ACCESS TO INFORMATION LAWS: PIECES OF THE PUZZLE

AN ANALYSIS OF THE INTERNATIONAL NORMS

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INTRODUCTION

In January 2004, the heads of state in the Western Hemisphere met in Mexico to discuss poverty, trade, democracy, and development. At the conclusion of the Summit of the Americas, these 34 presidents recommended that all states pass enabling legislation to provide their citizen's a "right to information."[1] In many Latin America countries the right to information is found in their constitutions, but without implementing legislation or access to the Constitutional Courts, the right has been meaningless. At present, there exist only four countries with functioning comprehensive national access to information laws (Mexico, Peru, Jamaica and Panama) and two small Caribbean nations with less effective laws (Belize and Trinidad and Tobago).

The case is similar in Africa, where more than three years ago the Declaration of Principles on Freedom of Expression, reaffirming the African Charter on Human and People's Rights provided a similar mandate to heads of state. Again, like Latin America and the Caribbean, a number of African nations include the right to information in their constitutions. And like Latin America, this continent lags far behind the rest of the world on promulgation, implementation and enforcement of effective access to information laws with only one law in effect, South Africa.

Much focus has been placed on passing access to information (ATI) laws, and many countries around the world have heeded the call to enact this transparency tool, with more than 50 countries promulgating access to information laws since the early 1990's. Although experience has demonstrated that implementation of an access to information regime is the most challenging phase, the need to draft a law that contemplates the necessary processes and provides for sufficient safeguards should not be ignored.

With the advent of this trend to promulgate access to information laws, whether be it to fight corruption, increase public participation, or provide persons the tools necessary to exercise their fundamental human rights, there is a growing body of knowledge related to critical provisions both for the scope of the law and its implementation. These emerging norms and standards can be used to inform the debate about the importance of access to

[1] All heads of state are included in the Summit, except Cuba.

information as underpinning the democratic system, and to assist in determining the most appropriate structure and terms for newly drafted access to information laws.

Each access to information law will be unique, depending upon the context in which it will function. For example, in countries in which there is a long tradition of authoritarianism and secrecy, more explicit legal provisions related to roles and responsibilities of the civil servants and procedures for providing information may be necessary. Likewise, in places where there is a less developed system of archiving and record keeping there may be greater focus on these areas within the law and/or regulations. To design, implement and enforce an information regime that will lead to a strengthened democracy is akin to completing a puzzle: for the picture to emerge all of the pieces must be identified, utilized (from the largest piece to even the smallest), and placed together within the puzzle's distinct framework.

This paper seeks to provide some guidance in properly completing the puzzle, based on best international practice, as well as a brief analysis of the present Bolivian experience.

DRAFTING AN ACCESS TO INFORMATION LAW[2]

Constructing an effective transparency regime should be seen as a three-phase process: passage, implementation, and enforcement of the access to information law. These three elements together constitute the "transparency triangle."[3]

The first side of the triangle is the passage of a well-drafted access to information law, and the following provides a brief description of the core principles necessary for a strong and effective access to information law. These recommendations interpret best international practice, with reference to documents such as ARTICLE 19's Principles on Freedom Of Information Legislation and Model Laws, SOCIUS' Guidelines on Access to Information Legislation, and reviews laws of a number of different jurisdictions including South Africa, Jamaica, Peru and the United States. Ultimately, however, any access to information legislation must be crafted to best suit the socio-political environment of that particular country.

The organization of the law may vary, but experience has demonstrated that, at a minimum, it should include:

a. Objectives and principles;
b. Scope of the law;
c. Automatic publication;
d. Process/procedures;
e. Exemptions; and
f. Appeals procedures

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[2] This section draws upon" Observations on the 2004 Bolivian Access to Information Draft Law," L. Neuman and R. Calland, The Carter Center, April 2004.

[3] "Establishing a Robust Transparency Regime: The Implementation Challenge," L. Neuman and R. Calland, Transparency Task Force, Initiative for Policy Dialogue, forthcoming.

