of public affairs".³⁵² Although these exemptions are phrased broadly, they do at least include harm tests.

The United Kingdom FOI Act, in common with many other such laws but contrary to the principles set out above, also preserves secrecy provisions in other laws, as well as disclosures prohibited by European Community obligations or the rules relating to contempt of court.³⁵³ However, the Act also gives the Secretary of State summary powers to repeal or amend by order laws restricting disclosure.³⁵⁴ This may serve

³⁴⁹Section 24.

³⁵⁰Section 26.

³⁵¹Section 35.

³⁵²Section 36.

³⁵³Section 44.

³⁵⁴Section 75.

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to mitigate at least the most egregious problems of leaving in place secrecy laws.

The Act also contains detailed provisions relating to historical records, defined as records which are more than 30 years old. A number of the exemptions no longer apply to historical records, including those protecting relations within the United Kingdom (section 28), court information (section 32), those protecting internal government processes (sections 35 and 36) and commercially confidential information (section 43).³⁵⁵

The Act provides that nothing contained within it shall be deemed to limit the powers of a public authority to disclose information.³⁵⁶ Thus, like most freedom of information acts, it is not in any way a secrecy law as well.³⁵⁷

Appeals

The United Kingdom FOI Act provides for three levels of appeal, first within the public authority which holds the information, second to the Information Commissioner and then to a special Information Tribunal. Both of these bodies were established under the Data Protection Act 1998 as, respectively, the Data Protection Commissioner and the Data Protection Tribunal. The Commissioner is appointed by Her Majesty³⁵⁸ and the Tribunal consists of a chair and a number of deputy chairs appointed by the Lord Chancellor (effectively the Minister of Justice) as well as a number of other members appointed by the Secretary of State.³⁵⁹ Despite this appointments process, both effectively operate as independent bodies.

Section 45 provides for the publication by the Secretary of State of a code of practice dealing with various matters including internal procedures for dealing with complaints relating to requests for information.

Pursuant to section 50, the Information Commissioner must consider all complaints relating to the manner in which requests have been dealt

³⁵⁵Part VI.

³⁵⁶Section 78.

³⁵⁷The United Kingdom has, for this purpose, the Official Secrets Act 1989, a law which has been widely criticised. See, for example, ARTICLE 19 and Liberty, *Secrets, Spies and Whistleblowers: Freedom of Expression and National Security in the United Kingdom* (2000, London, ARTICLE 19 and Liberty).

³⁵⁸Data Protection Act 1998, section 6(2).

³⁵⁹Data Protection Act 1998, section 6(4).

with under the Act unless the complainant has not exhausted any internal complaints procedures, there has been excessive delay or the complaint appears frivolous. Upon receipt of a complaint, the Commissioner must issue a decision notice and, where there has been a breach of any provision in Part I - including the obligation to disclose information, a failure to disclose in the form requested or a failure to properly notify the requester of reasons for any refusal to disclose - this notice should direct the public authority to take steps to rectify the problem.

The Commissioner has the power to require any public authority to provide him or her with any information he or she may require either pursuant to a complaint or for purposes of ensuring that the authority has complied with its obligations under the Act.³⁶⁰ The Commissioner may also require a public authority to take such steps as are necessary to comply with its obligations under the Act, even in the absence of a complaint.³⁶¹

Where a public authority fails to take the steps required of it by the Commissioner, he or she may notify the courts of this fact and the courts may inquire into the matter and, if it is substantiated, deal with the authority as if it had committed a contempt of court.³⁶²

Either the requester or the public authority may appeal to the Tribunal against any decisions or orders of the Information Commissioner. The Tribunal has the power to review the decision of the Commissioner on both points of law and fact.³⁶³ Either the Commissioner or anyone whose request has been denied may appeal to the Tribunal against a Ministerial certificate stating either that information relates to security bodies or that it is required for safeguarding national security. As regards the former, where the Tribunal finds that the information is not exempt, it shall quash the certificate. Regarding national security certificates, the Tribunal shall apply the standards of judicial review and quash it if the Minister did not have reasonable grounds for issuing the certificate.³⁶⁴

A further appeal lies from a decision of the Tribunal on points of law.³⁶⁵

³⁶⁰Section 51.

³⁶¹Section 52.

³⁶²Section 54.

³⁶³Sections 27-58.

³⁶⁴Section 60.

³⁶⁵Section 59.

Promotional Measures

The UK FOI Act contains a number of promotional measures. At a very general level, it provides for monies to be allocated to ensure its proper implementation,³⁶⁶ and protects public authorities from defamation claims when it discloses information provided by third parties, as long as it did not act with malice.³⁶⁷ It also makes it an offence for any person to alter, deface, destroy or conceal any record with the intention of preventing the disclosure of that record.³⁶⁸

More significant are the two codes of practice that the Act provides for. The first, set out in section 45, is a code of practice to be developed by the Secretary of State to provide guidance to public authorities on a number of matters including:

- ◆ the provision of advice to persons making requests for information;
- ◆ the transfer of requests between public authorities;
- ◆ consultation with third parties likely to be affected by a disclosure;
- ◆ the inclusion in contracts of terms relating to information disclosure; and
- ◆ how public authorities should deal internally with complaints.

The code is not binding, but the Information Commissioner has various promotional roles, detailed below, in relation to this code.

Second, pursuant to section 46, the Lord Chancellor (the Minister of Justice) shall issue a code of practice providing guidance to public authorities regarding practice which it would be desirable for them to follow in connection with the keeping, management and destruction of their records. This code shall also deal with the issue of transfer of records to the Public Record Office (the archives), including the destruction of those records which are not to be transferred. Again, the code is not binding, but the Information Commission has a mandate to promote compliance with it.

The Information Commissioner has a general mandate under Section 47 to promote compliance with the Act, the two codes of practice noted

³⁶⁶Section 85.

³⁶⁷Section 79.

³⁶⁸Section 77.

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above and generally good practice in relation to the maintenance and disclosure of information. For this purpose, the Commissioner is specifically empowered to provide information on matters within the scope of his or her functions, to assess the performance of any public authority,³⁶⁹ issue practice recommendations on the extent to which public authorities are complying with the two codes of practice noted above,³⁷⁰ and to report annually, as well as on an ad hoc basis, to parliament.³⁷¹

³⁶⁹Section 47.

³⁷⁰Section 48.

³⁷¹Section 49.

United States

Introduction

The United States was one of the first countries to embrace freedom of information after Sweden,³⁷² adopting legislation giving effect to this right in 1966. Since that time, despite ups and downs, it is fair to say that a significant culture of openness has developed in government, fuelled not only by the Freedom of Information Act³⁷³ but also by the activities of whistleblowers, as well as the Privacy Act,³⁷⁴ which gives access to personal information held by public authorities, the Government in the Sunshine Act,³⁷⁵ which requires disclosure of the deliberations of certain bodies, primarily those with governing boards, and the Federal Advisory Committee Act,³⁷⁶ which requires committees that advise federal bodies to be open. In addition, all States now have freedom of information acts of their own.

The Right of Access

Subsection (a)(3)(A) of the Act sets out the basic right of any person to request and receive information promptly from the agencies covered, as long as the request meets certain basic conditions and subject to the provisions of the law. The request must reasonably describe the record sought and the request must be in accordance with published rules relating to time, place, any fees and the procedures to be followed. There are no limits based on citizenship or residence, and foreigners do frequently use the law.³⁷⁷

Definitions

The Act defines "record" - the term used throughout to refer to the subject of a request - as "any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format".³⁷⁸ This has been interpreted by the United States

³⁷²Sweden adopted legislation in 1776. This also covered Finland, then a Swedish-governed territory, which adopted its own protection for freedom of information when it became independent in 1919.

³⁷³5 U.S.C. § 552. Available online at: http://www.epic.org/open_gov/foia/us_foia_act.html.

³⁷⁴5 U.S.C. § 552a.

³⁷⁵5 U.S.C. § 552b.

³⁷⁶5 U.S.C. App. II.

³⁷⁷This was noted, for example, by David Hencke, investigative journalist with the British Guardian Newspaper, at an International Conference on The Right to Information: Focus on South Asia hosted by ARTICLE 19, 29-31 July 2001.

³⁷⁸Paragraph (f)(2).

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Supreme Court to include any record created or obtained by the agency in question, which is under the control of that agency when the materials are requested.³⁷⁹

The term "agency", which is used by the Act to refer to the public bodies under an obligation to disclose, includes, "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency". In assessing whether or not a body is covered by the definition, the critical question is whether it has any authority under law. The Act is thus focused on the executive branch of government, in all its manifestations, including where it controls private corporations. It does not, however, cover either the legislative branch - Congress - or the courts. Nor does it cover the Executive Office of President, including, for example, the National Security Council and White House Chief Counsel. Finally, it does not cover private bodies which are substantially publicly funded.

Process

Anyone may make a request for information, subject to the formalities noted above relating to clarity and any procedural rules established by the agency in question. The Act includes detailed rules on time limits. Eligible requests - that is those that are within the ambit of the law and not covered by exceptions - shall be answered "promptly", normally be decided within 20 working days.³⁸⁰ In "unusual circumstances", the time limit may by notice be extended for an additional 10 days. In such cases, the agency shall notify the requester that the information cannot be provided within the original 20 days and provide him or her with an opportunity either to limit the scope of the request or to arrange an alternative timeframe.³⁸¹ For these purposes, "unusual circumstances" shall mean, to the extent reasonably necessary to the proper processing of requests, the need to search for records from field facilities, the need to search through a large volume of records or the need to consult with another agency or two or more branches of the same agency.³⁸²

³⁷⁹ *Department of Justice v. Tax Analysts*, 492 US 136 (1989), pp. 144-145.

³⁸⁰ Subparagraph (a)(3)(A).

³⁸¹ Clause (a)(6)(B)(ii).

³⁸² Clause (a)(6)(B)(iii).

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An appeal will lie for breach of these time limits. However, if the government can show that exceptional circumstances exist which justify the delay, and that the agency is exercising due diligence in responding to the request, the court may grant the agency additional time to fulfil the request, while at the same time retaining jurisdiction over the case.³⁸³ In practice, as a result, some agencies, such as the FBI, have long delays, often several years, which have been upheld by the courts.

