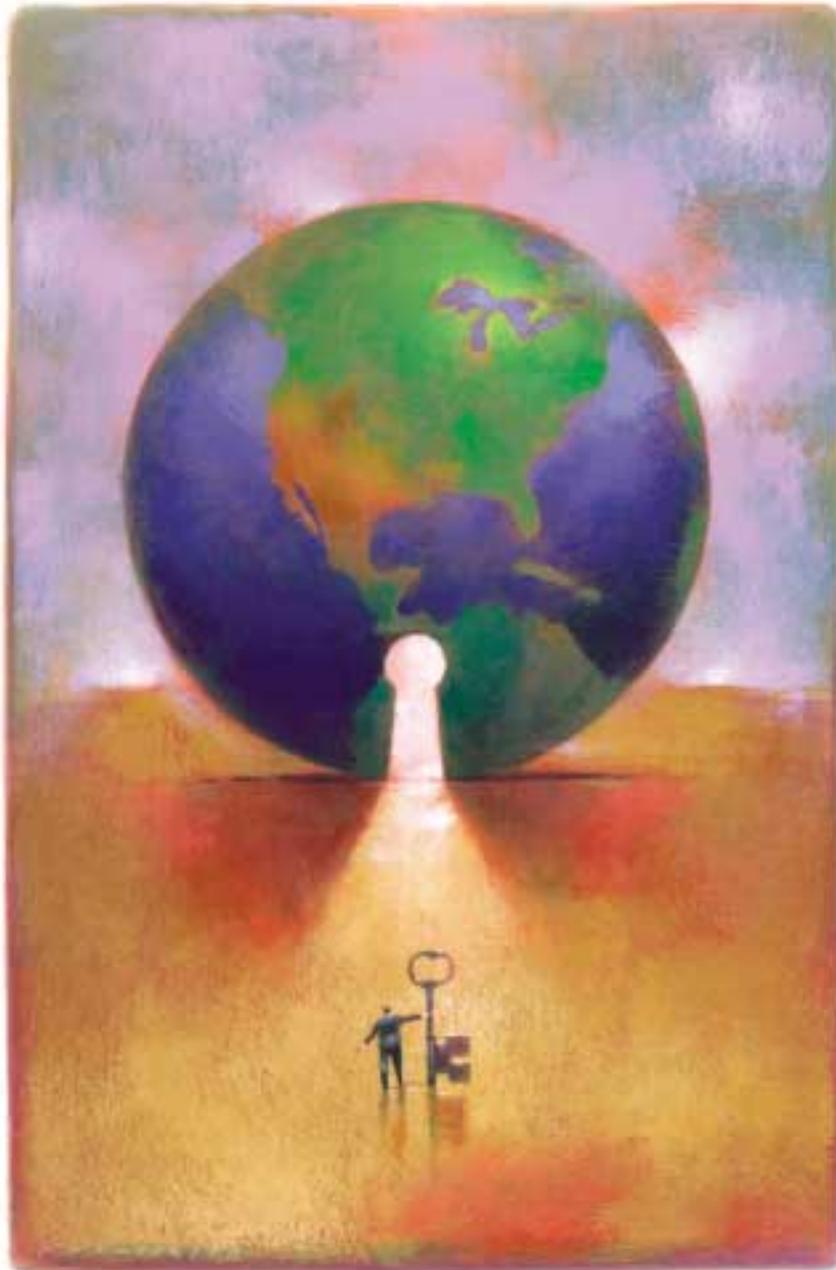


ACCESS TO INFORMATION



A KEY TO DEMOCRACY

THE CARTER CENTER



Edited by Laura Neuman
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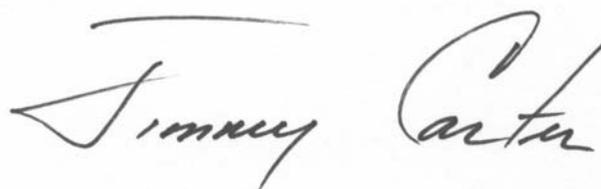
FOREWORD

By Jimmy Carter

Times have changed. Public awareness about corruption and its corrosive effects has increased substantially since 1977 when I signed into law the United States Foreign Corrupt Practices Act, which prohibits bribery of foreign officials. Now many other countries are passing legislation to combat corruption and increase public confidence in government. Access to information is a crucial element in the effort to reduce corruption, increase accountability, and deepen trust among citizens and their governments.

Public access to government-held information allows individuals to better understand the role of government and the decisions being made on their behalf. With an informed citizenry, governments can be held accountable for their policies, and citizens can more effectively choose their representatives. Equally important, access to information laws can be used to improve the lives of people as they request information relating to health care, education, and other public services.

The Carter Center has collaborated in Jamaica and other countries to help inform the public debate about the need for strong access to information laws, to bring together the government and diverse sectors of society to discuss and promote the issue, to share the international experience, and to assist in overcoming implementation obstacles. We encourage every nation to ensure that citizens can exercise their right to know about the decisions of their government, and we stand ready to assist.

A handwritten signature in black ink that reads "Jimmy Carter". The signature is written in a cursive, flowing style with a prominent flourish at the end of the name.

INTRODUCTION

Laura Neuman

Citizens and their leaders around the world have long recognized the risk of corruption. Corruption diverts scarce resources from necessary public services, and instead puts it in the pockets of politicians, middlemen and illicit contractors, while ensuring that the poor do not receive the benefits of this “system”. The consequences of corruption globally have been clear: unequal access to public services and justice, reduced investor confidence, continued poverty, and even violence and overthrow of governments. A high level of corruption is a singularly pernicious societal problem that also undermines the rule of law and citizen confidence in democratic institutions.

In addition, citizens around the world continue to struggle to meet their basic needs of food, clothing, and adequate shelter and to exercise their broader socio-economic rights. More than 1.2 billion people worldwide live on less than \$1 per day,¹ 1.7 billion are without access to clean water, and 3.3 billion people live without adequate sanitation facilities.² Although nearly 150 countries have ratified the International Covenant on Civil and Political Rights, Freedom House finds that 106 countries continue to restrict its citizen’s important civil and political freedoms.³

Knowledge is power, and transparency is the remedy to the darkness under which corruption and abuse thrives. Democracy depends on a knowledgeable citizenry whose access to a broad range of information enables them to participate fully in public life, help determine priorities for public spending, receive equal access to justice, and hold their public officials accountable. When

the government and quasi-governmental agencies perform under a veil of secrecy, people are denied the right to know about public affairs, and the press is only able to speculate and subsist on rumors.

Poor public access to information feeds corruption. Secrecy allows back-room deals to determine public spending in the interests of the few rather than the many. Lack of information impedes citizens’ ability to assess the decisions of their leaders, and even to make informed choices about the individuals they elect to serve as their representatives.

Although perhaps most often considered in the fight against corruption, access to information is equally critical for citizens’ capacity to exercise their rights and to uphold the responsibilities and accountability of their leaders. Access to information laws allow individuals and groups to understand the policies with which the government makes determinations relating to health, education, housing and infrastructure projects and the factual basis for such decisions. Armed with such knowledge, citizens around the world are effectuating change that allows them to improve their living standards and better their lives.

Increasingly, government and civil society are seeing access to information as the key to fighting corruption and enhancing the public’s capacity to exercise their rights. Presently, there are over 45 countries with access to information laws, with dozens of others on the verge. Unfortunately, the Latin America and Caribbean region lags behind Western Europe, Central and Eastern Europe and

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even Asia in the coverage of access to information and implementation. Nevertheless, the trend toward new legislation continues as developed and developing nations, as well as international funding institutes, recognize the importance of strong access to information laws that are appropriately implemented and fully enforced. Reaching this goal is complex, and we hope that the following chapters provide the reader with a number of ideas for ways in which to do so.

In *Access to Government Information: An Overview of the Issues*, a paper originally written for The Carter Center's Transparency for Growth Conference in 1999, Dr. Alasdair Roberts sets out the international principles that govern many access to information laws. This article, premised on the notion that wholesale secrecy in government is no longer acceptable, includes a discussion about which government institutions should be covered by the law, when is it appropriate for the withholding of information, how costs can be controlled such that full implementation may be a reality, and the best mechanisms for enforcement. Dr. Roberts concludes with a reminder that the effectiveness of the law will only be determined through its use, and he encourages civil society organizations to build internal capacity so that they can take advantage of this important tool.

Richard Calland describes the successful use of access to information acts in Africa, Asia, and Eastern European States. *Access to Information: How Is It Useful and How Is It Used?* examines cases in which access to information laws have been used to fight discrimination, inform democratic debate, influence policy decisions and ensure the proper flow of vital resources. Through an emphasis on the experiences in other parts of the world, Mr. Calland presents a valuable guide to passage, implementation and enforcement of a vigorous access to information act and a persua-

sive argument for utilizing "the right to know" approach in developing legislation.

The Carter Center, through its work in Jamaica, learned a number of lessons relating to passage and implementation of an access to information act. *The Carter Center Access to Information Project: Jamaica Case Study* follows the project from its inception in 1999 through the first stages of legislative implementation, chronicling the successes and obstacles that the Jamaican government and civil society faced. I describe the need for political will and broad public debate, as well as the burden shift that occurs from government to civil society once the law is passed and procedures in place.

Disreali stated, "as a rule, he or she who has the most information will have the greatest success in life." Success, if measured as the increase in transparency in government, and thus decrease in corruption, and the citizen's capacity to exercise her rights, is achievable through the passage, implementation and enforcement of a strong access to information act. Access to information is a cornerstone of democracy.