Objectives and Principles

The fundamental goal of an access to information law is to further democracy's beneficial effects. The recently passed Jamaica Access to Information Act states its objectives in Part 1 as "to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely –

(a) government accountability;
(b) transparency; and
(c) public participation in national decision-making."[4]

The Mexican Access to Information Law included similar aims, such as to "contribute to the democratization of Mexican Society and the full operation of the Rule of Law," and adding such other goals as "improving the organization, classification and handling of documents."[5]

To satisfy these objectives, the overarching principle of the law should be one of openness based on the premise that information belongs to the citizens, rather than the government. The state is simply holding and managing the information for the people. Article 19 of the Universal Declaration of Human Rights goes even further in describing this principle, stating "everyone has the right to the 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."

As such, the point of departure for any access to information legislation should be that:

a. all person have a right to "seek, receive and impart" information, and
b. all public information is accessible, except under very clear and strict conditions when it is in the best interest of the society that the information remains secret.

In drafting this section of the law, care should be taken to ensure that unnecessary conditions are not placed on access nor provisions included that could provide the opportunity for arbitrary restrictions of this right. It also may be appropriate to include in the principles the critical point that the right to request information exists without the need for the solicitor to provide any reason or justification.

Scope of the Law

The scope section of the legislation provides the extent to which public and private entities are covered under its provisions as well as who may request information. The emerging international standard provides that all persons, regardless of their citizenry or residency, should have the right to request information.

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[4] The Access to Information Act of Jamaica, 2002, Part 1 (2).
[5] Federal Transparency and Access to Public Government Information Law, Article 4, Mexico.

The law should strive for maximum breadth in the public bodies included under its reach. In a regional conference held November 2003 in Lima, Peru, "Guidelines on Access to Information Legislation" were drafted. These recognized that public authorities should include "any body which:

- Is established by or under the Constitution;
- Is established by statute;
- Forms part of any level or branch of government;
- Is owned, controlled or significantly financed by public funds; or
- Carries out a statutory or public function."[6]

In addition to including all relevant public bodies, access to information laws are increasingly encompassing private sector entities. Modern laws vary from applying to those organizations that receive some public funding, such as in the Mexican law, to those bodies which provide public services, as is found in the Jamaican act, to the South African case which covers all private bodies when the information requested is "necessary to protect or exercise a right."[7]

It is, perhaps, worth reiterating the rationale that calls for extension in scope of modern ATI laws to cover information held by private sector bodies. The fundamental concept that lies behind transparency is that through access to information, those who hold power can be held to account for their actions. The past twenty years has seen a huge shift in ownership and control of public services. Bolivia is no exception to this international trend. For the citizen or the consumer, the fact that the controlling entity has changed makes little difference to their core concerns of access, quality, and affordability. It seems unwise and unfair to create duties on the public sector to provide a right to access to information, while exempting powerful private interests.

Nevertheless, with private sector information it is appropriate to include a caveat to ensure that there is not an unjustified intrusion on privacy. As with publicly held information, a right to private bodies' information also can be limited with appropriate exemptions, such as for commercial confidentiality or trade secrets. Where a private company is clearly providing a public service, such as after a privatization process, their information should then be defined in the law as "public information."

[6] Guidelines on Access to Information Legislation, Addendum to the Declaration of the SOCIUS Peru 2003: Access to Information Conference, British Council Peru.
[7] Promotion of Access to Information Act, 2000, South Africa.

The Case for Including Private Sector Bodies
Excerpted from Non-State/Corporate Transparency
- Richard Calland, Transparency Task Force, Institute for Policy Dialogue

Throughout the world, privatization and related policies such as the "contracting out" of public services and the so-called "public-private partnerships," have radically altered the landscape of public power. Local public services, such as waste collection, are now in the hands of private contractors. Public transport schemes are elaborate partnerships between government and large companies. Even prisons, in some places, have been placed in the hands of the private sector.

Yet more fundamental to people's every day existence; water services have been privatized. The supply of water is now a vast multi-billion dollar industry worldwide. From the hills of Cochabamba in Bolivia to the poverty stricken townships of South Africa, citizens are resisting the increased costs of water that have followed fast on the heals of privatization . . . The argument for transparency in the state sector and the accountability it provides is rendered meaningless if vast tracks of privatized state power are exempted from the duty to be open and to grant access to information.

Automatic Publication

The "right to know" approach, whereby governments automatically publish as much information as possible, is important in increasing transparency, reducing costs for both the state and the requestor, and making the law more convenient. Governments are often faced with resource limitations and the need to seek mechanisms to reduce bureaucratic costs while continuing to meet all of its obligations. One way in which this can be accomplished, vis-à-vis an information regime, is through automatic publication. The more information that is made available, without the need for individualized decision-making related to each request, the less costly the process.