The Act also provides for "multitrack" processing of requests based on the amount of work involved,³⁸⁴ as well as for expedited processing of requests in cases where the requester demonstrates a "compelling need". A claim of such compelling need must be determined within 10 days and a notice to this effect provided to the requester. A compelling need exists either where a failure to obtain the record could reasonably be expected to pose an imminent threat to life or safety, or where there is an urgent need to inform the public about federal government activity and where the requester is primarily engaged in disseminating information.³⁸⁵

Jurisprudence under the Act requires an agency to undertake a search that is reasonably calculated to uncover all documents. This now finds statutory form in relation to records in electronic format, which require a reasonable effort to search for them, except where this would significantly interfere with the operations of the agency.³⁸⁶ In limited cases, agencies may aggregate different requests which actually constitute a single request.³⁸⁷ Requesters do not need to explain the reason for their request but this may assist them if they want to overcome any discretionary exemption, or apply for a fee waiver or for expedited request processing.

The notification should set out the reasons for the decision, along with any right of internal appeal.³⁸⁸ Where all or part of a request is denied, the notice shall also provide the names and titles or positions of any officers responsible for that denial,³⁸⁹ as well as a reasonable estimate of the quantity of information denied, unless this would divulge information excepted from disclosure.³⁹⁰

³⁸³ Clause (a)(6)(C)(i).

³⁸⁴ Subparagraph (a)(6)(D).

³⁸⁵ Subparagraph (a)(6)(E).

³⁸⁶ Subparagraphs (a)(3)(C) and (D).

³⁸⁷ Clause (a)(6)(B)(iv).

³⁸⁸ Clause (a)(6)(A)(i). The rules relating to this appeal are described below under Appeals.

³⁸⁹ Clause (a)(6)(C)(i).

³⁹⁰ Subparagraph (a)(6)(F).

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The Act sets out detailed rules on the fees which may be charged for requests for information. Each agency must, after public consultation, promulgate regulations specifying the schedule of fees which may be charged for access to information, as well as procedures and guidelines for waiving or reducing these fees. The schedules must conform to guidelines promulgated, again after public consultation, by the Director of the Office of Management and Budget, which shall provide a uniform schedule of fees for all agencies.³⁹¹

The Law provides for three different fee systems for different types of request. Requests for commercial use may be billed "reasonable standard charges for document search, duplication, and review". Requests by educational or scientific institutions which are not for commercial purposes may be billed only "reasonable standard charges for document duplication" and all other requests may be charged for search and duplication.³⁹² For the latter two categories of document, no fees may be charged for the first two hours of search or for the first 100 pages of documents. And no fee may be charged where the cost of collecting the fee would exceed the value of the fee.³⁹³

Only direct costs may be levied. As regards the review element of the charges, this shall apply only to the initial examination of the document to determine whether it should be disclosed. Furthermore, where disclosure is in the public interest because it is, "likely to contribute significantly to public understanding of the operations or activities of the government", records must be provided without charge or at a lower charge than would otherwise be the case.³⁹⁴ This is, in effect, a waiver for the media, as well as for NGOs who can show a public interest use. Finally, no advance fee may be charged unless the requester has already failed to pay a fee or the agency determines that the fee will exceed US\$250.³⁹⁵

This fee regime does not displace any statutory charging system for information.³⁹⁶

Pursuant to subparagraph (a)(3)(B), information must be provided to a requester in the specified format, as long as it is readily reproducible in

³⁹¹ Clause (a)(4)(A)(i).

³⁹² Clause (a)(4)(A)(ii).

³⁹³ Clause (a)(4)(A)(iv).

³⁹⁴ Clause (a)(4)(A)(iii).

³⁹⁵ Clause (a)(4)(A)(v).

³⁹⁶ Clause (a)(4)(A)(vi).

that format. Agencies are also required to make an effort to ensure that their records are reproducible for purposes of compliance with this duty.

Duty to Publish

The Act provides for two different obligations to proactively make information available to the public. Agencies are required to publish certain information in the Federal Register, as provided for in paragraph (a)(1), including the following:

- ◆ a description of its central and field organisation;
- ◆ the manner in which and from whom information may be requested;
- ◆ an overview of its general functions and of all formal and informal procedures;
- ◆ rules of procedure and a description of all forms and papers produced;
- ◆ statements of policy and legal rules of general applicability; and
- ◆ any amendments to the above.

The Law also requires agencies, in accordance with published rules, to make available for public inspection and copying a range of information, unless this information is to be published shortly and offered for sale. Records covered which were created after 1 November 1996 must be made available by electronic means. Information covered by this rule includes final opinions and orders, statements of policy and interpretations and administrative staff manuals. Significantly, this rule also covers records released pursuant to a request which, "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records", as well as an index of such records, which must be made available electronically. Information may be deleted from these records, to "the extent required to prevent a clearly unwarranted invasion of personal privacy" but in such cases a written justification must be provided and the extent of the deletion must be indicated, unless this would result in the disclosure of information which is exempt from disclosure. Agencies must maintain an index of all records covered by this rule, which must be published at least quarterly.³⁹⁷

³⁹⁷ Paragraph (a)(2).

Every agency which has more than one member is also required to make available for public inspection a record of the final votes of each member in every agency proceeding.³⁹⁸

Exceptions

The Act contains nine primary exceptions,³⁹⁹ in addition to exceptions for information that has already been published in the Federal Gazette or which is required to be made available for public inspection. The regime of exceptions is reasonably clear and comparatively narrow, but it could be significantly improved upon. There is no provision for a public interest override, and many of the exceptions are not subject to a harm test. In practice, as a result of this, many information requests fall into the "discretionary" category. A Department of Justice's FOIA Memorandum of 4 October 1993, issued by Janet Reno, called on agencies to use this discretion to disclose information. This was effectively reversed by a FOIA Memorandum issued by Attorney General John Ashcroft on 12 October 2001, which required agencies to carefully consider any discretionary disclosures. The Ashcroft Memorandum also promised legal defence to agencies whenever there was a 'sound legal basis' for their decision to withhold information, replacing the 'foreseeable harm' test applied previously.⁴⁰⁰

Significantly, paragraph (b)(3), the third exception, excludes from the ambit of the Act all records which are exempt from disclosure by other statutes, as long as these laws leave no discretion as to non-disclosure or establish particular criteria for withholding information. These conditions would rule out some secrecy provisions, but this rule still effectively leaves in place most secrecy laws.

The first exception covers all information which is specifically classified as secret, under criteria established by an Executive Order, for purposes of national defence or foreign policy, as long as the material is in fact properly classified pursuant to that Executive Order.⁴⁰¹ Although this does ensure some procedural guarantees against excessive classification, it is not subject to a harm test and there is little to prevent the original Executive Order from being overly broad.

³⁹⁸ Paragraph (a)(5).

³⁹⁹ These are set out in Subsection (b).

⁴⁰⁰ The text of the Memorandum is available at: <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>.

⁴⁰¹ The Clinton era Executive Order 12958 was recently amended by Executive Order 13292, of 25 March 2003. The new Order retains the basic system of automatic declassification after 25 years, but provides for greater discretion to exempt documents and extends the scope of documents not subject to this system, particularly those relating to national security.

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The second exception covers records, "related solely to the internal personnel rules and practices of an agency". Again, there is no harm test, although the exception itself is relatively narrow. The fourth exception applies to trade secrets, and confidential or privileged commercial or financial information obtained from a third party. Once again, although the exception does contain conditions, it is not subject to a harm test. The fifth exception applies to inter-agency memoranda which would not be available to parties in litigation.

The sixth exception covers files the disclosure of which, "would constitute a clearly unwarranted invasion of personal privacy", a relatively strong form of harm test. In practice, courts have applied a modified public interest test to determine whether or not an invasion of privacy is unwarranted. The seventh exception relates to a range of records compiled for law enforcement purposes, all of which, apart from one, have built-in harm tests. The non-harm test exception is to protect confidential sources of information, where harm from disclosure may normally be assumed. Despite that, there is no reason why this exception should not also have a harm test.

The eighth exception relates to certain reports prepared by an agency responsible for regulating financial institutions. Once again, although harm may often be presumed, this will not always be the case and the exception would benefit from being explicitly subject to a harm test. The final exception, which is not found in most freedom of information laws, relates to geological and geographical information concerning wells. Various theories exist as to why this unusual exception has been included; it is not subject to a harm test.

Subsection (b) requires that any information which may be segregated from exempt material be disclosed. It also requires requesters to be informed about the amount of information deleted and, where technically feasible, the place where the deletion was made.

Finally, subsection (d) provides that the law does not justify non-disclosure of information except as provided for in the Act and that it is not authority to withhold information from Congress.

Appeals

Requesters must first appeal any refusal to disclose information to the head of the relevant agency. This internal appeal must be decided within 20 working days and, if the appeal is refused, in whole or in part, the requester must be notified of the possibility of judicial review.⁴⁰² In

⁴⁰²Clause (a)(6)(A)(ii).

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unusual circumstances, as outlined above in relation to the original request, this period may be extended by written notice, for a maximum of another 10 days.⁴⁰³ If there is no response within the stipulated time limits, the requester can appeal directly to the courts.

There is no provision for an independent administrative level of appeal. If the internal appeals system has been exhausted, an appeal will lie to various courts, at the choice of the requester.⁴⁰⁴ Such an appeal will also lie if the time limits for a response have been exceeded, subject to exceptional circumstances (see above, under Process).⁴⁰⁵ Exceptional circumstances does not include a delay resulting from a predictable workload of requests but any refusal by the requester to modify the scope of a request or to arrange for an alternative timeframe for meeting the request may be taken into account.⁴⁰⁶

The defendant agency must file a response within 30 days of service of the pleading in the complaint.⁴⁰⁷ The court may require the agency to produce the record for its examination, *in camera* if necessary, and require the agency to disclose the record.

