



“Public policies for access to information: ideas for innovation”

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I. Information policy of the state

My opening thesis is that every state needs a lot of information in relation of the society being ruled by it for the sake of its own existence. On the other hand, the state and its representatives are expected to provide information to the members of society about the state's functioning and its results. This two-way information flow – to get and to provide information – can be defined as the **information policy of the state** and the characteristics of each state's information policy vary from time to time.

In ancient times the flow of information was unbalanced and unsophisticated: average members of society had absolutely no right to be informed about how the state is being run but the leaders of the community needed to have basic knowledge on the availability of financial and military resources (how many soldiers they can count with and how much money and other supplies can be gathered from the people). If we think about it that was precisely the reason why the birthplace of Jesus was Bethlehem since the census ordered by Caesar Augustus was purely for tax purposes. The information policy model is very similar to this in dictatorships with the major difference that the one-way flow of information is highly sophisticated: the ruling person or party spares no expense when it comes to the question of setting up and maintaining total control over society. The “perfect” example for this is the activity of the Sigurimi, the Albanian state security and intelligence service and secret police of the communist People's



Socialist Republic of Albania whose activities permeated Albanian society to the extent that every third citizen had either served an extended time in cruel labour camps or had been interrogated by Sigurimi officers. The Sigurimi used informer collaborators to collect information on the families under surveillance and the declassified files prove that the number of informants used for each family ranged from 3 to 50.⁴⁵

In the liberal democracies of the 18th century the informational balance was improved by introducing new constitutional rights for the freedom of the press and the freedom of opinion. Through its fundamental role of informing the public about facts and events of public importance, the press has played a vital role in guaranteeing access to public information.

However, citizens were granted **direct access to public information** only in the 20th century (following World War II) through the new constitutional right of the freedom of information. We may call it the “postmodern model” of state information policy.

There have always been two extreme poles of giving out information to citizens: secrecy and publicity. The fundamental question of state information policy is the quality and quantity of information made available to the public (and on the other hand: the depth and limits of gathering private information by authorities upon an appropriate legal basis). The answer to this question is crucial from a democratic point of view.

II. Public policies

Public policies for access to information can be described as tools of information policy.

“Getting scholars to agree on a single, all-inclusive definition of public policy is no easy task. Broadly, we might say that a public policy is simply what government (any public official who influences or determines public policy, including school officials, city council members, county supervisors, etc.) does or does not do about a problem that comes before them for consideration and possible action. Specifically, public policy has a number of key attributes:

- *Policy is made in response to some sort of issue or problem that requires attention.*
- *Policy is what the government chooses to do (actual) or not do (implied) about a particular issue or problem.*

⁴⁵ <https://balkaninsight.com/2021/11/26/declassified-documents-show-power-of-albania-as-communist-secret-police/>



- Policy might take the form of law, or regulation, or the set of all the laws and regulations that govern a particular issue or problem.
- Policy is made on behalf of the “public”.
- Policy is oriented toward a goal or desired state, such as the solution of a problem.
- Policy is ultimately made by governments, even if the ideas come from outside government or through the interaction of government and the public.
- Policymaking is part of an ongoing process that does not always have a clear beginning or end, since decisions about who will benefit from policies and who will bear any burden resulting from the policy are continually reassessed, revisited and revised”.⁴⁶

In other words, “public policy can be generally defined as a system of laws, regulatory measures, courses of action, and funding priorities concerning a given topic promulgated by a governmental entity or its representatives”.⁴⁷ According to the above definition a **major aspect of public policy is law**, including specific legislation.

III. Constitutional models

From the aspect of introducing RTI into the national catalogue of constitutional rights (which is although not a “must” but has become quite an expectation in democracies by now) most nations follow the model developed by the United Nations in two essential international documents: the Universal Declaration of Human Rights (UDHR) adopted in 1948 and the International Covenant on Civil and Political Rights (ICCPR) adopted in 1966. According to this model the citizens’ basic right to access public information is **being incorporated in the law family of “communication rights” with the “mother-law” of the right to the freedom of expression.**

Article 19 of the UDHR states that “everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”. The same model is being used in the European Convention of Human Rights (1950), whereas Article 10 states that “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” However, for quite a long time, the European Court of Human Rights (the “Strasbourg Court”) refused to apply Article 10 in cases of refu-