This publication draws on the experiences and talents of many persons. I would like to thank the authors for sharing their knowledge and time with us to make this both a scholarly and practical resource. My colleagues Dr. Shelley McConnell, Daniel Gracia, Amy Sterner and, especially, Dr. Jennifer McCoy Director of the Americas Program assisted greatly in the conceptualization and implementation of this guidebook. Alex Little, a member of The Carter Center's Conflict Resolution Program, spent his own valuable personal time in creating the layout. Finally, I would like to thank our tireless translators for the Spanish edition of this publication; Paula Colmegna and Dr. David Dye, as well as Americas Program intern

"As a rule, he or she who has the most information will have the greatest success in life"

Marcela Guerrero for their time in painstakingly assuring that the author's voice and meaning was heard in the translation.

1 World Bank. 2000. World Development Report, Washington, Table 1.1.

2 Statement of Miloon Kothari, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living to the Third United Nation Conference on the Least Developed Countries, Brussels 14-20 May, 2001.

3 UNDP Human Development Report 2002, p. 10.

ACCESS TO GOVERNMENT INFORMATION: AN OVERVIEW OF ISSUES

Dr. Alasdair Roberts†

WHY ACCESS RIGHTS MATTER

A right of access to information held within government institutions is usually justified as an instrument for promoting political participation. It has been argued that access is necessary for the realization of the basic rights to freedom of opinion and expression that are guaranteed in the United Nations Declaration on Human Rights, subsequent human rights declarations, and many national constitutions. A related but stronger argument is that access is essential for persons to realize their basic right to participate in the governing of their country and live under a system built on informed consent of the citizenry.¹ In any state, and particularly in states where the policy-analysis capabilities of civil society are poorly developed, political participation rights cannot be exercised effectively without access to government information.

These arguments are sound but incomplete. In jurisdictions where access laws have been adopted, requests often do not seek information about the higher-level policy and management functions of government. Instead, the most frequent users of access laws tend to be individuals or businesses seeking information relating to administrative activities that immediately affect them. For example, individuals seek information about decisions to deny benefits, while businesses seek information about adverse regulatory or procurement decisions. In most cases, therefore, a right of access is more accurately justified as an instrument for discouraging arbitrary state action and protecting the basic right to due process and equal protection of the law.²

Access laws play an important role in reducing corruption within government institutions. By making available information about procurement processes and successful bids, access laws make it more difficult for officials to engage in unfair contracting practices. Similarly, access to information about decisions regarding the conferral or withholding of other benefits by government institutions, or regulatory or policing decisions, reduces the probability that such decisions will be taken for improper reasons. Access laws may also make it more difficult for senior officials to make larger policy decisions that are not supported by sound analysis. Access to information about the formulation of policy can reveal instances in which policy decisions were taken without careful consideration, and instances in which decisions contradicted advice provided by professionals within the public service.

Over the last thirty years, many governments have formally acknowledged a right of access to information. In some instances, governments have adopted administrative codes that establish a right of access, although the more common approach is to give access rights the force of law. A few nations, including South Africa, have entrenched a right of access in their constitutions. Formal recognition of access rights is now essential if institutions hope to maintain popular legitimacy. The burden was once on proponents of access rights to make a case for transparency; today, the burden is on governments to make the case for secrecy.

[†]This paper was first written for The Carter Center's Transparency for Growth Conference, May 1999.

LIMITS TO ACCESS RIGHTS MUST BE DEFINED

Access laws typically establish a presumption that citizens have a right to inspect information within public institutions. However, no government recognizes an unqualified right of access to information. Before adopting an access law, three questions - all pertaining to the scope of the access right - must be settled. First, what institutions should be subject to an access right? Second, under what circumstances is an institution that is subject to an access law justified in withholding information? Finally, what steps can properly be taken to moderate the cost of administering an access law?

What institutions should be subject to an access law?

The rule traditionally used to define the limits of access law is that the law should include public, but not private, organizations. The rule has always had important exceptions. For example, few laws establish a right of access to information held by legislators or legislative officers. The rationale is that the operations of legislatures are sufficiently transparent that a right of access is unnecessary. Some laws also exclude state-owned enterprises (SOEs) engaged in commercial activities, on the premise that they are subject to market discipline and that increased transparency would put them at a competitive disadvantage. Exclusion of SOEs is often disputed, particularly when they have mixed mandates or hold dominant positions in the marketplace.

The idea that private organizations should not be subject to access law is also being questioned. The usual argument has been that private enterprises “do not exercise the executive power of government” or are regulated by “market forces

and customer relations.”³ This argument has become more tenuous as governments have increased contracting-out and privatization of state assets. Citizens worry that inherently governmental work may be cloaked by the principle of commercial confidentiality. Anomalies may also arise. For example, a publicly-run school or prison might be held to a higher standard of transparency than its privately-run counterpart.

The burden was once on proponents of access rights to make a case for transparency; today, the burden is on the governments to make the case for secrecy.

Legislatures have had difficulty in defining the circumstances in which access rights should be imposed on private enterprises. Florida’s access law includes

private entities “acting on behalf of a public agency,” but administrators and courts have not found this to be a helpful standard for deciding whether a contractor should be subject to access requirements.⁴ The Australian Law Reform Commission is skeptical about the possibility of defining a precise standard in law and suggests that a better approach is to allow contracting institutions to make judgments about access rights on a case-by-case basis. The new British access law takes a similar approach, giving the Secretary of State the discretion to include private enterprises that “exercise functions of a public nature” or which “provide under contract made with a public authority any service whose provision is a function of that authority.”⁵ This is unlikely to be a satisfactory solution for critics who believe that public institutions sometimes share the contractor’s desire to preserve secrecy.

In several jurisdictions, proposals have been made for inclusion of privately-owned utilities under access laws. These proposals rest on the argument that access rights can provide a useful check against the tendency of monopolies to abuse their power. In fact, the prospect of an abuse of power - regardless of whether that power is acquired through statute or market imperfections — may be a better test for the imposition of access

rights than whether the assets of an organization are publicly or privately owned. It is noteworthy that the United States has imposed a limited right of access to information held by private entities in competitive markets - such as credit bureaus and post-secondary educational institutions - where there is thought to be an imbalance of power between those entities and citizens.⁶ A similar right may be imposed on private healthcare providers.

When can information be withheld by institutions that are subject to an access law?

Every access law identifies exemptions to the right of access - that is, provisions that permit institutions to withhold certain kinds of information. The need for exemptions is not disputed, and in some instances there is wide agreement about the appropriate definition of exemptions. However, there is no consensus about the definition of exemptions when information relates to important state interests.

The least-contentious exemptions are also the most frequently used. These provisions balance access rights against the privacy rights of other individuals and the right to commercial confidentiality. For example, laws typically allow institutions to deny access to information about other persons if the release of that information would be an unreasonable invasion of their privacy. These laws recognize that there are circumstances in which personal information should be released despite the invasion of privacy, such as a threat to public health or safety. In such circumstances, other persons are given a right to appeal the institution's decision to release their personal information. Similar arrangements are used where individuals request access to confidential information supplied to government by businesses.

Greater controversy arises over exemptions designed to protect important state interests. Here, governments generally push for wide discretion to deny requests for information. Critics argue that these broadly-defined provisions allow gov-

ernments to evade accountability and undermine citizens' ability to exercise their political participation rights.

For example, access laws vary widely in their treatment of information relating to internal deliberations about policy or the management of public institutions. All laws give some kind of protection to this information, on the premise that secrecy is essential to ensure "open, frank discussions on policy matters."⁷ But the degree of protection varies widely. U.S. law obliges institutions to show that disclosure would cause injury to the quality of government decision-making. However, the Canadian law protects these records even when there is no evidence that harm would be caused by disclosure, and precludes independent review of decisions to withhold certain Cabinet records.

The British law, proposed in 1999, takes a mixed approach, adopting a blanket exemption of all material relating to "the formulation or development of government policy" without proof of harm, and also an exemption of information where disclosure would be likely to inhibit "the free and frank exchange of views" or would "otherwise prejudice the effective conduct of public affairs."⁸ The Australian law also allows Cabinet ministers to issue "conclusive certificates" that limit the ability of tribunals to review their decisions to withhold this information.

Governments are also reluctant to disclose information relating to national security, defense, and international relations. The American approach requires institutions to show that disclosure of classified material would cause harm to national security. However, critics argue that this relatively narrow exemption is weakened in practice by the diffusion of authority to make classification decisions and a tendency to "over-classify" records.⁹ The laws of Ireland and New Zealand require proof that harm will be caused by disclosure but allow ministers to issue certificates preventing review of their decisions to deny access. Australia permits non-disclosure without

proof of harm and also allows ministers to issue certificates limiting review. The 1999 British proposal denies any right of access to information held by some security and intelligence agencies and allows ministers to issue certificates limiting review of decisions to withhold information relating to national security that is held by other agencies.¹⁰

There is similar variation in the treatment of information relating to other state interests. In Ireland and New Zealand, ministers may issue certificates limiting access to information about law enforcement. The British government proposed to deny any right of access to certain law enforcement records; however, this approach has been criticized as unnecessarily restrictive.¹¹ Some laws also exempt information if disclosure would undermine government's capacity to manage the economy.

What steps can be taken to control the cost of administering an access law?

Governments sometimes argue that access laws impose an unreasonable administrative burden. A broadly-worded request for information may require public servants to spend many hours searching for records, consulting about the use of exemptions, and removing exempted information from records. Few thorough studies of administrative costs have been undertaken, although a 1996 study by the Canadian government estimated that the average cost of responding to information requests was US\$600.¹² Estimates such as this must be taken with a grain of salt. The cost of compliance can be increased by inadequate procedures or excessive internal deliberations about disclosure of information.