The court shall examine the matter *de novo*, and the burden of proof shall be on the agency to justify non-disclosure. However, the court is required to accord "substantial weight" to an affidavit of an agency concerning, among other things, whether the information falls within the scope of an exception.⁴⁰⁸ When considering appeals relating to fee waivers, the court shall consider the matter *de novo*, but based only on the record before the agency.⁴⁰⁹

The court may, in a case where the complainant "substantially prevails", order the government to pay reasonable lawyers fees and other litigation expenses.⁴¹⁰ In case of non-compliance with an order of the court, the responsible officer may be punished for contempt of court.⁴¹¹

⁴⁰³ Clause (a)(6)(B)(i).

⁴⁰⁴ Subparagraph (a)(4)(B).

⁴⁰⁵ Clause (a)(6)(C)(i).

⁴⁰⁶ Clauses (a)(6)(C)(ii) and (iii).

⁴⁰⁷ Subparagraph (a)(4)(C).

⁴⁰⁸ Subparagraph (a)(4)(B).

⁴⁰⁹ Clause (a)(4)(A)(vii).

⁴¹⁰ Subparagraph (a)(4)(E).

⁴¹¹ Subparagraph (a)(4)(G).

Promotional Measures

The Act includes a mechanism for addressing cases of obstruction of access. Where the circumstances of a case in which costs have been assessed against the government raises questions as to whether agency personnel "acted arbitrarily or capriciously" with respect to the withholding of information, the Special Counsel shall initiate a proceeding to determine whether disciplinary action is warranted. The findings of this proceeding shall be submitted to the administrative authority of the agency concerned, as well as to the officer concerned.⁴¹²

Agencies are required to submit annual reports to the Attorney General on their activities under the Act and these annual reports must be made publicly available, including via electronic means. The reports must, in particular, cover:

- ◆ the number of refusals to disclose information, along with the reasons therefor;
- ◆ the number of appeals, their outcome and the grounds for each appeal that does not result in disclosure of information;
- ◆ a list of all statutes relied upon to withhold information, whether the court has upheld the refusal to disclose and the scope of information withheld;
- ◆ the number of requests pending and the average number of days they have been pending;
- ◆ the number of requests both received and processed, along with the average number of days to process requests of different types;
- ◆ the total amount of fees charged; and
- ◆ the number of full-time staff working on access to information.⁴¹³

The Attorney General must also make all the annual reports available at a central website and notify various Congressional committee representatives of their availability.⁴¹⁴ The Attorney General, in consultation with the Director of the Office of Management and Budget,

⁴¹²Subparagraph (a)(4)(F). Apparently actions of this sort are extremely rare and even more rarely upheld by the courts.

⁴¹³Paragraph (e)(1).

⁴¹⁴Paragraph (e)(3).

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must develop reporting and performance guidelines for the annual reports and he or she must also submit an annual report listing the number of cases arising under the Act, the exception relied upon in each case, the disposition of each case and the cost, fees and penalties assessed.⁴¹⁵

Finally, the head of each agency is required to prepare and make publicly available a guide for requesting records including an index of all major information systems, a description of the main information locator systems and a handbook for obtaining various types of public information from the agency.

⁴¹⁵Paragraphs (c)(4) and (5).

International Organisations

UNDP

Introduction

The UNDP adopted its Public Information Disclosure Policy in 1997,⁴¹⁶ stating as its rationale for doing so that:

The importance of information disclosure to the public as a prerequisite for sustainable human development (SHD) has been recognized in major United Nations intergovernmental statements, including the Rio Declaration on Environment and Development. ... As a custodian of public funds, UNDP is directly accountable to its member Governments and indirectly accountable to their parliaments, their taxpayers, and the public in donor and programme countries.⁴¹⁷

The Policy is a progressive one, more so than the policies of other intergovernmental organisations. At the same time, it still fails in serious ways to meet the standards found many national laws.

Unfortunately, the Policy appears to be used very little. A study in 2001 noted:

Even when, as seen above, IDP is in practice nonexistent, UNDP is perceived by CSOs as a friendly and transparent institution.⁴¹⁸

The Right of Access

The Policy provides for access in two ways. First, it includes a list of documents that will be disclosed, either when finalised or, in some cases in draft form. This is similar to the approach adopted by other

⁴¹⁶The Policy is available at: <http://www.undp.org/csopp/CSO/NewFiles/policiesinfo.html>.

⁴¹⁷Para. 3.

⁴¹⁸Bisalo, R., *Revision of UNDP's Information Disclosure Policy*, 4 June 2001, section 2.3, Policy Revision. Available at: http://faculty.maxwell.syr.edu/asroberts/foi/library/undp_review_2001.pdf.

intergovernmental organisations. However, the UNDP Policy also provides for a general presumption in favour of disclosure, "in the absence of a compelling reason for confidentiality".⁴¹⁹

The documents that will be available are listed in paragraphs 12-14 dealing, respectively, with information about UNDP and its operations, documentation concerning programming, and documentation concerning country-specific activities. Different documents are available either in final form only or, in some cases and "where feasible", in draft form.

Definitions

Given the limited applicability of the Policy, definitions do not take on quite the level of importance that they would in national law. Information is not defined, but it may be presumed that the Policy covers all information held by the UNDP. The Policy notes that it is applicable to all documents created after its adoption, and also to documents created before that date, "unless there are compelling reasons to the contrary". This appears to distinguish between the two categories of documents, although the same test for confidentiality is applicable to all documents.⁴²⁰

The Policy does not really define its scope in terms of bodies covered, again given that it is primarily applicable simply to the UNDP. However, paragraph 9 notes that the Policy also applies to funds and programmes administered by the UNDP, including "United Nations Development Fund for Women (UNIFEM), the United Nations Capital Development Fund (UNCDF), and the United Nations Volunteers (UNV)."

Process

Documents will be made available through the Internet and in hard copy at UNDP headquarters and country and liaison offices.⁴²¹ Country-specific information will be available from the relevant country office and documents not available through that office will be sent by post. To facilitate access, Public Affairs Officers will be designated for these offices with a responsibility for ensuring that requests are "adequately addressed". Some information, particularly documents sent to the Executive Board for formal approval, will be available in all six UN

⁴¹⁹ Para. 1.

⁴²⁰ Para. 10.

⁴²¹ Para. 9.

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working languages while other documents will only be available in the language in which they were prepared.⁴²²

The Policy notes that the UNDP is currently studying best implementation practices, including the idea of "cost-recovery". A report on the Policy in June 2001 notes, however, that the study was never finalised or implemented.⁴²³ To keep costs low, a commitment is made to make extensive use of the Internet.⁴²⁴ Requesters must be provided with a response within 30 business days and, in case of refusal, reasons shall be provided.

Duty to Publish

The Policy does not explicitly provide for an obligation to publish but the UNDP does in practice actively publish a variety of information. Furthermore, the Policy makes a commitment to actively use the Internet to facilitate low-cost access, which, almost by definition, implies active publication.

Exceptions

The UNDP Policy, as noted above, both lists documents which are subject to disclosure and provides for a general presumption in favour of disclosure for other documents, subject to a set of exceptions.⁴²⁵ Paragraph 2 of the Policy notes the special relationship between the UNDP and programme governments, based on the Standard Basic Assistance Agreements (SBAAs) that are in force. These documents specifically state that the parties shall consult each other regarding publication of project-related information, and that, "information relating to any investment-oriented project may not be released by the UNDP to potential investors, except with the written consent of the government".

Decisions to treat documents as confidential should, according to the Policy, be made by governments and the UNDP at the time the document is designed. Paragraph 15 of the Policy sets out the recognised exceptions. However, the Policy also recognises the possibility of information being kept confidential even where it does not fall within the scope of the exceptions, as long as an explanation is provided. In this case, decisions on confidentiality shall be made by, "weighing the

⁴²² Paras. 16-17.

⁴²³ *Revision of UNDP's Information Disclosure Policy, note 418*, section 2.2 Implementation.

⁴²⁴ Para. 18.

⁴²⁵ Para. 6.

justification for confidentiality against the need for project and programme quality and public involvement". The provisions of paragraph 2, noted above, are no doubt relevant here.

Paragraph 15 lists 5 sets of exceptions, only one of which is subject to a harm test. There is no public interest override. The first exception in paragraph 15 covers proprietary information, intellectual property in the form of trade secrets and information provided in confidence, the disclosure of which would cause financial or other harm. The second exception relates to internal notes and other documents, unless "these are specifically intended for public circulation". Legally privileged information, including disciplinary information, forms the subject of the third exception. The fourth exception covers personal information, including health or employment-related information, except to the staff member concerned. Finally, the fifth exception deals with information relating to procurement processes that involves "prequalification" information about a bidder, proposals or price quotations.

Appeals

The Policy provides for the appointment of a Public Information and Documentation Oversight Panel. The Panel serves as an appeal body and requesters may lodge an appeal with the Panel, stating why they consider their request was inappropriately denied. The Panel is tasked with developing its own operating procedures.⁴²⁶

The Panel consists of five members, three UNDP professional staff and two "highly qualified individuals from the not-for-profit sector, one from a programme country and another from a donor country, appointed in their personal capacity," all appointed by the Administrator.⁴²⁷ The independence of this body is clearly not as well protected as in many national laws but, at the same time, it is encouraging that an intergovernmental organisation has accepted the principle that its decisions should be subject to review.

A long list of qualifications for both the staff members and the not-for-profit representatives is set out in the Policy, including such things as a good understanding of the UNDPs work, ability to balance transparency and confidentiality and access to mechanisms for disseminating information. The Panel appoints its own chair.

⁴²⁶ Paras. 20-23.

⁴²⁷ Paras. 20.

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According to the Policy, the Panel shall normally meet twice a year at UNDP headquarters but, where a case is particularly urgent or more than three appeals are pending, the Chair may call an emergency meeting, either in person or by teleconference. Minutes of the meeting shall be made available on the Internet.⁴²⁸ In practice however, a study on the Policy in 2001 notes that the Panel, while appointed, had never been convened.⁴²⁹

Promotional Measures

The Policy provides for a review two years after its adoption.⁴³⁰ The Panel has a number of promotional roles, in addition to its function as an appeals body. It is tasked with reviewing the UNDP's performance in implementing the policy, making recommendations for reform, and participating in the review process.⁴³¹

⁴²⁸ Chapter III.

⁴²⁹ *Revision of UNDP's Information Disclosure Policy, note 418*, section 2.2, Implementation.