This approach is found in the South African law and in the Australian State laws. Article 9 of the Panamanian Access to Information Law obligates the state to automatically provide information within specified broad categories. This legislation requires the information to be printed, placed on the relevant Internet sites, and periodically published.[8] However, the strongest automatic publication schemes are not limited to disclosure via the Internet. Rather, in these cases legislation mandates the state to use all appropriate means to reach the populace, which in countries with less technological capacity may not be solely through websites.

Finally, when developing a publication scheme, issues relating to implementation must be considered. These include the amount of time necessary to identify automatically

[8] Transparency in Public Administration, 2002, Article 9, Panama.

available information, design methods for disseminating information, and training of the responsible public servants. Some laws, like in Peru, took the implementation challenges into account when drafting their law and established a legislated phased-in approach for website development and automatic disclosure.

Process and Procedures

Often the processes for requesting and providing information are more determinative of the Act's value and effectiveness than any other provisions. Thus, clear and workable guidelines should be established to ensure that all persons might exercise their right to information. Access to Information laws differ in the specifics, but most modern laws include the following procedures:

How to Request Information

In general, this process should be as simple as possible to facilitate requests and not create artificial barriers, such as the satisfaction of formalistic procedures. Requestors should be obligated to describe the information sought with sufficient specificity so that the civil servant can identify the item. However, requirements to submit the request on a specified form or to a specified person within the relevant agency may cause unnecessary obstacles to the exercise of the right to information. Moreover, many laws allow for verbal requests of information, either in person or via the telephone. This is particularly important in countries where there is a high level of illiteracy or multiple languages.

Responding to Information Requests

Access to Information laws should clearly establish the process that civil servants must follow in responding to information requests. In addition to the manner in which the civil servant should provide the information, this section should include precise time frames for responding to requests, with a potential for one extension for justifiable cause, and the circumstances in which a request may be transferred to another covered entity.

Many countries, in an attempt to appease detractors, put in time limits for responding to requests that are too short and impossible to meet on a consistent basis, thus undermining the workability of the law and giving the appearance that the holder of the information is unwilling to release it. Rather, the time limits should be realistic, without being excessively long, and there should be an opportunity for one reasonable extension. The Peruvian Law provides only seven working days to respond to requests, with the possibility of one five day extension. In practice, compliance with this abbreviated time frame may prove difficult. The Panamanian, Jamaican and South African legislation, more reasonably, provides for 30 days, with potential for an additional 30 days.

In addition to time lines, sections relating to responding to information requests generally include a specified duty and procedure for transfer of requests when the information sought is held by another agency. In other words, where a petitioner makes a request to the wrong body, he or she should not simply be denied the information; instead, the agency must point the requester in the correct direction by transferring the request to the appropriate agency. Such a provision places the burden on the agency, rather than the requestor, to transfer the request to the appropriate body. This alleviates the "ping-pong"

phenomena, whereby a requester is directed from one agency to another, without satisfaction. However, to ensure that transfers are not used as a bureaucratic delay tactic, it is important to include strict time limits for effectuating the transfer, the number of transfers allowed, the time period for responding, and the mechanism for notifying the requester that his/her request has been transferred.

Denials

All ATI laws include a process for denying requests. The best drafted legislation mandates that information requests will be denied only based on a specified exemption, and that the denial and reason for rejecting the request will be provided in writing. In the four countries presently enjoying a modern access to information law in Latin America and the Caribbean, the legislation states that denials must be provided in writing and must clearly state the reason.

Responsibility and sanctions

Identifying an Information Officer is one of the first steps to properly implementing an access to information law. There should include a description of the Officer's main powers and duties, such as responsibility for the operation and implementation of the automatic publication scheme and for ensuring requests for information are satisfied.

Publication and dissemination of a "roadmap" should be an unambiguous responsibility of the Information Officer (often expressed in modern access to information laws as "guides" or manual"). A "roadmap" which describes the type of information held by each agency and how it can be accessed serves to assist the citizen in targeting and preparing their information requests and is an integral part in any record keeping system. It helps government organize its records and systems, and serves to limit the number of time-wasting misdirected requests.

The Information Officer, or designated civil servant, also may be responsible for assisting the requestor, particularly persons in need of greater assistance, for making initial disclosure decisions, and for notifying the applicant of the decision.