Nevertheless, the cost of responding to access requests may be substantial, and governments may

legitimately impose controls - sometimes known as "gateway provisions" - to regulate the inflow of requests. One approach is to prohibit requests that are frivolous, vexatious, or repetitive. This restriction is not problematic so long as an effective route of appeal is available in cases where it is misapplied. However, such restrictions are used infrequently and unlikely to have a significant effect on administrative costs.

A more effective method of regulating demand is through application fees and charges for processing access requests. Governments have sometimes suggested that fees should be calculated on a "cost-

recovery" basis, but this is inadvisable. A fee schedule designed for recovery of a large proportion of administrative costs would deter all but a handful of requests. High fees

also disadvantage poorer individuals and organizations.¹³ Several governments have attempted to reduce such inequities by developing distinct fee schedules for different classes of individuals or different classes of information.

MECHANISMS FOR ENFORCING ACCESS RIGHTS MUST BE ESTABLISHED

Because institutions may have an ingrained "culture of secrecy," an external mechanism for encouraging compliance with access law is necessary. Access laws typically adopt one of three approaches to enforcement:

1) Individuals are given a right to make an "administrative appeal" to another official within the institution to which the request was made. If the administrative appeal fails, individuals may appeal to a court or tribunal, which may order disclosure of information.

2) Individuals are given a right of appeal to an independent ombudsman or information

The American approach requires institutions to show that disclosure of classified material would cause harm to national security.

commissioner, who makes a recommendation about disclosure. If the institution ignores the recommendation, an appeal to a court is permitted.

3) Individuals are given a right of appeal to an information commissioner who has the power to order disclosure of information. No further appeal is provided for in the access law, although the commissioner's actions remain subject to judicial review for reasonableness.

All of these approaches require an independent judiciary that is prepared to make and enforce rulings against the government. Of the three approaches, the latter two are clearly preferable. Administrative appeals are unlikely to produce satisfactory outcomes in contentious cases where senior officials may already have participated in discussions about disclosure, and a further appeal to court may be expensive and time-consuming. Some observers say that the second approach is also preferable to the third. They argue that governments rarely ignore recommendations, and that commissioners with quasi-judicial responsibilities may feel obliged to avoid public advocacy of access rights. Proponents of the third approach argue that it provides a quicker and less costly remedy in cases where recommendations are not followed.

All approaches share two weaknesses. The first is the attempt to promote compliance by addressing individual complaints. If governments systematically abuse access rights, commissioners may be overwhelmed with appeals, straining their ability to resolve complaints promptly. A power to take action against institutions that repeatedly violate the law may be desirable. Commissioners should also have the right to receive statistical reports from institutions that allow them to monitor institutional compliance. A second weakness is

the inability to review and modify fee schedules. The design of fee schedules has been viewed as an administrative matter that can be left to the executive branch of government. This is a mistake: fee schedules play an important role in determining how access laws are used, and should be subject to external review.

No external enforcement mechanism will be effective in controlling institutions that are determined to thwart an access law. Officials can engage in forms of non-compliance - such as hiding or destruction of records - which are not easily detected.

Ultimately, the effectiveness of an access to information law depends on a professional public service that is prepared to comply with the law...

Ultimately, the effectiveness of an access law depends on a professional public service that is prepared to comply with the law, even while it tests the limits of the law in daily practice.

CIVIL SOCIETY MUST HAVE THE CAPACITY TO EXERCISE ACCESS RIGHTS

Access laws will be ineffective if citizens and non-governmental organizations lack the capacity to exercise their right of access. In some smaller jurisdictions, for example, the media are less likely to use access laws because they cannot afford to hire skilled reporters or support lengthy investigations of public institutions. The complaint by officials that media requests focus on trivialities such as travel expenses is partly explained by the fact that these requests are uncomplicated, inexpensive, and likely to generate a quick story. Advocacy groups are also unlikely to take full advantage of access laws if they lack resources to maintain a staff and pursue complex requests.

Similarly, access laws will not be used if elements of civil society are incapable of acting on the information obtained through access requests.

A fettered press, which faces legal penalties or persecution for news reports that are critical of government, does not have a strong incentive to use an access law. Advocacy groups are less likely to use an access law if there are no channels for effective political action. Individuals and businesses will request information about the administrative activities of government only if remedies are available for cases in which officials have acted inappropriately. In short, an access law is unlikely to be used extensively unless other steps are taken to build capacity within civil society and increase its influence over the policymaking and administrative processes of government.

13 For an illustration of the effect which fee increases can have on the use of access law, see: Alasdair Roberts, *Ontario's Freedom of Information Law: Assessing the Impact of the Harris Government Reforms*. Working Paper, School of Policy Studies, May 1999.

1 See Articles 19 and 21 of the United Nations Declaration of Human Rights.

2 See Articles 7, 10, and 12 of the United Nations Declaration of Human Rights.

3 Australian Law Reform Commission, *Open Government: A Review of the Federal Freedom of Information Act, 1982*. Report 77, December 1995, Section 15.

4 Florida Public Records Law, s. 119.011(2), Florida Statutes.

5 United Kingdom, Home Office, Freedom of Information Unit, Freedom of Information Bill, May 1999, section 2.

6 House of Representatives, Committee on Government Reform, *A Citizen's Guide on Using the Freedom of Information Act*, H. Rep. 106-50 (March 1999), p. 6.

7 *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 151 (1975).

8 United Kingdom Freedom of Information Bill, section 28.

9 Daniel Patrick Moynihan, *Secrecy*. New Haven, CT: Yale University Press, 1998.

10 United Kingdom Freedom of Information Bill, sections 18 and 19.

11 United Kingdom Freedom of Information Bill, section 25. House of Commons, Select Committee on Public Administration, *Report on the White Paper on Freedom of Information*, June 1998, Paragraphs 24-30.

12 Treasury Board Secretariat, *Review of Costs Associated with ATIP Legislation*, April 1996.

ACCESS TO INFORMATION: HOW IS IT USEFUL AND HOW IS IT USED?

Dr. Richard Calland[†]

The scene: a small village in rural India. The whole of the village has gathered to listen as public records are being read out. A villager is listed in the public record as having rented out his plough to the government-sponsored irrigation project. “No,” he says, “I did not do that. I was away in Delhi at my cousin’s wedding at that time.” There is laughter, as well as outrage, as people immediately discover how they have been tricked and how public money has been siphoned away from them and their village. More false information is revealed: Examples such as items for bills for transport of materials for 6km when, in fact, the real distance is just 1km. A worker, employed according to government records on the construction of a new canal, stands up and asks: “What canal?” Workers involved in the building of houses confirm that fifty bags of cement, not one hundred, were supplied and used. At the end of the public hearing the chant goes up: “What do we want? Information. What do we want? Information.”

INTRODUCTION

Meaningful participation in democratic processes requires informed participants. Secrecy reduces the information available to the citizenry, hobbling their ability to participate meaningfully.

Joseph Stiglitz, Former Senior Vice-President and Chief Economist of the World Bank¹

The Right to Know

We live in an “information age.” There has been an explosion in the amount of infor-

mation held by governments, companies, non-governmental organizations (NGOs) and other citizen organizations. Information is power. Very often, the more you know, the more you are able to influence events and people. For citizens and citizen organizations, it is an age of opportunity and immense challenge. As a sector, civil society must ensure that it does not get left behind. Information is vital for individual citizens, communities, and citizen’s organizations if they are to fully participate in the democratic process.

Information is not just a necessity for people – it is an essential part of good corporate and state governance. Weak companies and bad governments depend on secrecy to survive. Secrecy allows inefficiency, wastefulness and corruption to thrive.

In terms of government, access to information allows people to scrutinize the actions of their government and is the basis for informed debate of those actions. For the private sector, access to good information is vital for tendering, for open competition, and for an efficient marketplace of ideas and products.

When countries pass access to information laws, they join an international bandwagon, one that has gathered great momentum in recent years. But the international experience shows that for an access to information law to work well in practice and to be useful to both government and citizens and their civil society organizations, it should meet a number of key principles. The purpose of this paper, therefore, is to:

[†]A version of this paper was first published in the guidebook *Fostering Transparency and Preventing Corruption in Jamaica*, edited by Laura Neuman and published by The Carter Center, 2002.

1. Look at access to information law from a practical user's perspective and try and answer the questions:
 - ◆ What is the value of access to information law?
 - ◆ How can an access to information law be used?
2. Set out the main principles that need to be adhered to, if the law is to be effective in practice and valuable to its users.

In doing so, a number of case studies are used to illustrate the potential value of an access to information law for all sectors of society. In particular, because of South Africa's history and context, a more detailed comparison with its law, the Promotion of Access to Information Act 2000, is provided.

The Global Trend Towards Greater Transparency

It is not, perhaps, immediately obvious how and why the right to access information is so important. But the case of the Indian State of Rajasthan, where they say "The Right to Know, the Right to Live," helps make this crystal clear. Deep in the rural communities, a peoples' movement—the Mazdoor Kisaan Shakti Sangathan (MKSS) organization—has shown how information can empower ordinary people and improve their lives. Historically, local people have had difficulty getting paid the minimum wage. At election time, politicians would make promises about the minimum wage in return for votes, but these promises were rarely turned into reality. Campaigners realized that it was only by obtaining the relevant documentation, in particular the

muster rolls (a list of persons employed and wages paid), that they could be successful. The right to information and the right to survive thus became united in peoples' minds.

Now Rajasthan, in common with most states in India, has a Freedom of Information law. Its government recognized that it was better to create a law that would affirm the right to access to information and provide a system to underpin this right. This is part of a global trend; in the past twenty years many countries have passed freedom of information laws.