⁴³⁰ Para. 10. It would appear that no review has taken place, unless the study noted above, note 418, is construed as this review.

⁴³¹ Chapter III.

World Bank

Introduction

The World Bank first began issuing instructions on disclosure to its staff in 1985⁴³² and, in the aftermath of the 1992 Rio Declaration on Environment and Development, adopted a formal, detailed Policy on the Disclosure of Information in 1993.⁴³³ The Bank took concrete steps to review its policy - in 1995, 1997, 1998 and 1999 - resulting in progressively more openness and an increase in the number of documents subject to disclosure. A new World Bank Policy on Disclosure of Information was adopted in 2001, which came into force in January 2002.⁴³⁴

Overview of the Policy

The World Bank Policy is fundamentally different from the other laws and policies described in this book. Like the other laws and policies, it contains a general presumption in favour of disclosure, stating: "[T]here is a presumption in favour of disclosure, subject to the provisions of this statement."⁴³⁵ Indeed, the Policy sets out four main rationales for openness relating to the different functions of the Bank, as follows: to promote effective operations as a development organisation, to promote accountability as an organisation owned by its member countries, to help attract investment as a borrower and to help staff carry out their responsibilities as an employer.⁴³⁶

However, the substance of the Policy is a list of documents that may be disclosed once certain conditions are met. Information that is not specifically listed in the Policy is not subject to disclosure. In practice, then, the Policy actually creates a presumption against disclosure, subject to a number of listed exceptions, namely documents that will be disclosed.

The *prima facie* conditions for release vary with the document in question. In some cases, the Policy simply provides that a document shall be available. In other cases, the document shall be available once it reaches

⁴³² Administrative Manual Statement 1.10, *Directive on Disclosure of Information*, 1985, revised in 1989.

⁴³³ The World Bank Policy on the Disclosure of Information (Washington, D.C.: World Bank, 1994).

⁴³⁴ Available at: <http://www1.worldbank.org/operations/disclosure/policy.html>.

⁴³⁵ Para. 4.

⁴³⁶ Para. 3.

a certain point, for example once it has been formally adopted by the Executive Directors. In many cases, availability depends on the consent of the affected country. Other conditions apply to the disclosure of other types of documents. These conditions are described in more detail below. A regime of exceptions applies to further limit document availability, even when the document satisfies the *prima facie* conditions for release.

The Policy applies to the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA), although in some cases different standards apply to document availability for these two different bodies. The IDA is the wing of the Bank that lends to the poorest countries, with the stated goal of reducing poverty. It provides 'credits', which are loans with zero interest, a repayment grace period of 10 years and maturities of 35-40 years. The IBRD states its goal as promoting sustainable development by lending to middle-income and creditworthy poorer countries. Although it does not "maximize profit", it "has earned a net income each year since 1948."⁴³⁷

There is no appeal from a refusal of the Bank to disclose information and the Policy fails to set out any process guarantees, even in relation to the time limit within which requests must be decided.

Conditions on Information Availability

The World Bank Policy places a number of *prima facie* conditions on information availability. This section outlines the main types of conditions. Notwithstanding these conditions, disclosure of a document may still be refused if the document in question falls within the scope of an exception. In general, information relating to safeguards for certain vulnerable or affected groups or interests - such as indigenous peoples, those likely to be dislocated by a project or the environment - is more likely to be available than other types of documents.

Documents which are Generally Available

A number of documents are presumptively available, subject to the regime of exceptions, under the Policy. Examples of these documents include:

- ◆ Project Information Documents, providing a brief factual summary of the main elements of an evolving project (para. 15);

⁴³⁷ See

<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20049553~menuPK:58859~pagePK:34542~piPK:36600~theSitePK:29708,00.html>

International Organisations

- ◆ Monthly Operational Summary, providing information on the status of each lending operation under preparation for financing (para. 17);
- ◆ Integrated Safeguards Data Sheet, identifying key issues under the Bank's 'safeguard policies' (for example relating to the environment, indigenous peoples and dam safety) in relation to investment projects and sector adjustment operations under preparation for financing (para. 30);
- ◆ Country Policy and Institutional Assessments for countries eligible for IDA financing (the poorest countries) (para. 46); and
- ◆ a range of internal documents, such as the Articles of Agreement and By-Laws, organisational charts and basic employment data (paras. 68-74).

Documents which are Available After a Certain Point

A much larger number of documents under the Policy are presumptively available, again subject to the regime of exceptions, once they reach a certain point in their evolution. The most common such point is either adoption by the Executive Directors or having been distributed to the Directors, which implies a certain level of approval. A representative list of these documents includes:

- ◆ Economic and Sector Work Reports which are required to be submitted to the Directors, providing the basis for a diagnosis of development prospects, after such distribution (para. 5);
- ◆ Sector Strategy Papers, setting out the Bank's strategy for future work in the sector, after being finalised by the Directors (para. 13);
- ◆ The annual report, *Status of IBRD/IDA Projects in Execution*, after distribution to the Directors (para. 26); and
- ◆ Implementation Completion Report, reviewing the results of a lending operation, after distribution to the Directors (para. 47).

A number of other documents are available at different points in their life. For example, the Program Document for a Poverty Reduction Support Credit and the Project Appraisal Document for an investment project, appraising the feasibility of and justification for Bank support for

the program, are available once the credit/project has been approved (paras. 18 and 20, respectively).

In some cases, the determining 'point' depends on the borrowing country. For example, an Environmental Assessment required to be prepared by a borrowing country will be available by the Bank after it has been published at a place accessible to project-affected groups (para. 31). Another example concerns Resettlement Instruments (RI), again prepared by the borrower, which the Bank will make available once the RI has been made accessible to those affected, including in an appropriate language and form, and the Bank has accepted it as providing an adequate basis for project appraisal (para. 34).

Historical information, meaning documents maintained by the Archives unit of the Bank's Information Solutions Group, is available after 20 years. The Policy is not retrospective. However, historical information that would be available under the new policy but was not available previously is normally available after 5 years (paras. 77-78).

Country Vetoes

A large number of documents are effectively subject to a country veto, or at least a presumptive veto. A presumptive veto allows the country to veto release, as long as the Executive Directors agree. An example of a document that is subject to a different type of veto for IDA and IBRD countries is the country assistance strategy, providing the framework for Bank assistance to a country over time. IBRD countries have an effective veto over the release of these documents whereas IDA countries simply have a presumptive veto, subject to being overruled by the Directors (respectively paras. 8 and 7).

The Bank, and other intergovernmental organisations, often claim that they must respect country claims for confidentiality. Indeed, this claim underlies many of the rules limiting disclosure of Bank documents in this category, and further informs one of the exceptions (see below). However, the fact that the Directors can overrule country objections for certain documents severely tests the legitimacy of this claim.

In other cases, the document will be released unless the affected country objects. This is the case, for example, for documents prepared under the Heavily Indebted Poor Country Initiative (para. 27). This presumably makes it at least marginally more difficult for countries to prevent disclosure.

Other Conditions

In some cases, documents will be made available unless the Directors object. This is the case, for example, for various summings up by the Chairman of the Board of Executive Directors (see paras. 12 and 26). It is also the case for sector, thematic and operational evaluations prepared by the Operations Evaluation Department (para. 50).

A number of other documents are available if and when other conditions are met. For example, directors have the power to decide upon release of some documents. This is the case for economic and sector work reports which do not need to be distributed to the Executive Directors, which may be made publicly available by the director concerned, taking into account such factors as the need to protect confidential information and the country's internal deliberative process, and after consultation with the country concerned (para. 6).

In some cases, conditions are layered, so that both the consent of the affected country and of the Bank is required. This is the case, for example, for accelerated or special access to historical documents (paras. 79 and 80).

Exceptions

The availability of documents subject to certain conditions, as described above, is further conditional upon the information contained in those documents not falling with the scope of an exception set out in Part IV of the Policy, entitled Constraints.⁴³⁸ Almost none of the exceptions listed refers to the risk of harm; indeed many exempt wholesale large categories of documents. None of the exceptions are subject to a public interest override.

The first 'constraint' is that proceedings of the Board of Executive Directors and its committees are confidential, as provided for in the Board's Rules of Procedure. As a result, unless the Board approves them for disclosure, documents prepared for consideration by the Board are not available.⁴³⁹ This is a contentious matter and getting this rule changed is one of the greatest priorities for many of those campaigning for greater Bank openness.

The Bank also makes a commitment to respect the fact that certain documents are provided in confidence. In particular, it will not disclose

⁴³⁸See para. 82, as well as footnote 4 to Part III.

⁴³⁹Para. 83.

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trade secrets, pricing information or copyrighted material (para. 84). It will also not disclose material in breach of attorney-client privilege or where this may prejudice an investigation (para. 85). This is consistent with many freedom of information laws.

Paragraph 86 sets out an exception "to preserve the integrity of the deliberative process and to facilitate and safeguard the free and candid exchange of ideas between the Bank and its members". On this basis, analyses of country creditworthiness and credit ratings, and supervision reports are not publicly available. This also provides a basis for refusing to disclose documents relating to the decision-making process which have been exchanged with international organisations, aid agencies and private banks. It is unclear how the "free and candid exchange of ideas" requires the Bank to keep all such documents secret. The next paragraph applies the same rationale to internal Bank processes, providing that "internal documents and memoranda written by Executive Directors and their Alternates and Senior Advisors, by the President of the Bank, and by Bank staff to their colleagues, supervisors, or subordinates are considered confidential". Again, the scope of information covered is excessive.

There is also an exception relating to sound financial management, pursuant to which the Bank will not provide estimates of future borrowing, financial forecasts, information on individual investment decisions and credit assessments.⁴⁴⁰

Pursuant to the Bank's Principles of Staff Employment, it is required to respect the privacy of its employees, so all individual and medical records are exempt. Again, there is no requirement of harm to a legitimate privacy interest or public interest override, of particular importance in relation to privacy.⁴⁴¹

Finally, paragraph 90 provides a catch-all exception for *ad hoc* decisions to refuse to disclose where this would be "detrimental to the interests of the Bank, a member country, or Bank staff". This is an extremely broad, unfettered power although it is perhaps to some extent constrained by the examples of situations where it might be used, including where the information was excessively frank or because of premature disclosure, an eventuality which seem already to be adequately addressed by the conditions placed on disclosure of different documents.