⁴⁶ What is Public Policy? - civiced.org

⁴⁷ Dean G. Kilpatrick, Ph.D.: Definitions of Public Policy and the Law in: Definitions of Public Policy and the Law (musc.edu)



sals of access to public documents but since 2007 the case law dramatically changed and in 2009 the Court delivered an important judgment in the case of *TASZ v. Hungary*. “The judgment refers to the “censorial power of an information monopoly”, when public bodies refuse to release information needed by the media or civil society organisations to perform their “watchdog” function. The Court refers to its consistent case law, in which it has recognised that the public has a right to receive information of general interest and that the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society’s “watchdogs”, in the public debate on matters of legitimate public concern, including measures which merely make access to information more cumbersome”.⁴⁸

The famous national exemption for **not** following the above-mentioned general model is the Constitution of South Africa which provides for a “stand-alone” right and does not connect RTI to the other communication rights: Section 32 of the Constitution of 1996 states that “Everyone has the right of access to (a) any information held by the state, and (b) any information that is held by another person and that is required for the exercise or protection of any rights; (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state” (Republic of South Africa 1996).⁴⁹

IV. FOI Act

FOI legislation is the basis of all related public policies. More than 130 countries around the world have already adopted comprehensive FOI Acts to facilitate access to records held by government bodies and much of the rest of the world is also moving in the same direction.

The first country ever guaranteeing access to official documents was Sweden (1766), and the spread of FOI legislation became really essential after World War II in Western Europe: Finland (1951), Norway (1970), France and the Netherlands (1978), Denmark (1985), Greece (1986), Italy (1990), followed by 25 countries of the ex-Communist Bloc (1992-2006). We shall not forget to mention the USA (1966) and the pioneer Electronic FOI Act (1996), Australia (1982), New-Zealand (1982) and Canada (1983). In Latin America, Chile (2001) and Mexico (2002) were the exemplary countries. The growth is nowadays especially remarkable in the case of the African continent where the model law developed by the African Commission on

⁴⁸ <https://merlin.obs.coe.int/article/4953>

⁴⁹ <https://origin-archive.ifla.org/IV/ifla73/papers/135-Arko-Cobbah-en.pdf>



Human and Peoples' Rights (ACHPR) in 2012 has been used by at least 23 African national jurisdictions.

Numerous international treaties, agreements and other statements encourage nations to adopt freedom of information laws. **The influence is particularly strong in the fields of anti-corruption (individual corruption scandals “help” a lot in the fight to reach transparency in the system) and also on environmental protection.**⁵⁰ The latter can be regarded as the area where the strictest and broadest interpretation of FOI rules apply. A good example is the European Aarhus Convention (the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1988) which obligates public authorities ‘to provide public access to the requested environmental information in the framework of national law’ providing the broadest possible interpretation of the concept of environmental information. *(Based on Article 4(4) of the Aarhus Convention, a request for environmental information may be refused, if the disclosure would adversely affect the confidentiality of commercial and industrial information where such confidentiality is protected by law in the light of a legitimate economic interest. However, these reasons are to be interpreted stricto sensu, taking into account the public interest in accessibility, as well as to what extent the information requested relates to emissions to the environment).*⁵¹

As David Banisar points out *“there have been a variety of internal and external pressures on governments to adopt FOI laws. In most countries, civil society groups such as press and environmental groups have played a key role in the promotion and adoption of laws. International organizations have demanded improvements. Finally governments themselves have recognized the use of FOI to modernize. ...The international community has been influential in promoting access. International bodies such as the Commonwealth, Council of Europe and the Organization of American States have drafted guidelines or model legislation and the Council of Europe decided in September 2003 to develop the first international treaty on access. The World Bank, the International Monetary Fund and others have pressed countries to adopt laws to reduce corruption and to*

50 David Banisar: Freedom of Information around the world 2006 in: Microsoft Word - surveynearfinal.doc (humanrightsinitiative.org)

51 In the case of data on the environment, the protection of trade secrets is a highly frequent reference for restricting access. An association for the protection of the environment requested the documents – Noise map and Action plan – to reduce noise of the local gigantic plant from the county government office. Fulfilling the data request was rejected with reference to the protection of trade secrets (the cover sheet of the Noise map says that “The documentation contains information qualifying as trade secrets” and the header of each page included that “For use by the authorities only”), at the same time, nobody disputed that the Noise map contained data of public interest or data accessible on public interest grounds. in: Case law of NAIH, *naih_annual_report_2021.pdf* Pp.153-154.



make financial systems more accountable".⁵²

Other important factors for adoption are the needs and requirements of the Information Society – the modernization of the archives and governmental information systems might be a pushing element as well as the economic reason for the re-use of public information.