Often, the decision to protect peoples' right to access information has been part of a wider process of democratisation. Since the end of the Cold War and Communist rule at the end of the 1980s, there has been a rush to pass such laws in Central and Eastern Europe. Amongst others, Bulgaria, Bosnia, the Czech Republic, Hungary and Slovakia have all passed laws in the last decade.

In the East, there is a similar trend. The Philippines recognized the right to access information held by the State relatively early, passing a Code of Conduct and Ethical Standards for Public Officials and Employees in 1987. Thailand passed its Official Information Act in 1997, and similar laws have been passed in Japan and South Korea.

Most Western European countries, as well as longer-established democracies such as the United States, Sweden, Canada and Australia, all have access to information laws. And, in Africa, Nigeria is soon to follow South Africa's example by passing its own Act.

Often, the decision to protect peoples' right to access information has been part of a wider process of democratization.

INFORMATION, DEMOCRACY AND ACCOUNTABILITY

For some reason, many governments appear to think that they can only govern effectively if they operate in total secrecy and their citizens do not know what they are doing, supposedly on behalf of the larger population. African governments are taking the lead in this approach to governance and in many countries in the region, secrecy in government has attained the status of state policy. It is perhaps the result of a messiah complex which imbues political leaders with a feeling that only they know what is best for the people and that citizens cannot be trusted to make important decisions on issues that affect their lives or how they want to be governed.

Ejetaen Ojo, Executive Director: Media Rights Agenda, Lagos, Nigeria, October 2000.

THE CASE OF SOUTH AFRICA

Secrecy is a function as well as an effect of undemocratic rule. Throughout the *apartheid* era, South Africa's increasingly paranoid white minority government suppressed access to information— on social, economic, and security matters— in an effort to stifle opposition to its policies of racial supremacy. Security operations were shrouded in secrecy. Government officials frequently responded to queries either with hostility or misinformation. Press freedom was habitually compromised, either through censorship of stories or through the banning and confiscation of publications. Information became a crucial resource for the country's liberation forces, and their allies in international solidarity movements, as they sought to expose the brutality of the *apartheid* regime and hasten its collapse.

Consequently, opposition groups came to see unrestricted access to information as a cornerstone of transparent, participatory and accountable governance. This consensus was ultimately captured in South Africa's new constitution. A democratic parliament then gave further shape to

the right of access to information by passing enabling legislation— a process in which civil society organizations played an unusually influential role.

One of the most important aspects of the interim constitution that guided South Africa's transition to democracy was the introduction of a Bill of Rights designed to ensure equal protection for a broad range of human, socio-economic and civil rights, irrespective of race, gender, sexual orientation, disability, belief, and other factors.² Among the rights upheld was that of access to publicly-held information. Section 23 of the interim constitution stated: "Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights."

By entrenching an independent right of access to information, rather than leaving it to be protected by the right to freedom of expression as has generally been the case in international human rights instruments, the drafters underscored its significance in South Africa's constitutional order.

Following the historic general election of 1994, the interim constitution's broad right of access to information was expanded further. Section 32(1) of the final constitution, enacted by the National Assembly in 1996, guarantees "everyone...the right of access to any information held by the state **and** any information that is held by another person and that is required for the exercise or protection of any rights." Not only is the right of access to publicly-held information no longer qualified by the stipulation that the information be needed for the exercise or protection of a right, but a qualified right of access to information has also been established with respect to private bodies and individuals. The legislation was, however, permitted to include "reasonable measures to alleviate the administrative and financial burden on the state." To balance, in other words, the state's potentially competing obligations to

protect citizens' information rights and to provide fair, efficient, and cost-effective administration.

THE SOUTH AFRICAN LAW

The Promotion of Access to Information Bill reaches out towards new horizons. It captures both the spirit and the necessity of the age in which we live. Information is the life-blood of our times; we need it to survive and to prosper, almost as much as we need oxygen to live. This new law does something truly innovative and truly radical. It aspires not only to enhance an information rich society, but also to democratize the use, ownership, application and access to information. If information represents power, then we must ensure that it is not monopolised by the rich and powerful.

Priscilla Jana ANC MP, National Assembly, Feb. 2000.

The South African Promotion of Access to Information Act 2000 (POATIA) begins by “recognising that the system of government in South Africa before 27 April 1994 resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations.” As was noted in the section above on the history of the Act, the right to access to information is a part of the new set of human rights designed to prevent a repeat of history and to ensure that South Africans can fulfill their potential as human beings.

The Objects of South Africa's Promotion of Access to Information Act 2000

1. To give effect to the Constitutional Right to Access Information (section 32 of the Constitution), and to generally promote transparency, accountability and effective governance of all public and private bodies, by establishing procedures to do so.

2. To enable requesters to obtain records held by the State and by private bodies as swiftly, inexpensively and effortlessly as reasonably possible in a way that balances this right with the need for certain justifiable limitations, such as privacy, commercial confidentiality and effective, efficient and good governance.

In addition, the Act's objects include the empowerment and education of everyone so as to:

1. understand their right to access information
2. understand the functions and operation of public bodies
3. effectively scrutinize, and participate in, decision-making by public bodies that affect their rights.

A System for Accessing Information

Beyond the fleshing out of the right to access records, the South African (SA) Act, in meticulous detail, creates a system for using the law. This is vital for its success. There is no point in having a law that provides for the right to access to information, if there is not at the same time a clear and workable system of mechanisms to enable citizens to use the law.

Hence, the SA law requires government to ensure that a manual is produced. This is a crucial obligation, as it will provide both government and the requester citizen with a “road map” of the records held by that part of government. If the manual is well produced, it will enable government to categorise records and, thus, facilitate automatic disclosure or publication, as is encouraged by the Act. In addition, the Information Officer must ensure that the relevant contact details are included in the telephone directory.

“Information is the life-blood of our times; we need it to survive and to prosper, almost as much as we need oxygen to live.”

In particular, the Information Officer must decide which records shall be automatically published. The evidence from other countries is that the more records that are automatically published or disclosed, the easier and cheaper it is for government to administer the law.

Furthermore, deputy information officers must be appointed in sufficient number to “render the public body as accessible as reasonably possible for requesters of its records.” The SA Act envisages that deputy information officers will be the operational hubs of the new system of open information, reporting to the Information Officer who, in most cases, is likely to be the most senior person in the department or body (often the Director-General).

The SA law requires that a prescribed form be used so as to “provide sufficient particulars to enable an official of the public body concerned to identify the record or records requested.” With this and with the request in general, the deputy information officers are under an explicit duty to assist requesters, thus enabling the requester to comply with the request procedures.

Most importantly, the SA Act provides for clear time limits: a decision must be made within 30 days (though the transitional rules extend this period for years one and two to 90 and 60 days respectively). The Act sets out the specific grounds for extending the period of the decision and declares a deemed refusal, where the time limit for making a decision is not met.

Private Information: The “Horizontal” Right to Know

Powerfully, the South African law also creates the mechanism whereby an individual citizen may

access privately-held information, so that he or she may meaningfully exercise other rights in the Bill of Rights. This applies especially to the group of rights in the constitution known as socio-economic rights, such as the rights to adequate health care, education and clean environment.

It is also important for the right to equality. The experience in

other parts of the world has shown that in equality cases it is very difficult to prove discrimination due to a lack of evidence. Access to information will facilitate such a claim by allowing an open assessment of all the facts surrounding the alleged discrimination. Equally importantly, therefore, if such activity is open to scrutiny it may also serve as a deterrent to the continued violation of rights.

In terms of sectors such as banking and pensions, the opportunity to use the legislation to expose unlawful or unjust policies such as “red-lining” now exist. In the realm of consumer protection there will be the opportunity to ask for information relating to safety testing. With product pricing— drugs, for example— there is the opportunity to get information relating to the production costs and profit margins and how these affect affordability and accessibility. In the sphere of the environment, there will be an opportunity to elicit the information pertaining to pollution testing. For example, a factory may be emitting pollution, causing endemic ill health in a community. It may be important, therefore, to access the testing records of the company. Science and industry develop thousands of new kinds of potentially dangerous consumer products, many of which are extremely complicated, leaving consumers puzzled and confused. Consumers’ good health and safety are often threatened due to lack of information concerning the quality, safety and reliability of products and services that they buy.

There is no point in having a law that provides for the right to access to information, if there is not at the same time a clear and workable system of mechanisms to enable citizens to use the law.

Prices for essential services and products such as bank transactions, insurance policies, bus and train fares, fuel consumption, as well as for essentials such as foodstuffs, are often increased without prior notification and proper justification. Lack of information makes it extremely difficult for communities to decide whether price hikes are fair.

In some of these cases, an individual will be able to make the application for the information. Often, though, there will be no one with the wherewithal to make the application, to have the strength of purpose and the resources or to pursue an appeal if the request is refused by the private entity. Those whose rights are most seriously threatened will be powerless to obtain the information they most desperately need. This is why South Africa decided to permit the state to have the opportunity to make a request for privately-held information, whether directly on behalf of an individual or community, or in order to pursue a policy directed at protecting the rights of its citizens.

Critics of this proposal saw it as a state intrusion into privacy— a fear of ‘Big Brother State’. The state can, of course, still abuse its power— and clearly the South African Information Act adds to the Executive Power’s panoply of constitutional and statutory privileges by granting access to public sector information. But, this paradigm needs to be recast in the light of the massive global economic developments of the past decade. The South African Bill was passed into law by parliament a week after a new company, Glaxo Wellcome SmithKline Beecham, was created through merger, with an estimated turnover of around 100 billion US Dollars. The South African economy, in contrast, has a budget of not much over 20 billion US Dollars.