⁴⁴⁰ Para. 88.

⁴⁴¹ Para. 89.

Duty to Publish

The Policy does recognise the proactive publication of various types of information, although in most cases it simply refers to an existing publication rather than creating a new obligation to publish. General procurement notices for each Bank-financed project are published in the UN publication, *Development Business*, which also publishes major contract award decisions (paras. 35 and 36). The Policy also refers to the leading Bank publications, its *Annual Report* and the *World Development Report* (para. 53), as well as the *Annual Index of Publications* and the bimonthly *Publications Update* (para. 55). Finally, the Policy refers to the Bank's practice of publishing a wide range of information about itself, including financial and administrative information (Parts III.C and III.D).

Comparative Analysis

As the survey above demonstrates, countries all over the world are recognising that individuals have a right to access information held by public bodies and that legislation is needed to give practical effect to this right. The survey indicates that there are significant areas where national legislation is reasonably consistent, but that there are also areas of divergence. This chapter looks at the different issues dealt with in freedom of information laws, pointing out consensus themes, as well as areas of disagreement. It also highlights some of the more imaginative or innovative approaches adopted in different countries.

The Right of Access

The right of access is the fundamental reason for adopting a freedom of information law, and most legislation sets out this basic right pretty clearly. In some countries, particularly those with more established access regimes, everyone, regardless of citizenship, can claim the right, while in other countries this right is restricted to citizens or residents. There are fairly obvious reasons for extending the right to everyone, and it has not proved to be a significant additional cost or burden in those countries where this is the case.

In some countries, such as Bulgaria and South Africa, the law also includes a set of principles governing access. These can be a useful way to set out clearly the underpinnings of the law, and they can also serve as an important interpretive tool, helping to clarify ambiguity or the apparent conflicts between openness and other public interests that are bound to arise.

Definitions

There is some discrepancy in the way the different laws approach the question of definitions. Some, like the Thai law, define information very broadly, so that it covers any record held by a public authority, regardless of form or status, including whether or not it is classified. Others, like the Pakistani law, restrict the scope to information used for official purposes. This unnecessarily limits the right since some there is no legitimate basis

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for this restriction and some information may be useful to the public even though it is not used for official purposes.

The Swedish law uses the definition of information as a sort of surrogate internal deliberative processes exception, providing that only documents relating to matters which have been finally settled are covered, subject to certain exceptions. It may not make a lot of difference to do it this way, but it seems preferable to keep the exceptions regime in one place. Also, using the definition to exempt information may result in that information not being covered by the public interest override.

There are two main approaches when it comes to defining which bodies are covered by the freedom of information law. First, and most common, is simply to define the bodies covered and then let any borderline issues be dealt with on a case-by-case basis. Second, some laws provide a list of bodies covered. This has the virtue of being clear, but it may also be excessively limited and rigid, which could be a problem over time. The UK law seeks to avoid this problem by providing that the Secretary of State may designate additional public bodies, although this also has its problems. Perhaps an ideal solution would be to combine both systems, providing a generic definition, but also a list of bodies which are specifically covered.

Many countries include all three branches of government - administrative, legislative and judicial - while others restrict the scope of the law to the first of these. There is no reason in principle why the legislative and judicial branches should not be covered, as long as the regime of exceptions protects legitimately secret information, and experience in those countries that do cover all three branches of government supports this view. In some countries, such as Thailand, coverage of the courts is limited to their administrative function.

Mexico has adopted a novel approach to the question of coverage, providing for a detailed very set of obligations for administrative bodies, and then placing the legislative and judicial branches of government under a generic obligation effectively to do their best to meet the same set of obligations, without setting these out in the same detail. If this proves to be successful, which remains uncertain, it could prove a good model for other countries.

Another area of divergent practice is with respect to public corporations, and private bodies which receive funding through public contracts. The Indian law, for example, includes all bodies "owned, controlled or substantially financed by funds provided directly or

indirectly" by government (see Subsection 2(f)). Other countries, however, such as Japan, do not include these bodies.

South Africa is unique among the countries surveyed and, to the best of the author's knowledge, in the world, in placing private bodies, defined as commercial entities, under an obligation to disclose information needed for the exercise or protection of any right. Private bodies hold a wealth of information which should be accessible in the public interest. At the same time, the scope of access and modalities by which this should be exercised are different than for public bodies and there have been some teething problems in South Africa.⁴⁴² More thought on these matters may be required to ensure that the obligation to disclose is effectively and appropriately extended to cover private bodies.

Process

There are some variations in terms of the processing of requests for information, but this is an area where, on balance, the various laws demonstrate a relatively high degree of consistency. All provide for requests in writing, some also in oral form, which require the requester to specify his or her name and contact details, as well as a sufficiently detailed description of the information sought to enable it to be identified. Many laws require public bodies to appoint information officers, who are then required to assist requesters as necessary in honing their requests. In some cases, such as South Africa, the law makes specific provision for assistance to people who cannot make a written request either because they are illiterate or due to disability.

Most laws provide for time limits for a response, ranging from around 14 days (Bulgaria) to around 30 days (various), and a number require the information to be provided as soon as possible, with the time limit as a maximum. Almost all allow for an extension of the time limit, for example where the request is complex or requires third party notice. The UK law has a special set of time limits where the public interest override is under consideration and some laws, for example that of Japan, have different time limits where third party notice is required.

Most laws also require a public body to give written notice, along with reasons, whenever a decision is made not to disclose information. This allows the requester to determine whether or not to pursue any appeal options, and also provides a basis for the appeal, should one be

⁴⁴²For example, private bodies have complained of the cost of producing guides on how to access information they hold.

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brought. Various laws also require public bodies to take appropriate steps to locate information, and to inform the requester if it is not found, as well as to transfer requests where the information in question is held by another public body.

In some cases, the law sets out circumstances in which a request does not have to be processed. For example, in Mexico, 'offensive' requests may be rejected, while in the UK 'vexatious' or repetitive requests do not have to be processed.

Various systems apply to fees. There are four main costs involved in the provision of information, namely the cost of searching for the information, any costs associated with preparing or reviewing the information, the cost of reproducing or providing access to the information and the cost of sending the information to the requester, where this applies. Some laws, such as the Mexican law, restrict fees to the cost of reproducing the information. In the UK, all costs may be charged, but draft regulations restrict costs to 10% of the cost of locating and retrieving the information, plus the reproduction and postage costs. A different system of fees, however, will apply to more expensive requests.

Many laws make provision for a central body to set the schedule of fees, for example in Japan, where this is set by Cabinet Order. This avoids a patchwork of fee structures at different public bodies and also tends to limit inflationary fee pressures.

In some countries, different fee regimes apply to different sorts of information. For example, in Mexico, access to personal data is free. The US law contains detailed provisions relating to fees, distinguishing between commercial requesters, which may be charged for search, duplication and review of documents, educational or scientific institutions, which may be charged only for duplication, and other requesters, who may be charged for search and duplication. For the latter two groups, there is a waiver for the first two hours of search and first 100 pages of copying. Finally, fees are effectively waived for public interest requests, which covers the media and many NGOs.

Many countries allow requesters to select from among a number of forms of access, such as inspection of the document, a transcript, an electronic copy or photocopies, although in many countries the form specified may be refused in certain cases, for example where this would harm the record or unreasonably divert the resources of the public body.

Sweden is unique in requiring public bodies to prepare a register of all documents they hold, with a few exceptions, for example, documents

which are obviously of little importance. The registers themselves are normally public documents and they are increasingly available online. This clearly facilitates information requests enormously.

Duty to Publish

Most, but not all, of the laws surveyed impose a duty on public bodies to publish certain key information, even in the absence of a request. This is in recognition of the fact that the right to know goes beyond passive provision of information in response to requests and includes a duty to proactively promulgate information which is likely to be of interest to a wide range of individuals.

The various national laws approach this issue in two different ways. Some provide a list of the categories of documents that must be published, such as information about their general operations, about services provided and about how to request information. This has the virtue of being clear and consistent across all public bodies. The Bulgarian law is innovative, requiring public bodies to publish information where this may prevent a threat to life, health, security or property, or where this is in the overall public interest. Other laws require public bodies to come up with publication schemes or proposals, which may then need to be approved by an independent body. This is more flexible, and allows for change over time, but may also lead to differences in the scope of information published by different public bodies.

The Thai law has an interesting dual publication scheme, whereby certain information must be published in the Government Gazette while other information must be made available for inspection. The idea of a sort of triage for the duty to publish is interesting, although publication in the Government Gazette may not be the best way to reach a broad audience. In the US, by contrast, information covered by the duty to publish must be made available electronically. Furthermore, under the US law, any information which has been released pursuant to a request and which is likely to be the subject of another request must be made available electronically, along with an index of such records. This provides a built-in mechanism for ensuring that popular information regularly becomes available. The Mexican law goes even further, requiring public bodies to make certain categories of information available electronically, and also to make a computer available to the public for this purpose, along with a printer and technical support where needed.

Exceptions

Most freedom of information laws include a comprehensive list of exceptions, or grounds for refusing to disclose information. Indeed, in many cases, the list of exceptions is unduly long, or broad, and this is a serious problem in many freedom of information laws. In a small minority of cases, such as Bulgaria, the law does not actually list exceptions, referring instead to existing secrecy laws for this purpose. This is quite controversial and could potentially seriously undermine the openness regime (see below).

The three-part test for exceptions has been noted above, namely that information must be disclosed unless the public body can show that it is covered by an exception listed in the law, that disclosure would pose a risk of substantial harm to the protected interest and that this harm outweighs the overall public interest in the disclosure of the information.

Few of the laws surveyed in this book strictly conform to all three parts of this test, but many incorporate most of it. An large overall majority of the exceptions in the various laws are subject to a harm test of one sort or another, or have built-in harm tests - as is the case, for example, with legally privileged information - but, at the same time, most laws have a least some exceptions that do not have a harm test and some, like the UK law, have numerous class exceptions.