In addition to the duties of the civil servants, the law should clearly state the sanctions for impeding access to information by destroying, altering, falsifying, or concealing a record and interfering, delaying or in any way arbitrarily obstructing the disclosure of the information. In most jurisdictions, there are civil penalties for this administrative offense, although increasingly some countries are providing for some criminal penalties.

Costs

In general, modern laws do not attach a fee to the request for information but do require minimal payments to offset the reproduction costs. In many laws there are provisions for reduction in fees or the possibility of a waiver of costs for a certain number of copies, for requests that are considered to be in the "public interest", or for persons considered indigent.

Record-keeping

Thought should be given to the question of archiving and record keeping, and the duty of the civil servant to create and maintain certain records. In many of the countries presently implementing access to information laws, establishing record keeping systems is one of the most time consuming and costly elements in the openness regime. It is important that full consideration be given to this critical issue, and that requisite guidelines are established to assist public bodies to develop good practices in relation to archiving and record keeping.

In many countries an archiving law already exists. In these cases, there should be an emphasis on ensuring that the access to information law is consistent with extant legislation and norms. The Peruvian law provides for the conservation of information, including the creation and maintenance of public registers, and calls on the public body to submit documents to the National Archives in accordance with the archives established norms.[9] The norms, whether included in the ATI law or supplementary regulations, should be clear, achievable and realistic.

Annual report

Annual reports allow governments to identify successes and failures in the implementation and execution of the new information regime, thus providing guidance for areas in need of greater resources or focus. Reports also facilitate citizens in their monitoring of government efforts and compliance. Thus, the ATI law should mandate annual reporting, or more frequent reports as necessary. The Jamaican Access to Information Act instructs each Minister to provide annual reports to the Parliament on the functioning of the act in his or her department.[10] These reports are to include the number of requests and their disposition, as well as the number and type of exemptions claimed.

Interestingly, the Panamanian Law combines access to information reporting requirements with reports related to measures to increase citizen participation in policymaking. For example, the law calls for all public institutions to present annually to Congress a report that includes the number of requests for information received, the number resolved and denied, and a list of administrative acts submitted for citizen participation with a report of the observations and ultimate decisions adopted.[11]

Exemptions

In the best access to information laws, exemptions to the right to access information should be narrowly and clearly drafted, and should explicitly define the public interest that is being protected (and harm avoided) by the disclosure denial. The exclusive and exhaustive legitimate exceptions to the release of documents should all be included in the exemptions section of the ATI law. The classification of a document as “secret” or “confidential” should not, without further review, be considered an automatic reason for refusal to disclose. Classifications are generally a tool for archiving of documents related

[9] Transparency and Access to Public Information Law, Peru. Article 21.
[10] Access to Information Act 2002, Article 36, Jamaica.
[11] Transparency in Public Administration, 2002, Article 26, Panama.

to national security and should not, without a clearly definable public harm and additional analysis, render a document exempt from release.

One of the main problems with titling the different exemptions section "Confidential", "Reserved" etc. is that it is likely to lead to abuse. Public servants who are not enthusiastic about the purpose of the law or who misunderstand its objectives and duties are likely to stamp something "reserved" or "confidential" without dedicating the necessary attention to whether or not the record properly falls within the exemption and the harm that would be caused through disclosure.

All good access to information laws provide for a public interest test that allows an override of the exemption. In these cases, after determining that a document or part of a document falls within an exemption for release, a balancing test is applied. If it is found that the public interest in providing the document outweighs the potential harm identified by the exemption, the document is released.

The Case for a Public Interest Test
Excerpted from National Security and Open Government: Striking the Right Balance
- Toby Mendel

Even when the disclosure of information is likely to harm a legitimate state interest, it should still be subject to disclosure unless the harm outweighs the public interest in accessing the information. This is a logical inference from the principles underlying freedom of information and is reflected in many laws. A public interest override of this sort is necessary since it is not possible to frame exceptions sufficiently narrowly to cover only information which may legitimately be withheld. Furthermore, a range of circumstances, for example the presence of corruption, will generate an overriding public interest in disclosure.

Sometimes only one part or section of a document may fall within an exemption but not the balance of the document. Under the premise of severability, only the offensive part(s) of the requested document should be withheld from release.