So the question is: where does the real power lie? We are dealing with a new set of power rela-

tions. Horizontal rights seek to address the inequalities that these relationships create. To exclude the state, despite its obvious stake, from the new system of open information on the grounds that it is too powerful would be perverse in the face of these new realities. In fact, the SA Act will ensure that the state, operating in the public interest and in pursuit of its constitutional obligations, will be able to access information that is needed to protect or exercise the rights of its citizens. Thus will the state be brought into the human rights framework, both in terms of its holding of information and in terms of its obligation to obtain information on behalf of its citizens, most especially those sectors of society least able to protect its interests.

Inequality of access to information...is a form of poverty. Without knowledge, you cannot act.

USING THE LAW: SOME CASE STUDIES FROM AROUND THE WORLD

As Amartya Sen, the Nobel Prize-winning economist observed, there has never been a substantial famine in a country with a democratic form of government and a relatively free press. Inequality of access to information, he has argued, is a form of poverty. Without knowledge, you cannot act.

Fighting for the Right to Know: Thailand: Case Study One³

In May 1992, Thai army soldiers fired at thousands of pro-democracy protesters who had gathered at Bangkok’s Sanam Luang park in an uprising against Suchinda Kraprayoon, the general who had appointed himself prime minister only six weeks earlier. Scores were killed when troops fired their rifles straight at the crowd and pursued demonstrators in the streets and back alleys of the capital. The violence ended only when King Bhumibol Adulyadej himself intervened and a transitional government was formed to prepare for elections.

Eight years later, the Thai government, in response to the demands of the relatives of those murdered in the uprising, released the report of an army investigation of the “Bloody May” massacre. The report provided previously secret information on what went on during those tumultuous days and the possible role of two political parties in the carnage. “Now the healing can begin,” said an editorial in *The Nation*, the newspaper that in 1992 braved military censors by publishing photographs and accounts of the violence.

The release of the army report was a milestone in a country where the military remained a powerful and secretive institution that had so far not been held to account for its actions. For the first time, thanks in part to a new information law that allowed citizen’s access to a wide range of official documents, the army was releasing information on one of its deepest and darkest secrets.

Thailand had come a long way. The 1992 uprising marked the formal withdrawal of the military from power and the end of the era of coups d’etat. In the following years, Thais laid the foundations— including a new constitution, media reforms and the information law— for what is now Southeast Asia’s most robust democracy.

For the longest time, the rulers of Southeast Asia maintained political control through information control. Powerful information ministries muzzled the press, setting guidelines for what could be reported and what could not. A culture of secrecy pervaded the bureaucracy, making it difficult, if not impossible, for citizens to find out how their governments were doing their work and how public funds were being spent.

Since the late 1980s, however, democracy movements, technological advances and the

increasing integration of regional economies into global trade and finance have challenged such stranglehold. In Indonesia, the Philippines and Thailand, the media have played an important role in providing citizens information on the excesses of authoritarian regimes. The power of an informed citizenry was dramatised in uprisings that took place in the streets of Manila in 1986, in Bangkok in 1992 and in Jakarta and other Indonesian cities in 1998.

Today, in these countries, a free press provides a steady stream of information on corruption, the abuse of power and assorted forms of malfeasance. Greater access to information has also shed light on the past, whether it is military wrongdoing as in the case of Thailand, or the thievery of deposed dictators, as in the case of the Philippines and Indonesia.

Information has empowered not just the press, but citizens as well, allowing them to challenge government policy and denounce official abuse.

Uncovering Corruption in the Thai School System: Thailand: Case Study Two⁴

The first major case under Thailand’s right to access information act revolved around the admissions process to Kasetsart Demonstration School, one of several highly regarded, state-funded primary schools. The admissions process to the school included an entrance examination, but test scores and ranks were never made public, and the student body was largely composed of *dek sen*— children from elite, well-connected families. These factors created a widely held public perception that some form of bribery played a part in the admissions process.

In early 1998, a parent whose child had ‘failed’ to pass the entrance examination asked to see her daughter’s answer sheets and marks, but was

Information has empowered not just the press, but citizens as well, allowing them to challenge government policy and denounce official abuse.

refused. In the past, that would have been the end of the road— she and her daughter would have been left aggrieved, frustrated, and powerless. Instead, she invoked the access to information law.

In November 1998, the Official Information Commission ruled that the answer sheets and marks of the child and the 120 students who had been admitted to the school were public information and had to be disclosed. There was a period of public controversy, but eventually the school admitted that 38 of the students who had failed the examination had been admitted because of payments made by their parents.

The child's parents then filed a lawsuit arguing that the school's admission practices were discriminatory and violated the equality clause of Thailand's new Constitution. The Council of State, a government legal advisory body with power to issue legal rulings, found in her favour and ordered the school and all state-funded schools to abolish such corrupt and discriminatory practices.

Using Its New Law to Powerful Effect: South Africa: Case One

In 1999, the South African government decided to declare a moratorium on the publication of crime statistics, which are the subject of considerable political controversy. The reason provided for the moratorium was to improve the collation and thereby the quality of the statistics.

The moratorium hampered the work of concerned organizations committed to the transformation of criminal justice in South Africa. A newspaper, the Cape Argus, took up the argument with the government and finally launched an application for a specific set of statistics relating to car hijackings in and around the main Cape Town freeway. The newspaper argued that it and its readers had the right to the information because it was a matter of public importance and interest. A

South African NGO, the Open Democracy Advice Centre (ODAC), intervened in order to strengthen the case by showing how service-providing NGOs, such as Rape Crisis, need the statistics for their work. ODAC mobilised support from a range of such organizations to submit a joint *amicus* application.

As a result of the action, brought using the right to access information, the government was forced to publish a 1998 crime statistics report of its own commission, which specifically stated that there was no reason to withhold crime statistics during the period of re-organization. In fact, it recommended the opposite, in order to encourage public input on the accuracy of the statistics. The Minister for Safety and Security withdrew their contest of the case, and the moratorium on publishing the information was lifted.

Transparency for the Victims of Apartheid: South Africa: Case Two

A central plank of President Nelson Mandela's post-transition project for building national unity was the Truth and Reconciliation Commission (TRC). The truth commission process had three main components: to hear evidence of violations of human rights and make findings; to consider applications by abusers for amnesty; and to award reparations (compensation) to those who had suffered gross violations of human rights.

A full report of the TRC has now been published, recording in comprehensive detail the cruel individual and institutional dimensions of *apartheid*. Hearings by the Amnesty committee have been completed, with scores of applications resolved. But, the third aspect— reparations— has been left hanging. Hardly anyone has received anything. A support group for victims of *apartheid* has been established, called the Khulemani Group. Their first goal was to try and find out the government's exact policy on reparations. They approached the Open Democracy Advice Centre (ODAC) for advice on how to request this neces-

sary information. ODAC assisted the Group in preparing a formal application under the South African Access to Information Act. The Government conceded that there was a policy document, but was nevertheless reluctant to release it.

Having failed to provide a copy of the document within the 90 day time limit, the Khulemani Group has, on ODAC's advice, now appealed the "deemed refusal" to the relevant Information Officer, the Director-General of the Department of Justice. He will now be compelled to either provide the policy document or point to the clause under the Act that exempts him from having to disclose it.

Either way there are due process protections; if an exemption is applied— and it is difficult to see what exemption could properly apply to this case— then the matter can be further appealed to the Courts. Although this case is causing frustrations to the Khulemani Group, the key is that they do have legal redress and the law provides both them and the government with a clear process for determining access.

New Access to Information Act is Attracting Much Use: Bulgaria

Although the Bulgarian Access to Public Information Act only came into force in July 2000, citizens and citizen support organizations, such as the Access to Information Program Foundation, have used it regularly.⁵ Completed or current cases include:

1. The Government was forced to provide information on the number of complaints of ethnic or racial discrimination made by ethnic minorities.
2. An environmental protection NGO requested minutes of Supreme Experts Ecological Council meetings.
3. An economic policy NGO has appealed the refusal by National Health Fund to release information of its regional units' 2000 budgets and financial reports.
4. An NGO has requested from the Central Electoral Committee the record of its vote counting procedures.
5. A local citizens' group has requested a copy of the report on the noise level of a building in the town where they live.

LESSONS FOR CITIZENS AND CITIZENS' ORGANIZATIONS

First, the right to access information creates the opportunity to garner information to bolster the research that underpins civil society organizations' campaigns.

Second, organizations have learned that they must actually use the legislation, especially in the early days. Requesters must be assertive and demand good service under the law. The experience in the United States, where they have had Freedom of Information laws for over 30 years, shows that the early few years are crucial in determining habits— on both sides. After that, systems are created, and norms established. Thus, organizations must take test cases, such as the South African test case against the government's crime statistics moratorium.

Third, organizations must move government towards a "right to know" approach, encouraging governments to automatically publish the majority of its information. The Internet age creates opportunities in this respect, such as e-government (with user-friendly search engines to help guard against the danger of overload).⁶ Clearly, the "hard cases", the pieces of information we most want and government most wants to protect, will not ever be automatically disclosed, unless by mistake. But there is a huge volume of useful information that could and should be put into the public sphere. It is in the government's interest, as the more that they automatically disclose, the fewer the decisions in relation to requests for

information that they will have to make and the cheaper the new system will be to manage.

Fourth, through use of the legislation organizations can help shape the government's response. In the U.S., for example, the environmental lobby was so effective in using the legislation that the federal government created a whole new structure – the Environmental Protection Agency – which has subsequently been used by concerned organisations to facilitate community requests for information.

Fifth, organizations will need to be vigilant in terms of time delays, to ensure that government does not suffocate the law by taking forever to respond to requests.

Sixth, organizations will, as usual, need to find champions in government and strategic partners, from the specialist civil society sectors (whether it be environmental, HIV-AIDS, human rights groups, and so on), with unions, professional associations and with the media.