There are common or similar features of the adopted laws everywhere: we can find the general rule and principle providing transparency, the public interest test, the exemptions of publicity (like national security, personal privacy or other legitimate interests of third parties), electronic FOI rules pushing for proactive publicity, the role of the oversight body and the guarantee for court supervision in the text. There is also an international trend towards extending the scope of the FOI laws to cover and include also the (semi-)private sector among the obligated bodies.

V. Innovations

Aiming for transparency offers plenty of room for innovation in related public policies. Numerous innovative ideas could be mentioned, here are some outstanding examples:

- **In regulating the powers of the oversight body** there are huge differences in national jurisdictions. However, where the culture for transparency is not so supportive and well developed as in the luckiest countries like Scotland or the Scandinavian region; this handicap can be well counterbalanced by giving more powerful tools to the oversight body.
- The example comes from 2022, Hungary: in order to reach an agreement with the European Commission (which has been blocking the payment of the EU financial funds referring to Rule of Law concerns) a new obligation of proactive publication was introduced in the FOI Act. With the exception of the national security services, all budgetary organs shall be obligated to publish specific financial management data (like budgetary support on public funds, contracts on supplies, sale and utilisation of assets, data on procurements, payments made for purposes other than the performance of their main tasks, and in particular, payments supporting associations) every two months on the newly established Central Information Public Data Registry online platform. Three concrete financial data categories are named (by the way these data categories are to be published by the obligated

⁵² David Banisar: THE FREEDOMINFO.ORG GLOBAL SURVEY FREEDOM OF INFORMATION AND ACCESS TO GOVERNMENT RECORD LAWS AROUND THE WORLD in: Freedom of Info Around the World (ndi.org)

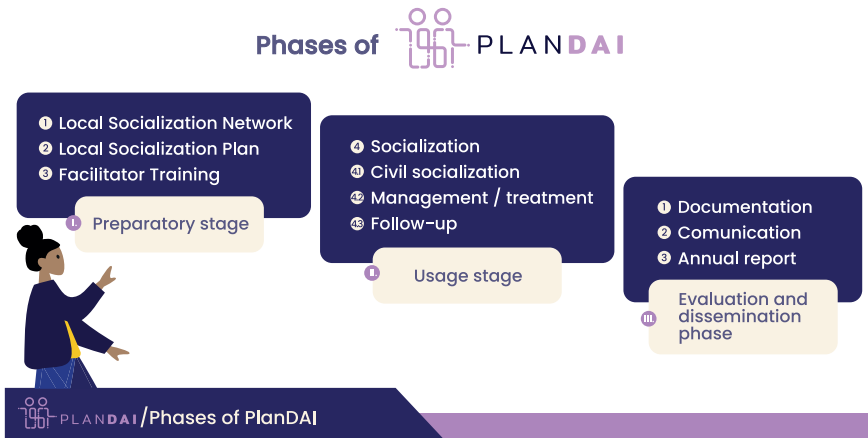


organs in the form of general publication schemes anyway...) but the consequences of not fulfilling the obligations are different. Should the budgetary organ fail to comply with this special publication or the published data are incorrect or incomplete, the oversight body (NAIH) shall commence a special (new) accelerated authority procedure called Transparency Procedure ex officio. Should the budgetary organ not remedy the infringement within fifteen days, the Authority may impose a serious amount of fine.

- Another innovative example of using an efficient **modern technological tool for ensuring proactive publicity** is the National Transparency Platform of Mexico (NTP)⁵³ launched in 2016 by the National Institute for Transparency, Access to Information and Personal Data Protection (INAI). This portal was created as a result of controversial reforms of the country's constitutional law on transparency and among the innovations that characterize the new platform is a feature that allows users to verify themselves in order to gain access by using social-network accounts like Twitter and Facebook. The platform also was designed to be accessible to people with special needs. The platform will be accessible from smartphones and tablets using a mobile app.⁵⁴ The numbers are very impressive: citizens can ask from 8,240 public institutions all over the country and the NTP updates its information of 48 data categories every three months. The number of data requests is 2.5 million so far. There are 9,752,166 queries made through thematic search engines and 7,384,000,000 records uploaded which are controlled by the INAI twice a year. Complaints can be submitted directly through the portal to the INAI as well (300,000 complaints so far).
- An innovative example for a **working plan** comes also from Mexico. It is called "National Socialization Plan of Freedom of Information" (PlanDAI) demonstrating how to solve individual and community problems, and from the strategic exercise of freedom of information in diverse and varied agendas. PlanDAI has 3 specific objectives that, together, socialize the freedom of information: to Know, to Exercise and to Take advantage of FOI.