In applying the exemptions section, a three-part test for refusal to disclose information has been defined:[12]

a. the information must relate to a legitimate aim for refusing access that is clearly listed in the law;
b. disclosure must threaten to cause substantial harm to that aim; and
c. the harm to the legitimate aim must be greater than the public interest in having the information.

[12] "Guidelines on Access to Information Legislation," Addendum to Declaration of the SOCIUS Peru 2003: Access to Information Conference.

Enforcement

As with implementation, the third side of the triangle, the mechanisms for enforcement must be fully considered during the drafting of the law. Enforcement of the law is critical; if there is widespread belief that the legislation will not be enforced, this so- called right to information becomes meaningless. If the enforcement mechanisms are weak or ineffective it can lead to arbitrary denials, or it can foment the "ostrich effect," whereby there is no explicit denial but rather the government agencies put their heads in the sand and pretend that the law does not exist.[13] Thus, some external review mechanism is critical to the law's overall effectiveness.

However, in countries where there is a deep lack of trust in the independence of the judiciary or it is so overburdened that the resolution of cases can take years, an enforcement model that is not dependent on judicial involvement in the first instance may be best. The context in which the access to information law functions will help determine the enforcement model chosen, but in all cases it should be:

- accessible,
- timely,
- independent, and
- affordable.

Enforcement models range from taking cases directly to the Courts such as in South Africa, to establishment of an independent Appeals Tribunal like in Jamaica, or an Information Commission/Commissioner as in Canada with the power to either recommend or to order the release of information.

ENGAGING CIVIL SOCIETY[14]

The process through which the new access to information law is conceived and promulgated is critical to its ultimate success in terms of legitimacy and use. Governments may choose to provide this right to information for a variety of reasons: a new constitution is drafted; a new administration or faltering ruler is seeking methods to fight corruption; in response to a government scandal; to meet provisions for acceptance to multi-lateral organizations; or to comply with international treaties and agreements.

But it is when civil society has played a significant role that the information regime has truly flourished, and surpassed the "check the box" syndrome of merely passing a law to satisfy some external requirement without achieving full implementation. In countries such as South Africa, Bulgaria, India, Mexico, Peru, and Jamaica widespread civil society campaigns augmented and encouraged the government efforts to pass enabling legislation. When there is such a campaign, the law enjoys greater credibility and legitimacy. There is more significant buy-in from society, as representatives have a

[13]" Establishing a Robust Transparency Regime: The Implementation Challenge," L. Neuman and R. Calland, Transparency Task Force, Initiative for Policy Dialogue, forthcoming.
[14] Id.

greater stake in the legislation's success. And, therefore, the law is more likely to be used and failure of the government or information holders to comply with its terms will be noticed and challenged.

In Jamaica, a diverse group of civil society actors worked together to seek amendments to the proposed law. This coalition included such strange bedfellows as human rights and democracy non-governmental organizations (NGOs), the journalists' association, prominent media owners and other private sector representatives, and the Civil Service Association. In South Africa, the Open Democracy Campaign Group that worked together between 1995-2000 to advocate for a strong law to give effect to the constitutional right to access information enshrined in the country's new 1996 constitution, included human rights NGOs, church organizations, environmental pressure groups, and the powerful trade union umbrella body COSATU.[15]

In contrast, in countries where civil society was not engaged in the debate, the law has been mistrusted and quickly the right to information has atrophied. Or worse, laws are passed that are contrary to the principles of openness and limit freedom of information and expression, such as was seen in both Zimbabwe and Paraguay. Belize, a small former British colony in Central America, is an example of where the bad process used to pass the law clearly negatively affected it's ability to meet the stated goals of transparency. Belize passed a law as early as 1994. It was accomplished with little public or parliamentary debate and no civil society involvement. For the past decade the law has been used only a handful of times, and rarely with success. Thus, the manner in which the law is promulgated and the extent to which actors outside of government are engaged should receive great focus.

CONCLUSION

Adjusting the mindset and creating a new culture of openness represents a great challenge that will require resources and political will. The passage of a well-crafted access to information act is just one step. However, with continued partnership among key stakeholders, the various pieces of the puzzle will combine to create the desired transparency framework.

[15] For a more detailed account of the Campaign, see A Landmark Law Opens Up Post-Apartheid South Africa, Dimba, M., www.freedominfo.org, posted July 17, 2002.