Finally, organizations will need to work together, to promote better and more effective use of Access to Information laws. For example, the new South African NGO, **The Open Democracy Advice Centre**,⁷ is a collaboration among three of its largest NGOs, and is intended to provide a service to other NGOs in the use of the Access to Information Act. In the U.S., **The Freedom of Information Clearinghouse** is a joint project of *Public Citizen* and *Ralph Nader's Center for Study of Responsive Law*. It provides technical and legal assistance to individuals, public interest groups, and the media who seek access to information held by government agencies.⁸

KEY PRINCIPLES FOR A USEABLE AND USER-FRIENDLY ACCESS TO INFORMATION LAW

A Basic Matrix of Key Issues & Questions

Breadth and Depth

Who does the law apply to? Which bodies will the law not apply to and why? Does the law cover records held by private bodies as well as public bodies? If not, are the records held by semi-governmental or semi-autonomous entities, like electricity boards, adequately covered by the definition of “public information”? Does it provide access to some internal government policy advice and discussion in order to promote public understanding, debate and accountability around public policy-making?

For example, all access to information laws around the world include provision for non-disclosure of records relating to national security; that is both inevitable and appropriate. But blanket exemptions – that is to say, an exemption that covers, automatically, a category or type of information – are unwelcome, often unnecessary, and risks serious abuse.

Exemptions

What information is exempt? Are the exemption categories tightly and clearly drawn? Are they reasonable and in line with international standards? Are the exemptions based on “harm tests” in which non-disclosure is only permissible if it can be shown that disclosure would harm a specified interest, such as national security? Are as many as possible of the exemptions discretionary? Is there a public interest over-ride?

In general, as discussed above, blanket exemptions are unattractive in terms of usability from a requester, citizen perspective, because they focus on the owner/holder of the information rather than the information itself. The better course is to

have clearly drafted exemption sections for the *type* of record, rather than broad blanket exemptions for the holding department or entity. In the South African example concerning the unlawful moratorium in the publication of crime statistics, the preciseness of the national security exemption meant that it was, rightly, hard for the South African government to justify its unnecessary and unhelpful shift towards secrecy. Armed with a law containing blanket exemptions, the SA government would have been surely tempted to claim that the crime statistics were an “intelligence gathering” activity and thereby exempt without recourse to appeal.

Another common exemption found in many acts is the “deliberative process”, which exempts from disclosure an official document that contains opinions, advice or recommendations and/or a record of consultations or deliberations. However, this exemption should clearly link the type of document to any form of mischief. Where such clauses appear, such as in the U.S. or South African law, they are linked to the notion of candour; the idea is that policy-makers should not feel restricted in terms of their candour with each other during the decision-making phase. If release of the document would not have a chilling effect on deliberation, the document should not be exempt from disclosure.

Finally, there should be a general public interest override covering the exemptions. Most laws around the world link a harm test to the notion of public interest, so as to trump the exemption when appropriate. This is critical to drafting a bill that accords with good international practice.

The System

Is it user-friendly? Does it encourage application and openness? Are the bureaucratic procedures (such as request forms) fair, clear and reasonable? Do citizens have to pay a fee and if so, is the fee reasonable and affordable? Are there provisions for urgency? For example, time limits should be reasonably clear and public bodies should be required to provide guiding information such as the “road map” discussed above.

Blanket exemptions are unattractive in terms of usability...The better course is to have clearly drafted exemption sections for the type of record, rather than broad blanket exemptions for the holding department or entity.

However, effective implementation depends largely on a combination of political will and adequate resources. Where there is any doubt about either – as there was and still is in South Africa – then the level of procedural detail prescribed by the Act needs to be increased. In this, as is the case elsewhere, the governing/implementing regulations will be very important.

A Culture of Openness and Duty to be Proactive

Does the law mandate or encourage a “right-to-know” approach whereby as much information as possible is automatically disclosed in a user-friendly and accessible way? Will citizens be entitled to information in the form they request it? Is it an offence to shred records or lie about the existence of records in order to avoid disclosure?

Enforcement

How does the citizen enforce the right? Will he or she have to go to court, or will there be an independent commissioner, commission or tribunal? Is the enforcement route accessible, inexpensive and speedy? Are there firm timetables laid down for providing information and strong penalties for failure to meet them?

The Duty To Be Proactive – Adopting a Right to Know Approach

It is highly desirable that draft access to information laws mandate or encourages the “right-to-know” approach adopted in the most modern laws elsewhere. Inevitably, this makes the law both user-friendly and less expensive, as less human resources are needed to operationalize the right.

CONCLUSION

Throughout the world nations, multilateral organisations and corporations committed to good corporate governance are taking the open road. More than thirty countries have passed laws that give effect to the public’s Right to Know. There is an international trend, setting new standards in openness in contrast to the years of secrecy and tyranny that preceded the last decade. Thus, an access to information law can offer a new beginning in the relationship between government and its citizens. Transparency and the freer flow of information that comes with it provides a chance to build confidence and to craft a new covenant of trust between the governed and the governing. With it come an array of other possibilities – of enhanced international business confidence and, therefore, a more conducive environment for investment and of strengthening the fight against corruption. For citizens, especially the poor, it is a chance to reclaim ground in their struggle for a more just existence. With greater knowledge, people can participate more meaningfully and can contribute to the policy-making process. Moreover, they can use access to information law to gain the information with which comes greater power. In this sense, the Right to Know is the Right to Live.

To achieve these noble objectives, the passing of a law must be accompanied by a commit-

ment to effective implementation. The drafting of the law must take this into account; while international best practice is now sufficiently developed that there are key principles that can be applied to the writing of a good access to information law, the detail

can be fashioned in such a way as to maximise the prospects for successful implementation. Making the law work in practice is a

two-way responsibility: government must deploy resources to create the system that will permit information requests to be proficiently responded to; civil society organizations must generate requests and actually use the law. On its own an access to information law is no panacea. But with political will, it can lay the pivotal foundation stone around which can be built a fairer, modern and more successful society.

For citizens, especially the poor, it is a chance to reclaim ground in their struggle for a more just existence.

1 Joseph Stiglitz, ‘On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life,’ Oxford Amnesty Lecture, Oxford University, United Kingdom, January 27, 1999.

2 Section 8(2) of the interim constitution stated: ‘No person shall be unfairly discriminated against, directly or indirectly ... on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.’ The final constitution added pregnancy, marital status and birth to the list of grounds [section 9(3)].

3 This is an edited extract from the introduction to “The Right to Know: Access to Information in South-East Asia” by Sheila S. Coronel.

4 Extracted from “Global Trends on the Right to Information: A Survey of South Asia”, published by ARTICLE 19, the Centre for Policy Alternatives, Sri Lanka, the Commonwealth Human Rights Initiative (CHRI), and the Human Rights Commission of Pakistan.

5 www.aip-bg.org

6 US law has been bolstered by an eFOI law in 1996, which promotes right-to-know through electronic publication of government information.

7 www.opendemocracy.org.za

8 http://www.publiccitizen.org/litigation/free_info/. The Clearinghouse is a nonprofit organization. This site contains links and resources to assist citizens in using the Freedom of Information Act (FOIA), as well as information and testimony on their involvement with Freedom of Information issues and cases. Also found at this site: **The United States Freedom Of Information Act: Lessons Learned from Thirty Years of Experience with the Law.** By Amanda Frost, Director of Public Citizen's Freedom of Information Clearinghouse.

THE CARTER CENTER ACCESS TO INFORMATION PROJECT: JAMAICA CASE STUDY

Laura Neuman

INTRODUCTION

Recognizing the challenges that corruption posed to democracy and development in the hemisphere, The Carter Center's Council of Presidents and Prime Ministers of the Americas asked that we convene political leaders, civil society organizations, scholars, media, and private business sector representatives to discuss each sector's role in addressing this multi-faceted problem. The Transparency for Growth in the Americas conference, held at The Carter Center in May 1999, provoked thoughtful discussion regarding an issue that, heretofore, was often considered taboo. Recommendations for promoting transparency and decreasing corruption were varied, including the need to disseminate the basic message that corruption is not only an ethical, but also a policy problem, and that solutions must be grounded in firm, achievable commitments from both leaders and citizens. One of the key recommendations to promote transparency and further deepen democracy was the passage and implementation of access to information laws.

In conjunction with the conference, The Carter Center's Americas Program began three transparency projects in the region. Jamaican Prime Minister and member of our Council, P.J. Patterson, invited us to include Jamaica as one of our first initiatives. At that time, his administration was considering proposed access to information legislation, as well as having drafted the Corruption Prevention Act in order to bring Jamaica into compliance with the Organization of American States' Convention Against Corruption, of which Jamaica was a signatory. The Carter Center agreed to help inform the debate regarding these important transparency tools.

LEGISLATIVE HISTORY

The Freedom of Information Act, as it was then called, had been initiated as early as 1991. The interest was perhaps generated by the discussions leading up to the 1992 CARICOM Charter of Civil Society for the Caribbean Community, which include a provision for Freedom of Expression and Access to Information. In 1995 a Green Paper was tabled before Parliament, followed in 1996 by the Wells Committee report entitled *Freedom of Information: A Door to Open Government*. On November 16, 1998, the Jamaica Cabinet approved the proposal for the enactment of a Freedom of Information Act, which was to incorporate the Wells report recommendations. A Ministry Paper authored by Prime Minister Patterson, in essence the equivalent of drafting instructions to the Parliamentary Counsel, was then submitted on November 23, 1998 with the expectation that the bill would be tabled before Parliament shortly and go to a vote of the full house. The highly anticipated draft legislation never appeared, as other priorities overshadowed the initial enthusiasm.