Unfortunately, a majority of the laws do not provide for a public interest override, although a substantial minority do. In some cases, for example in South Africa, the public interest override is limited to information which discloses evidence of a breach of the law or a serious risk to public safety or the environment. This has the advantage of being clear, but it is also relatively narrow in scope.

It is not proposed to list specific exceptions here - a detailed list is provided in the table of exceptions in Annex 3. A few laws do contain rare or peculiar exceptions. The laws of the UK and Thailand, for example, contain exceptions relating to the royal family, while South Africa has an exception relating to the Internal Revenue Service. The US law contains an exception relating to information about oil wells, according to rumour because the president at the time, Lyndon B. Johnson, was from Texas.

A few exceptions, while common, are also problematical. For example, most laws have an exception relating to internal decision-making, or deliberative, processes. This is legitimate as government

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needs to be able to run its internal operations effectively. In particular, the following harms may need to be prevented:

- ◆ prejudice to the effective formulation or development of government policy;
- ◆ frustration of the success of a policy, by premature disclosure of that policy;
- ◆ undermining of the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views; or
- ◆ undermining of the effectiveness of a testing or auditing procedure.

At the same time, if this exception is phrased in excessively broad terms, it can seriously undermine the principle of maximum disclosure. It is, as a result, particularly important that the exception be clearly and narrowly drawn, that it be limited to protecting the specific interests noted above and that it be subject to a public interest override.

Another problematical exception is one protecting good relations with other States or intergovernmental organisations. In principle, this is legitimate. At the same time, it is extremely difficult for someone not involved in the specific relationship, such as a judge or information commissioner, to assess whether or not the disclosure would harm that relationship. This means that the scope of the exception largely depends on the interpretation given to it by civil servants, an obviously problematical situation.

This exception has potentially very serious implications when used by intergovernmental organisations, since it embraces practically all of the information they hold. It may, in such cases, lead to a situation where both parties are denying access to the information on the basis that disclosure would harm relations with the other party, a clearly unacceptable situation.

National security is another problematical exception, which led ARTICLE 19 to produce a set of principles on this subject, *The Johannesburg Principles: National Security, Freedom of Expression and Access to Information*.⁴⁴³ As with inter-governmental relations, it is difficult for outside actors to assess the extent to which the disclosure of information may affect national security. Furthermore, this is an area where the problem of excessive secrecy is normally at its zenith. Unfortunately, the reaction of many States to the problem of terrorism has

⁴⁴³ARTICLE 19 (London: 1996).

been to increase secrecy, rather than to bolster democracy through openness.

A final, difficult issue relating to exceptions is their relationship with secrecy laws. In most countries, the freedom of information law leaves in place secrecy laws, although in a few, such as South Africa and India, the freedom of information law has overriding force. The Indian law specifically mentions that it takes precedence over the Official Secrets Act, 1923. A compromise solution has been adopted in Sweden, where only one secrecy law, the Secrecy Act, is recognised as legitimate. This has the virtue of being transparent and also of ruling out the many secrecy provisions that lurk in older laws in most countries. The US law provides that secrecy laws remain in place, but only where they leave no discretion as to the non-disclosure of the information in question.

Appeals

Most, but not all, of the freedom of information laws provide for an ultimate appeal to the courts. Exceptions are India and the UK. Even where appeals are specifically precluded by the law, however, courts will assume some jurisdiction under the rules of administrative law, for example in relation to ultra vires actions and compliance with the rules of natural justice. Significantly, in Mexico, only requesters, and not public bodies, may prefer an information appeal to the courts. This prevents public bodies from using their power to delay or prevent information disclosure.

A number of laws also specifically provide for some form of internal appeal, either to a higher authority within the same body which originally refused the request, or to some other public body.

Less common, however, is provision for appeal to an independent administrative body. As noted previously, this is central to the effective functioning of a freedom of information regime, as appeals to the courts are too time-consuming and expensive for all but a small minority of applicants.

A number of laws do, however, provide for administrative appeals. In some cases, the law establishes a new body with specific responsibility for information appeals. In Mexico, for example, the law establishes a Federal Institute of Access to Information, which hears appeals from any refusal to disclose information, from a failure to comply with established time limits, against the level of fees charged or from a refusal to disclose the information in the form requested. In other cases, the law allocates the task of hearing appeals to an existing body, for example in Pakistan to the

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Mohtasib (ombudsman) or to the Federal Tax Ombudsman for cases involving the tax officials.

In general, these bodies are granted the necessary powers to conduct investigations and hearings, including to summon witnesses. Importantly, in most cases, they are empowered to request any information from public bodies, including the information to which access has been refused, which they may consider *in camera* if necessary.

In some cases, such as the UK, the law also establishes a specialized tribunal, in that case the Information Tribunal, to hear appeals from the administrative body.

Promotional Measures

A number of different promotional measures are found in the different laws surveyed. Most common are protections against sanction for civil servants who have acted in good faith pursuant to the freedom of information law, and punishments for those who have acted in a wilful manner to somehow prevent or retard access to information contrary to the law. A gloss on the former in the UK is protection against defamation proceedings for information disclosed pursuant to the law.

Quite a few countries provide for minimum standards for record maintenance. Some countries, like Mexico and the UK, give a mandate to a central body - the Federal Institute of Access to Information in Mexico and the Lord Chancellor (minister of justice) in the UK - to set standards regarding record maintenance, as well as some system for ensuring that public bodies respect these standards. This is a good approach as it ensures strong, uniform standards across the civil service.

In a number of countries, public bodies are required to appoint information officers as a central point of contact for information requests. These officers may also be given a range of promotional tasks, such as ensuring that the body meets its obligations under the law, training and also developing internal procedures to ensure timely disclosure of information. The administrative oversight body is also allocated promotional tasks in many countries, such as monitoring implementation of the law, providing an annual report to the legislature or government, and training. In some countries, public bodies are required to produce annual reports, providing them either to the oversight body or directly to the parliament. A number of countries also place an obligation on either the oversight body, or each public body, to produce a guide or manual on how to use the law or how to request information.

Conclusion

The right to freedom of information is founded on the idea that public bodies hold information not for themselves but on behalf of the public. Consistent with this is the principle that individuals should be able to access all such information unless there is an overriding public interest in keeping it secret. There are also powerful democratic principles underpinning the right, including its fundamental role as an underpinning of democratic participation and good governance, and in ensuring respect for all human rights.

The right to freedom of information, and in particular the right to access information held by public bodies, has now gained widespread recognition as a fundamental underpinning of democracy and as a basic human right. This recognition is reflected in a growing body of authoritative international statements on this right, at the UN but also within all three regional systems for the protection of human rights, as well as bodies like the Commonwealth. Importantly, it is also reflected in the adoption by a rapidly growing number of countries of legislation giving effect to this important right.

A number of features are central to any law guaranteeing access to information. Such laws should flow from the principle of maximum disclosure, whereby all information should be subject to disclosure unless there is an overriding public interest in secrecy. A number of key elements must be present in a law if it is to promote the principle of maximum disclosure. It should include broad definitions of both the scope of information and public bodies, consistent with its underlying purpose. It should also set out clear, user-friendly processes for the exercise of the right, as well as a right to appeal any refusal to provide information to an independent administrative body and from there to the courts. Public bodies should be under an obligation to proactively publish key categories of information, even in the absence of a request. It is essential that the regime of exceptions be clear and narrow, and that all exceptions be subject to a harm test and a public interest override. Finally, the law should make provision for a range of promotional measures.

Freedom of Information: A Comparative Legal Survey

The laws and policies surveyed in this book all meet, to varying degrees, the principles outlined above. They thus provide important guidance to anyone seeking to promote or develop a freedom of information law. No governing system can claim to be fully democratic if it does not include a guarantee of the right to information. A good freedom of information law will enhance participation and the policy process, lead to greater public accountability and better governance, and generally enrich the relationship between public bodies and the people they serve.

Comparative Table of Exceptions

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This table compares the main exceptions in nine of the ten laws surveyed, as well as in the UNDP and World Bank policies. The Bulgarian Access to Public Information Act has not been included in this table as it does not include a full regime of exceptions in the law, referring instead to other laws. To include it would, therefore, give the misleading impression that the law did not include many exceptions.

Each box in the table contains two different types of information. First, provides the test used to determine whether information falling within the scope of an exception may be withheld, which may be referred to as the 'harm test'. For example, in some cases information may be withheld only if it is "reasonably expected to harm" the protected interest, or it if is "likely to cause prejudice" to it. In some cases, no harm is required (i.e. the law establishes a class exception in relation to a whole category of information). In that case, the table indicates that there is "no harm test". Then, each box sets out the elements which make up the exception and which effectively define its scope in the relevant jurisdiction. Each box also provides a reference to the section, article or paragraph of the law/policy where the exception in question is found.

In some cases, the law in question does not contain the exception being considered, in which case this is stated in the table. In other cases, the exception effectively included within the scope of other exceptions. In this case, the table notes in the appropriate place that there is no separate exception.

The table does not include a small number of exceptions which are only found in one law and appear to have narrow, country-specific relevance (for example, the South African law excepts certain records of the Revenue Service). As the table shows, there is fairly broad agreement as to which social or personal interests are sufficiently important to overcome the presumption in favour of disclosure of information.