53 <https://www.plataformadetransparencia.org.mx/>

54 Mexico Launches National Transparency Platform · Global Voices Advox



Source: Slide from the PPT, Presentation of INAI, DGPA - Delegación Hungría 16-06-2022, author Ms. María de Lourdes Antonioli Ortíz.

- A **toolkit for checking self-compliance** is being used very effectively in Scotland⁵⁵ and in the UK.⁵⁶ The toolkit is designed to help public authorities assess their current FOI performance and provide indicators of where efforts should be focused in order to improve. It also provides templates or a bespoke report which helps to identify areas for improvement and where action needs to be taken.
- It is interesting to see that the **role of the court** seems to be very different in national jurisdictions. There are several countries where RTI litigation is definitely not the strongest element of the system (like in Sweden, Finland, Iceland, in Scotland there has not been even a single case of challenging the decision of the Information Commissioner, but in other countries like Hungary and South Africa judicial power plays an essential corrective role in the interpretation of the rules.
- The South African Supreme Court has issued famous decisions in the early 2010s like ordering the release of Key Points Data (the court has given the Ministry of Police 30 days to make public a list of National Key Points, places designated by the government as being of key security importance) or ordering a huge steel producer to hand over environmental information to an alliance of five environmental organizations (*“Corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced...The steel*

⁵⁵ [Self-assessment toolkit | Scottish Information Commissioner \(itspublicknowledge.info\)](https://itspublicknowledge.info/)

⁵⁶ [FOI self-assessment toolkit | ICO](#)



producer is a “major, if not the major, polluter” whose “crucially important” activities are a matter of public interest”).⁵⁷

- In Hungary the civil courts and the Constitutional Court has been playing a very active role from the very beginning in shaping and interpreting the FOI rules (that’s why in each annual report of NAIH the FOI chapter starts with a report of the most important case law of the given year).
- Last but not least it is worth mentioning that public policies can be successfully influenced through successful **campaigns organised by civil society**.
- Access Info Europe for example is a well-known, very active and professional European human rights organisation established in Madrid in 2006 promoting and protecting the right of access to information, busy with organising campaigns, challenging decisions at courts or issuing communications in transparency matters.⁵⁸
- Another example comes from India: the National Campaign for People’s Right to Information (NCPRI) as a network of organisations and individuals was established in 1996 to advocate for a legal backing to citizens’ right to information. The movement has also campaigned for Grievance Redressal Bill and Whistleblowers Protection Bill and harshly criticizes governmental policies and decisions.⁵⁹

57 <http://freedominfo.org/documents/CoySecyArcelorMittalSAfrica-v-VaalEnvironJusticeAllieance-SAfricaSC-Nov14.pdf>

58 <https://www.access-info.org/mission-and-strategy/>

59 https://www.humanrightsinitiative.org/programs/ai/rti/india/national/2006/ncpri_const_&_info_brochure.pdf#:~:text=The%20National%20Campaign%20for%20People%20%92s%20Right%20to%20Information,the%20people%2C%20and%20to%20promote%20efficiency%20and%20frugality



CONCLUSION

We could see that the state's information policy affects the direction and depth of the public policies related to the Right to Know. The short-term interest of the state may push for secrecy but the democratic demands shall have a counter-effect: transparency guarantees public trust which is quite a good investment in a long-term competition.

The quality of the public policy used can be successfully influenced by other stakeholders as well. The oversight body, the courts, the FOI experts and the NGOs as well as the elected representatives of the communities (for example the MPs) have a decisive role in the decision of choosing and implementing the given public policy, speaking about drafting the relevant legislation or issuing an awareness raising campaign. However, the same is true when it comes to correcting a public policy wrongly chosen or applied.



Source: <http://righttoinformation.info/>