In 1999, the Parliamentary Counsel drafted a Freedom of Information bill, but never tabled it before Parliament. Throughout 1999 and 2000, discussion periodically occurred but no legislation was forthcoming. A seminar to release The Carter Center guidebook on combating corruption in Jamaica was held in October 1999 and a second seminar sponsored by the Media Association of Jamaica in February 2000 sought to keep the spotlight on the legislation. This second seminar, which focused on the importance of this law for all sectors of Jamaica society, drew over 50 participants and included a number of well-regarded

international experts, as well as Minister of Information Maxine Henry-Wilson. Nevertheless, there was still no indication that legislation was imminent.

In May 2001, fully one year later, Minister Henry-Wilson informed us that a number of changes had been made to the drafting instructions, including a name change to Access to Information. She hoped to have the act drafted and tabled in Parliament before the session ended in July, and then moved to a joint committee for further debate and to allow for public comment.

The Access to Information Act, 2001 was completed in the summer of 2001, but like its predecessors, it was never tabled before the Jamaica Parliament. Shortly thereafter, Minister Henry-Wilson was relocated within government and replaced by Minister of Information Colin Campbell. On November 28, 2001, a full 10 years from the first discussion of access to information legislation in Jamaica, Minister Campbell announced that the draft law would be tabled in Parliament on December 4 and then moved to the joint select committee. Following numerous full days of sittings of the joint select committee and more than 4 days of public hearings, the report was presented to the full House of Parliament on March 31, 2002. Debate, which lasted through two days of Parliamentary sessions, began on May 22 and concluded on May 28 with the passage of the Access to Information Act 2002.

CARTER CENTER JAMAICA PROJECT

Legitimacy is crucial to the ultimate success of access to information legislation. Engaging society writ large in deep debate, before the law is passed, is an important mechanism to assure that there is broad “buy-in” as well as that the law will be utilized. Education is, thus, critical. As a first step in the Jamaica project, we commissioned papers from distinguished Jamaican scholars on the existing anti-corruption laws and on the

proposed Corruption Prevention Act and Freedom of Information Act. In October 1999, these articles were compiled and edited into *Combating Corruption in Jamaica: A Citizen’s Guide*, and widely distributed for free. In partnership with the Media Association of Jamaica, the Center held public seminars on the issue and conducted working groups.

Although the Corruption Prevention Act included controversial provisions, such as costly fines for anyone that published information related to civil servants’ annual asset declarations, until that point, civil society had shown little interest in the draft legislation. However, when it became clear that the Corruption Prevention Act had wider implications that could adversely affect press freedoms, local media and human rights groups became more vocal. This same interest carried over to the debate regarding access to information.

In February 2002, The Carter Center published a second guidebook entitled *Fostering Transparency and Preventing Corruption in Jamaica*. Again accompanied by international and local experts, the Center cosponsored a seminar to discuss the status of the two relevant pieces of legislation. Over 100 persons attended the seminar, including many influential legislators. Many of those present made submissions to the joint select committee, which resulted in significant amendments to the draft legislation. Following on the heels of the seminar and the joint select committee hearings, and with great continued interest from the media owners and a civil society consortium led by the human rights organization, Jamaicans for Justice, the access to information act was passed.

The implementation phase, which to some is even more critical than passage, is a time in which government and civil society can cement their joint interest in the effectiveness of the legislation. Governments play a critical role during implementation, as they must provide the neces-

sary human and financial resources to develop processes for archiving and retrieving information and work with agencies to metamorphosis the culture of secrecy to one of openness. Nevertheless, it is during the implementation phase that the responsibility begins to shift from government to civil society. At this point, civil society organizations should begin initiatives to request information and to monitor the act. Without persistent use of this law, it will atrophy, thus diminishing the potential for open government and citizen empowerment

Following the Parliamentary vote, The Carter Center met with Minister Campbell and his newly formed Access to Information Unit. We discussed the government's plan for designing procedures related to requests and retrieval of information and for allocating scarce resources. The Jamaica government, to their great credit, had already begun meeting with individual ministries to develop an action plan for implementation.

The Carter Center, in August 2002, convened a workshop of over 25 ministerial staff members tasked with implementing the access to information act, members of the access to information unit, and civil society representatives. The broad question addressed at this workshop was "what needs to be happen for the access to information act to be effectively implemented." The participants split into six smaller working groups, comprised of a mix of government and civil society representatives, to design an implementation landscape including challenges, obstacles and identifying the responsible party. This exercise, led by Carter Center consultant Richard Calland, proved highly successful in delineating next steps for implementation and solidifying alliances.

The Jamaica government and civil society has recognized access to information as a key to

deepening their long-standing democracy. As they have learned, a critical component to a successful anti-corruption strategy, more open government and enhancement of citizen rights is a legislated right to and systematic method for receiving information.

I have been privileged to walk the path with the Jamaican people from debate to passage to implementation of the access to information act, and hope

that the following lessons may assist others to avoid obstacles and achieve similar successes.

LESSONS LEARNED

In working to inform the debate regarding the access to information act and assist in the effective passage and implementation, we have learned a number of valuable lessons.

Political Will is Critical

The government must see passage, implementation and enforcement of a vigorous access to information law as a priority. Effective access to information laws can take an enormous amount of energy and resources, particularly in societies where a culture of secrecy has dominated in the past and where there has been no process in place for archiving and retrieving government-held documents. Moreover, even if the head of government is committed to promoting the right to information, he or she needs the backing of her political party. Opposition is often an ally in access to information campaigns, but that interest can change once they are again in office. Finally, political will, even when once clear, can change under stressful circumstances, such as September 11the events, or when inconvenient.

In the three years that The Carter Center was engaged in Jamaica, there were clearly times in which access to information was not a priority.

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The ultimate passage of the bill was largely due to continued pressures from civil society, and the need for the government to find success for its anti-corruption program during the election season. The role of the media and other civil society groups in keeping this issue on the “front-burner” cannot be underestimated. As well, continued international attention from groups such as The Carter Center and recognition of the increasing global trend toward openness, reinforced the government’s will when they may have otherwise floundered.

Create Alliances and Strange Bedfellows

Access to information transcends all sectors of society. Media houses use access to information requests as part of their investigative journalism, advocates for human rights and the environment take advantage of such laws to understand the policy decisions of governments, local communities can better monitor spending decisions by their municipal governments, and the private sector benefits as they use this mechanism to learn of government plans relating to taxation, public contracting, or customs. It is when these groups join together to form a constituency for access to information that the laws strength becomes most apparent.

The international community can play an important role in keeping the pressure on governments and in providing comparative experiences and resources. However, international organizations, such as The Carter Center, cannot work alone. Forming partnerships with local organizations that are continually present and can more effectively monitor the political situation is critical.

In Jamaica, such strange bedfellows as human rights NGOs, media owners, private sector leaders, and the civil service association joined together to

encourage amendments to the proposed bill. Through their joint submissions and support of one another, in addition to meetings and work with The Carter Center, a number of critical changes were made during the Parliamentary debate. The formation of a vocal constituency, along with specific “champions” such as the well known and highly regarded Oliver Clarke, ultimately placed the necessary political pressure on the legislators and clearly indicated the political capital of this legislation.

The Debate Must Be Focused

As governments increasingly look to pass access to information laws, it is clear that many are drafted in a rush and without sufficient technical and comparative expertise or civil society involvement. This opens the door for great criticism of drafted legislation and, subsequently, government entrenchment and refusal to make appropriate amendments.

It is important that in promoting the passage of access to information laws, NGOs carefully pick their battles to focus on the most critical deficiencies. When an NGO criticizes the entire bill, rather than choosing the most crucial areas in need of change, they often lose credibility with the government and the important messages mixed in with the rest of their critiques are missed. At the same time, government must be willing to compromise on some matters in order to provide greater legitimacy and receive greater acceptance of the nascent bill.

Jamaica NGOs learned this lesson, as they sought to influence government and opposition lawmakers. As their lobbying efforts continued, the NGO’s became more sophisticated and focused on the two or three most offensive provi-

The government must see passage, implementation and enforcement of a vigorous access to information law as a priority.

sions. When the bill came before Parliament for final debate, the strategy paid off as the Minister himself initiated a change in accord with the wishes of the vocal civil society coalition.

Passing the Law May be the Easy Part

Passing the access to information law may in fact be the easiest piece of the puzzle. As we all know, laws alone are only as good as the quality paper that they are printed upon. The legislation must be fully implemented and enforced, and these two factors should be considered early on – during the initial drafting of the law, rather than only after its passage.

It is easy, for example, when working on drafting the laws to become overly preoccupied with the exemptions portion of the bill, to the exclusion of other key provisions. While national security exceptions are clearly sexier than the implementation procedures, they are often much less important in determining the bill's overall value to citizens. Issues such as how the agencies will archive and retrieve information, time limits for completion of information requests, fees and appeals procedures are areas that must receive much greater public attention.

As the bill was in its draft stages, our local partner, Jamaicans for Justice, began considering not only how the law could be used to further their agenda, but also how they would monitor the effectiveness of the law. For our part, we considered equally the implementation and enforcement stages. For example, judicial remedies are available for persons denied their petition, thus allowing enforcement of the law. This strength of the appeals process lies in its accessibility. Therefore, prior to passage of the law, we met with local attorneys to discuss the role they may play in

assuring representation for persons inappropriately denied information.

Finally, under this point, implementation cannot be based solely on the use of the internet. Although the internet can and should play an important role in disseminating governmentally held information, it is by no means the sole answer, particularly in societies where availability of the internet is not widespread.