Exception	India	Japan	Mexico	Pakistan	South Africa	Sweden	Thailand	UNDP	United Kingdom	United States	World Bank
Future Publication	Test: - no harm test Elements: - likely to be published within 30 or already published (9(b) and (c))	No such exception	Test: - no harm test Elements: - already publicly available (42)	Test: - no harm test Elements: - published in the official Gazette or in book form and is on sale (12(2))	Test: - may defer access for a reasonable period Elements: - to be published within 90 days or further reasonable period, required by law to be published or has been prepared for submission to legislature (24(1))	Test: - no harm test Elements: - documents solely for the purpose of publication in a periodical published under the auspices of the authority (11(2))	no such exception	no such exception	Test: - reasonable to withhold until publication Elements: - intended for future publication (22)	no such exception	no such exception

Exception	India	Japan	Mexico	Pakistan	South Africa	Sweden	Thailand	UNDP	United Kingdom	United States	World Bank
National Security	<p>Test: - prejudicially affect</p> <p>Elements: - sovereignty and integrity, security of the State, strategic scientific or economic interest (8(a))</p>	<p>Test: - pose a risk of harm</p> <p>Elements: - the security of the State (5(3))</p>	<p>Test: - could</p> <p>Elements: - compromise national security, public security or national defence (13(I))</p>	<p>Test: - no harm test</p> <p>Elements: - record relating to defence forces, defence installations or connected therewith or ancillary to defence and national security (8(e))</p>	<p>Test: - reasonably expected to cause prejudice to</p> <p>Elements: - the security of the Republic (41(1)(a))</p>	<p>Test: - necessary having regard to</p> <p>Elements: - security of the realm (2(1))</p>	<p>Test: - will jeopardise</p> <p>Elements: - national security (15(1))</p>	no such exception	<p>Test (national security): - required - Minister's certificate conclusive</p> <p>Elements: - safeguarding national security (24) - security bodies completely excluded (23)</p> <p>Test (defence): - likely to prejudice</p> <p>Elements: - defence of British Isles - effectiveness of forces (26)</p>	<p>Test: - classified in the interest of</p> <p>- classification specifically authorised and properly classified under an Executive Order</p> <p>Elements: - national defence</p> <p>Test: - classified FBI records</p> <p>Elements: - pertaining to foreign intelligence or international terrorism ((c)(3))</p>	no such exception
International Relations	<p>Test: - prejudicially affect</p> <p>Elements: - conduct of international relations (8(a))</p>	<p>Test: - risk of damage or disadvantage</p> <p>Elements: - trustful relations with another country or an international organisation negotiations with another country or an international organisation (5(3))</p>	<p>Test: - impair</p> <p>Elements: - ongoing negotiations or international relations, including information provided by other states or international organizations on a confidential basis (13(II))</p>	<p>Test: - likely to cause grave and significant damage</p> <p>Elements: - interests of Pakistan in the conduct of international relations (15(1))</p>	<p>Test: - reasonably expected to cause prejudice</p> <p>Elements: - the international relations of the Republic (41(1)(a))</p>	<p>Test: - necessary having regard to</p> <p>Elements: - relations with a foreign state or an international organization (2(1))</p>	<p>Test: - will jeopardise</p> <p>Elements: - international relations (15(1))</p>	the policy provides for governments and the UNDP to treat documents as classified at the time the document is designed	<p>Test: - likely to prejudice</p> <p>Elements: - relations with other States/IGOs - interests of UK abroad and promotion or protection of such interests - information supplied in confidence from State or IGO (27)</p>	<p>Test: - classified in the interest of</p> <p>- classification specifically authorised and properly classified under an Executive Order</p> <p>Elements: - foreign policy ((b)(1))</p>	<p>Test: - detrimental to</p> <p>Elements: - the interests of the Bank or a member country - a Bank/country relationship (56)</p>

Exception	India	Japan	Mexico	Pakistan	South Africa	Sweden	Thailand	UNDP	United Kingdom	United States	World Bank
Public Economic Interests	<p>Test:</p> <ul style="list-style-type: none"> - Trade or commercial secrets protected by law or information, the disclosure of which would prejudicially affect <p>Elements:</p> <ul style="list-style-type: none"> - legitimate economic and commercial interests or the competitive position of a public authority (8(f)) 	<p>Test:</p> <ul style="list-style-type: none"> - risk causing a hindrance <p>Elements:</p> <ul style="list-style-type: none"> - the proper performance of affairs or business conducted by an organ of the State or a local public entity (5(6)) 	<p>Test:</p> <ul style="list-style-type: none"> - could harm <p>Elements:</p> <ul style="list-style-type: none"> - the country's financial, economic or monetary stability (13(III)) 	<p>Test:</p> <ul style="list-style-type: none"> - various <p>Elements:</p> <ul style="list-style-type: none"> - likely to cause grave and significant damage to the economy - likely to cause significant damage to the financial interests of the public body - likely to cause significant damage to the lawful commercial activities of the public body (18) 	<p>Test:</p> <ul style="list-style-type: none"> - likely to materially jeopardise/cause harm <p>Elements:</p> <ul style="list-style-type: none"> - the economic interests or financial welfare of the State - the ability of the government to manage the economy (42(1)) - the commercial interests of the State (42(3)(b)) <p>Test:</p> <ul style="list-style-type: none"> - no harm test <p>Elements:</p> <ul style="list-style-type: none"> - trade secrets of the State (42(3)(a)) - a computer program owned by the State (42(3)(d)) <p>Test:</p> <ul style="list-style-type: none"> - reasonably be expected disadvantage <p>Elements:</p> <ul style="list-style-type: none"> - a public body in negotiations or commercial competition (42(3)(c)) 	<p>Test:</p> <ul style="list-style-type: none"> - necessary having regard to <p>Elements:</p> <ul style="list-style-type: none"> - central finance policy, monetary policy, or foreign exchange policy (2(2)) - the public economic interest (2(5)) 	<p>Test:</p> <ul style="list-style-type: none"> - will jeopardise <p>Elements:</p> <ul style="list-style-type: none"> - national economic or financial security (15(1)) 	no such exception	<p>Test:</p> <ul style="list-style-type: none"> - likely to, prejudice <p>Elements:</p> <ul style="list-style-type: none"> - economic interests of UK - financial interests of government (29) 	<p>Test:</p> <ul style="list-style-type: none"> - no harm test <p>Elements:</p> <ul style="list-style-type: none"> - related to examination or operating reports of an agency responsible for financial institutions ((b)(8)) 	<p>Test:</p> <ul style="list-style-type: none"> - maintaining sound financial management practices <p>Elements:</p> <ul style="list-style-type: none"> - estimates of future borrowings - financial forecasts - data on individual investment decisions - credit assessments (54)

Exception	India	Japan	Mexico	Pakistan	South Africa	Sweden	Thailand	UNDP	United Kingdom	United States	World Bank
Law Enforcement	<p>Test:</p> <ul style="list-style-type: none"> - various <p>Elements:</p> <ul style="list-style-type: none"> - prejudicially affect order, detection and investigation of an offence - may lead to an incitement to commit an offence - prejudicially affect fair trial or adjudication of a pending case (8(b)) 	<p>Test:</p> <ul style="list-style-type: none"> - pose a risk of causing a hindrance <p>Elements:</p> <ul style="list-style-type: none"> - the prevention, suppression or investigation of crimes - the execution of sentencing other public security and public order maintenance matters (5(4)) 	<p>Test:</p> <ul style="list-style-type: none"> - could severely prejudice <p>Elements:</p> <ul style="list-style-type: none"> - prevention or prosecution of crimes, imparting of justice, collection of taxes, immigration control operations, or procedural strategies in judicial or ongoing administrative processes (13(V)) 	<p>Test:</p> <ul style="list-style-type: none"> - likely to <p>Elements:</p> <ul style="list-style-type: none"> - result in the commission of an offence - harm the detection, prevention, investigation or inquiry in a particular case - reveal the identity of a confidential source of information - facilitate an escape from legal custody (16) 	<p>Test:</p> <ul style="list-style-type: none"> - reasonably be expected to prejudice <p>Elements:</p> <ul style="list-style-type: none"> - law enforcement - the investigation of a contravention of the law - the fairness of a trial (39(1)) <p>Test:</p> <ul style="list-style-type: none"> - reasonably be expected to impede <p>Elements:</p> <ul style="list-style-type: none"> - the prosecution of an alleged offender <p>Test:</p> <ul style="list-style-type: none"> - reasonably be expected to result in <p>Elements:</p> <ul style="list-style-type: none"> - a miscarriage of justice in the prosecution of an alleged offender - the intimidation of a witness - the identification of a confidential source of information - the facilitation of a contravention of the law 	<p>Test:</p> <ul style="list-style-type: none"> - necessary having regard to <p>Elements:</p> <ul style="list-style-type: none"> - the interest of preventing or prosecuting crime (2(4)) 	<p>Test:</p> <ul style="list-style-type: none"> - will result in the decline in the efficiency of, or failure to achieve its objectives <p>Elements:</p> <ul style="list-style-type: none"> - law enforcement (15(2)) 	no such exception	<p>Test:</p> <ul style="list-style-type: none"> - likely to prejudice <p>Elements:</p> <ul style="list-style-type: none"> - prevention, detection of crime - administration of justice - apprehension or prosecution of offenders - prison security - immigration controls - collection of taxes (31) 	<p>Test:</p> <ul style="list-style-type: none"> - various <p>Elements:</p> <ul style="list-style-type: none"> - for law enforcement purposes - reasonably expected to interfere with enforcement proceedings - deprive of right to fair trial - invasion of privacy - disclose confidential source - disclose investigative techniques ((b)(7)) 	No such exception

Exception	India	Japan	Mexico	Pakistan	South Africa	Sweden	Thailand	UNDP	United Kingdom	United States	World Bank
Court Records	- no separate exception	- courts are excluded from the ambit of the Act (2)	Test: - no harm test Elements: - judicial or administrative procedure files where there has been no rule (14(IV)) - liability proceedings against civil servants where there has been no ruling (14(V))	no separate exception	- courts are excluded from the ambit of the Act (12)	Test: - necessary having regard to Elements: - the inspection, control or other supervisory activities of a public authority (2(3)) Test: - no harm test Elements: - court ruling which has not been pronounced (7(2)(2))	no separate exception (courts are only covered in their administrative aspect)	no such exception	Test: - no harm test Elements: - court records, broadly defined (32)	- courts are excluded from the ambit of the Section (s. 551(1)(B))	No such exception