Changing the Culture of Secrecy

Although passing the legislation is critical to developing an enforceable right to information, it is only through changing the pervasive culture of secrecy that the act will truly have meaning. Government employees who have always worked under a culture of secrecy may find the shift in

focus extremely difficult. Moreover, as in Jamaica, they may have even signed an oath binding them to uphold the traditional Official Secrets Act.

In cases where the culture has been one of secrecy, additional mechanisms may be necessary to ensure access to information or the default of withholding information will again become the rule.

Those tasked with completing access to information requests may look to their supervisors for guidance. Thus, full “buy-in” from the Ministers and Permanent Secretaries is critical and should be manifested early in the implementation phase. Continuing education of both access to information officers and the public will assist in transforming the traditional culture. Finally, as is discussed in greater detail in Dr. Calland's article, implementing a “right to know” system that automatically makes classes of information available removes discretion from the front line workers, thus avoiding the need for discomfiting decision-making.

It is only through changing the pervasive culture of secrecy that the act will truly have meaning.

CONCLUSION

The Carter Center will remain engaged in the promotion of the access to information law in Jamaica. In addition to continuing assistance relating to implementation, we will provide expert advice to the Jamaica bar association and judges on the enforcement of the law, as they seek to enforce the right to information and uphold the tenets of the new law.

As a case study, the Jamaica project illustrates the many obstacles that face governments and civil society as they strive to pass and implement effective access to information legislation. Nevertheless, it also demonstrates that with political will and local “champions” and alliances, success is possible. Each country will face their unique challenges. The Carter Center joins other groups, both local and international, in encouraging access to information as a key to increased transparency and democratic participation.

ABOUT THE CONTRIBUTORS

Jimmy Carter (James Earl Carter, Jr.), thirty-ninth president of the United States, was born October 1, 1924, in the small farming town of Plains, Georgia. He was educated in Georgia Southwestern College and the Georgia Institute of Technology, and received a B.S. degree from the United States Naval Academy in 1946. He later did graduate work in nuclear physics at Union College. In 1962, Carter won election to the Georgia Senate. He lost his first gubernatorial campaign in 1966, but won the next election, becoming Georgia's 76th governor on January 12, 1971. He was the Democratic National Committee campaign chairman for the 1974 congressional elections. Jimmy Carter served as president from January 20, 1977 to January 20, 1981. Noteworthy foreign policy accomplishments of his administration included the Panama Canal treaties, the Camp David Accords, the treaty of peace between Egypt and Israel, the SALT II treaty with the Soviet Union, and the establishment of U.S. diplomatic relations with the People's Republic of China. He championed human rights throughout the world.

In 1982, he became University Distinguished Professor at Emory University in Atlanta, Georgia, and founded The Carter Center. Actively guided by President Carter, the nonpartisan and non-profit Center addresses national and international issues of public policy. Carter Center fellows, associates, and staff join with President Carter in efforts to resolve conflict, promote democracy, protect human rights, and prevent disease and other afflictions. Through the Global 2000 program, the Center advances health and agriculture in the developing world.

On October 11, 2002, the Norwegian Nobel Committee announced it was awarding the Nobel Peace Prize for 2002 to Mr. Carter "for his decades of untiring effort to find peaceful solutions to international conflicts, to advance democracy and human rights, and to promote economic and social development."

Richard Calland is Programme Manager of PIMS, the Political Information & Monitoring Service at the Institute for Democracy in South Africa (IDASA), where he has worked since 1995, and Executive Chair of the Open Democracy Advice Centre in Cape Town. Calland was a leading member of the ten-organisation Open Democracy Campaign Group that conducted extensive research and lobbied intensively in relation to what was then the Open Democracy Bill (now the Promotion of Access to Information Act 2000). Large parts of the bill were re-written by the Parliamentary Committee as a result of the lobbying of the Campaign Group. The Open Democracy Advice Centre provides advice and support for organisations making requests for information under the Promotion of Access to Information Act and also conducts test case litigation.

Dr. Calland has written and spoken extensively on the issue of access to information legislation and implementation, and has recently published the book *The Right to Know, The Right to Live: Access to Information*. He has also published numerous books and articles in the field of South African politics, including *Real Politics – The Wicked Issues* and *Thabo Mbeki's World*.

Prior to coming to South Africa in 1994, Calland practised at the London Bar for seven years, specialising in Public Law. He has an LL.M. in Comparative Constitutional Law from the University of Cape Town (1994) and is a feature commentator for the Daily Mail and Guardian newspaper.

Laura Neuman is the senior program associate for the Americas Program at The Carter Center. She directs and implements transparency projects, including projects in Jamaica, Costa Rica and the United States. Ms. Neuman has edited two widely distributed publications on fighting corruption in Jamaica and presented at a number of international seminars relating to Access to Information

legislation and implementation and transparency measures. As part of her work on transparency, she facilitates The Carter Center's Council for Ethical Business Practices, a working group of leading Atlanta corporations that act to promote the adoption of business codes of conduct, integrity and transparency in the private sector. Ms. Neuman has also worked on election monitoring missions in Venezuela, Guatemala, the Dominican Republic, Nicaragua, Peru and the Cherokee Nation. Ms. Neuman led The Carter Center international observation delegations to Jamaica (2002), the Dominican Republic (2000) and Venezuela (1999, 2000). Ms. Neuman is a member of The Carter Center Human Rights Committee.

Prior to joining The Carter Center in August 1999, Ms. Neuman was senior staff attorney for SeniorLaw at Legal Action of Wisconsin, the state's largest legal services provider for low-income persons. In 1996, she won the prestigious Older Adult Service Providers' Consortium Advocate of the Year award. She is a 1993 graduate of the University of Wisconsin law school, receiving the Ruth B Doyle Award for Leadership and Excellence. She received a bachelor degree in international relations in 1989 from the University of Wisconsin, Madison. Ms. Neuman is presently working towards her Master Degree in International Public Health, with a specialty in infectious diseases, at Emory University.

Alasdair Roberts is an associate professor in the Maxwell School of Citizenship and Public Affairs at Syracuse University. He is also Director of the Campbell Public Affairs Institute at Syracuse University.

A native of Pembroke, Ontario, Canada, Professor Roberts began his BA in politics at Queen's University in 1979. He received a JD from the University of Toronto Faculty of Law in 1984, a Master's degree in Public Policy from the Kennedy School of Government at Harvard University in 1986, and a Ph.D. in Public Policy from Harvard University in 1994.

From 1990 to 2001, Professor Roberts taught in the School of Policy Studies at Queen's University, Canada. He was Associate Director of the School from 1993 to 1995. He has also held visiting appointments at Georgetown University's Graduate Public Policy Institute and at the University of Southern California's Washington Public Affairs Center. He was a visiting scholar at the Council for Excellence in Government in Washington, DC in 1997-98 and a fellow at the Woodrow Wilson International Center for Scholars in Washington, DC in 1999-2000.

Professor Roberts is currently a fellow of the Open Society Institute, New York; a visiting fellow at the School of Policy Studies at Queen's University; a member of the Canadian Treasury Board Secretariat's Academic Advisory council; and a member of the Board of Editors of Public Administration Review. His research focuses on two areas: public sector restructuring, and transparency in government. His work has been widely published. He received the Dimock Award for best lead article in Public Administration Review in 1995, and the Hodgetts Award for best English article in Canadian Public Administration in 2000.

THE CARTER CENTER AT A GLANCE

WHAT IS THE CARTER CENTER?

The Center is a not-for-profit, nongovernmental organization founded in 1982 by former U.S. President Jimmy Carter and his wife, Rosalynn, in partnership with Emory University. The Center has helped to improve millions of lives in more than 65 countries by waging peace, fighting disease, and building hope. We work directly with people threatened by war, disease, famine, and poverty to solve problems, renew opportunity, and create hope. A key to our success is the ability to make detailed arrangements with a nation's top leaders and then deliver services to thousands of villages and family groups in the most remote and neglected areas.

WHAT HAS THE CENTER ACHIEVED IN 20 YEARS?

The Carter Center has alleviated suffering and advanced human rights by observing about three dozen multiparty elections in more than 20 countries, preventing or correcting human rights violations worldwide, building cooperation among leaders in the Western Hemisphere, and helping inner-city families address the social issues most important to them. In addition, the Carter Center has strengthened human rights institutions, civil society, and economic development in emerging democracies, and has created new avenues for peace in Sudan, Uganda, the Korean Peninsula, Haiti, the Great Lakes Region of Africa, Liberia, and Ethiopia. The Carter Center has led a worldwide campaign that has reduced cases of Guinea worm disease by 98 percent, helped to provide some 35 million drug treatments to sufferers of river blindness in Africa and Latin America, and worked to erase the stigma against mental illness in the United States and abroad. The Center has also fostered improved agricultural practices, enabling 4,000,000 farmers in Africa to double, triple, or quadruple their yields of maize,

wheat, corn, and other grains and worked to erase the stigma against mental illness in the United States and abroad.

HOW IS THE CENTER STAFFED AND FUNDED?

The Center has about 150 employees, based primarily in Atlanta, Georgia. The Center is financed by private donations from individuals, foundations, corporations, and international development assistance agencies. The 2000-2001 operating budget, excluding in-kind contributions, was approximately \$34 million. The Carter Center Inc. is a 501 (c)(3) charitable organization, and contributions by U.S. citizens and companies are tax-deductible as allowed by law.

WHERE IS THE CENTER LOCATED?

The Carter Center is located in a 35-acre setting 1 mile east of downtown Atlanta. Four circular interconnected pavilions house offices for President and Mrs. Carter and most of the Center's program staff. The complex includes the nondenominational Cecil B. Day Chapel and other conference facilities. The Jimmy Carter Library and Museum, which adjoins the Center, is owned and operated by the National Archives and Records Administration of the federal government. The Center and Library are known collectively as The Carter Presidential Center.