Exception	India	Japan	Mexico	Pakistan	South Africa	Sweden	Thailand	UNDP	United Kingdom	United States	World Bank
Decision-making and policy formulation	<p>Test: - no harm test</p> <p>Elements: - Cabinet papers including records of deliberations of the Council Ministers, Secretaries and other officers (8(d)) - Minutes or records of advice including legal advice, opinions or recommendations made by any officer of a public authority during the decision making process prior to the executive decision or policy formulation (8(e))</p>	<p>Test: - risk unjustly harming</p> <p>Elements: - the frank exchange of opinions - the neutrality of decision-making (5(5))</p> <p>Test: - risk unjustly causing</p> <p>Elements: - confusion among the people (5(5)) - advantage or disadvantage to specific individuals (5(5))</p>	<p>Test: - no harm test</p> <p>Elements: - internal deliberative processes, until a final decision is reached (14(VI))</p>	<p>Test: - no harm test</p> <p>Elements: - notings on the file - minutes of meetings - intermediary opinions or recommendations (8(a)-(c))</p>	<p>Test: - no harm test</p> <p>Elements: - advice prepared for the purpose of policy formulation or decision-making - an account of a consultation or discussion that was held to assist in policy formulation or decision-making (44(1)(a))</p> <p>Test: - reasonably be expected to frustrate</p> <p>Elements: - candid communication of advice - a consultation or discussion (44(1)(b)(i)) - the success of a policy (44(1)(b)(ii))</p>	<p>Test: - no harm test</p> <p>Elements: - documents relating to matters which have not been finally settled (7) -preliminary drafts or memoranda which have not been accepted for filing (9-10) - letters and the like intended solely for communication (11)</p>	<p>Test: - no harm test</p> <p>Elements: - opinion or advice given within the State agency (not including a technical or factual report (15(3)))</p>	<p>Test: - no harm test</p> <p>Elements: - Information relating to procurement processes that involves prequalification information submitted by prospective bidders, or proposals or price quotations (15(e)) - Internal notes, memoranda, and correspondence among UNDP staff, including documentation relating to internal deliberative processes (15(b))</p>	<p>Test: - no harm test</p> <p>Elements: - formulation of policy - ministerial communications - advice of law officers - private ministerial offices (35(1))</p> <p>Test: - in opinion of reasonably qualified person likely to prejudice or inhibit</p> <p>Elements: - collective responsibility of Ministers - free provision of advice - frank exchange of views - effective conduct of public affairs (36(2))</p>	<p>Test: - no harm test</p> <p>Elements: - related solely to internal personnel rules ((b)(2)) - inter- or intra-agency memos which would not be available to private parties in the course of litigation ((b)(5))</p>	<p>Test: - to preserve the integrity of the deliberative process and to safeguard the free and candid exchange of ideas</p> <p>Elements: - internal documents and memoranda - documents exchanged between the Bank and its members related to internal decision-making processes (52, 53)</p>

Exception	India	Japan	Mexico	Pakistan	South Africa	Sweden	Thailand	UNDP	United Kingdom	United States	World Bank
Health and Safety	Test: - prejudicially affect Elements: - public safety (8(b))	No such exception	Test: - could put at risk Elements: - the life, security or health of any person	Test: - likely to Elements: - harm the security of any property or system (16(e))	Test: - reasonably be expected to Elements: - endanger the life or safety of an individual (38(a)) Test: - likely to prejudice or impair Elements: - the security of a building, structure or system; a means of transport; or any other property - methods, systems, plans or procedures for the protection of an individual in accordance with a witness protection scheme; the safety of the public; or the security of property (38(b))	no separate exception	Test: - will endanger Elements: - life or safety of any person (15(4))	no separate exception	Test: - likely to endanger Elements: - health or safety of any individual (38)	Test: - reasonably be expected to endanger Elements: - compiled for law enforcement - life of physical safety of an individual (b)(7)(F))	no such exception

Exception	India	Japan	Mexico	Pakistan	South Africa	Sweden	Thailand	UNDP	United Kingdom	United States	World Bank
Personal Information	<p>Test: - unwarranted invasion of</p> <p>Elements: - privacy (9(d))</p>	<p>Test: - no harm test</p> <p>Elements: - information concerning an individual where it is possible to identify a specific individual</p> <p>Test: - risk of harm to an individual's rights and interests</p> <p>Elements: - information concerning an individual where it is not possible to identify a specific individual (5(1))</p>	<p>Test: - no harm test</p> <p>Elements: - information provided by private individuals which they have indicated is confidential - personal information that requires consent before being released (18 and 19)</p>	<p>Test: - no harm test</p> <p>Elements: - disclosure would involve the invasion of the privacy of an identifiable individual (17)</p>	<p>Test: - unreasonable disclosure</p> <p>Elements: - personal information about a third party (34)</p>	<p>Test: - necessary having regard to</p> <p>Elements: - the protection of the personal integrity of private subjects (2(6))</p>	<p>Test: - unreasonably encroach upon the right of privacy</p> <p>Elements: - a medical report or personal information (15(5))</p>	<p>Test: - no harm test</p> <p>Elements: - Personal, health or employment-related information about staff (15(d))</p>	<p>Test: - no harm test</p> <p>Elements: - personal data of applicant - contravene principles of data protection or s.10 of DPA 1998 - exempt under Part IV of DPA 1998 (40)</p>	<p>Test: - clearly unwarranted</p> <p>Elements: - personnel and medical files - personal privacy ((b)(6))</p>	<p>Test: - maintain appropriate safeguards to protect</p> <p>Elements: - the personal privacy of staff members - the confidentiality of personal information about staff members (55)</p>

Exception	India	Japan	Mexico	Pakistan	South Africa	Sweden	Thailand	UNDP	United Kingdom	United States	World Bank
Information provided in confidence	no separate exception	Test: - no harm test Elements: - information concerning a corporation or a business which was offered on condition that it not be made public and the condition was rational (5(2)(b))	no separate exception	Test: - no harm test Elements: - provided on an express or implied condition that it would shall not be disclosed to a third person (8(f))	Test: - actionable breach of confidence Elements: - owed to a third party in terms of an agreement (37(1)(a)) Test: - reasonably be expected to prejudice Elements: - the future supply of information in the public interest from the same source (37(1)(b))	no separate exception	Test: - no harm test Elements: - information provided by a third party which is intended to be kept confidential (15(6))	Test: - would cause financial or other harm Elements: - Proprietary information, intellectual property in the form of trade secrets, or similar information that has been disclosed to UNDP under conditions of confidentiality (15(a))	Test: - actionable breach of confidence Elements: - obtained from third party (41)	no separate exception (see Commercial Interests)	Test: - no harm test Elements: - documents or information provided to the Bank on the explicit or implicit understanding that they are confidential (51)
Legal Privilege	No separate exception	no separate exception	Test: - no harm test Elements: - information considered secret in legal proceedings	no separate exception	Test: - no harm test Elements: - privileged from production in legal proceedings (40)	no separate exception	no separate exception	Test: - no harm test Elements: - Privileged information including disciplinary and investigatory information (15(c))	Test: - no harm test Elements: - covered by professional legal privilege (42)	no separate exception (see Statutory Prohibitions)	no such exception

Exception	India	Japan	Mexico	Pakistan	South Africa	Sweden	Thailand	UNDP	United Kingdom	United States	World Bank
Commercial Interests	<p>Test:</p> <ul style="list-style-type: none"> - Trade or commercial secrets protected by law or information <p>Elements:</p> <ul style="list-style-type: none"> - would cause unfair gain or loss to any person 	<p>Test:</p> <ul style="list-style-type: none"> - risk of harm <p>Elements:</p> <ul style="list-style-type: none"> - the rights, competitive standing, or other legitimate interests of a corporation or an individual carrying on a business (5(2)(a)) 	<p>Test:</p> <ul style="list-style-type: none"> - no harm test <p>Elements:</p> <ul style="list-style-type: none"> - commercial, industrial, tax, bank, and fiduciary secrets 	<p>Test:</p> <ul style="list-style-type: none"> - no harm test <p>Elements:</p> <ul style="list-style-type: none"> - record of the banking companies and financial institutions relating to the accounts of their customers (8(d)) 	<p>Test:</p> <ul style="list-style-type: none"> - no harm test <p>Elements:</p> <ul style="list-style-type: none"> - trade secrets of a third party (36(1)(a)) <p>Test:</p> <ul style="list-style-type: none"> - likely to cause harm/prejudice <p>Elements:</p> <ul style="list-style-type: none"> - the commercial or financial interests of a third party (36(1)(b)) - a third party in contractual or other negotiations (36(1)(c)(i)) - a third party in commercial competition (36(1)(c)(ii)) 	<p>Test:</p> <ul style="list-style-type: none"> - necessary having regard to <p>Elements:</p> <ul style="list-style-type: none"> - the protection of the of economic conditions of private subjects (2(6)) 	no separate exception	no separate exception	<p>Test:</p> <ul style="list-style-type: none"> - no harm test <p>Elements:</p> <ul style="list-style-type: none"> - trade secret (43(1)) <p>Test:</p> <ul style="list-style-type: none"> - likely to prejudice <p>Elements:</p> <ul style="list-style-type: none"> - commercial interests of any person (43(2)) 	<p>Test:</p> <ul style="list-style-type: none"> - privileged or confidential <p>Elements:</p> <ul style="list-style-type: none"> - trade secrets commercial or financial information ((b)(4)) 	no such exception
Statutory Prohibitions	Law takes precedence over other laws (14)	no such exception	<p>Test:</p> <ul style="list-style-type: none"> - no harm test <p>Elements:</p> <ul style="list-style-type: none"> - anything expressly considered confidential by another law 	<p>Test:</p> <ul style="list-style-type: none"> - no harm test <p>Elements:</p> <ul style="list-style-type: none"> - record declared as classified by the Federal Government (8(f)) - any other record which the Federal Government may, in public interest, exclude (8(i)) 	<p>Test:</p> <ul style="list-style-type: none"> - no harm test <p>Elements:</p> <ul style="list-style-type: none"> - Act applies to the exclusion of any provision of other legislation that prohibits or restricts disclosure (5) 	other laws are not permitted to extend the extent of secrecy	<p>Test:</p> <ul style="list-style-type: none"> - no harm test <p>Elements:</p> <ul style="list-style-type: none"> - information protected by other laws in exempt (15(6)) 	no separate exception	<p>Test:</p> <ul style="list-style-type: none"> - no harm test <p>Elements:</p> <ul style="list-style-type: none"> - prohibited under any other law - incompatible with any European Community obligation - contempt of court (44) 	<p>Test:</p> <ul style="list-style-type: none"> - leaves no discretion or established particular criteria for withholding <p>Elements:</p> <ul style="list-style-type: none"> - specifically exempted from disclosure by statute ((b)(3)) 	no such provision

